



# FIRST CALL

[www.nvsbc.org](http://www.nvsbc.org)

## Update from NVSBC

*A message from NVSBC Executive Director, Scott Denniston*



I hope you are all getting time to enjoy your summer in spite of these trying times. I find that getting outside and doing some activity, even exercise, makes my day complete. When we had to cancel VETS 20 and researched how to bring insightful and relevant content to NVSBC members, one of our thoughts was a two-day virtual conference with the same speakers scheduled for San Antonio. My reaction was “shoot me now,” as I could not see myself in front of my computer screen for six hours. Thus, our plan of weekly webinars.

We have just finished our second weekly “Virtual VETS 20” webinar with Ms. Amy Murray, Director of the Office of Small Business Programs for DoD and Acting Deputy Secretary of Defense for Industrial Policy. Last week’s guest was Dr. Michael Wooten, Administrator of the Office of Federal Procurement Policy. Both were engaging webinars with the opportunity to ask real time questions. I encourage you to look at the upcoming schedule of speakers at [www.nvsbc.org](http://www.nvsbc.org). We will bring you all the information we can to help you succeed in federal space.

One reason I was disappointed to cancel VETS 20, besides not seeing all of you, was missing celebrating a milestone in the life of the NVSBC. Ten years ago, on June 14<sup>th</sup>, 2010, NVSBC was incorporated in Washington, D.C. Earlier that month John Moliere, Heidi Gerding, Dan Frank, Troy Mizell, Eric Dailey, Jim Moody and myself had lunch in northern Virginia to discuss how to bring focus and clarity to the veteran small business community that was growing as a result of several laws and Executive Order 13360. We aimed to teach veteran small business owners how to be successful in the federal marketplace long before “procurement ready” was even a term. We also wanted to “level the playing field” to promote equal competition.

***Very few non-profits survive 10 years, let alone have the impact on so many people and small businesses as the NVSBC.***

We are now almost 500 members strong. I look back on the successes and accomplishments of the last 10 years and can only say THANK YOU to the six pioneers in this endeavor!

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*NVSBC's purpose is to transition veterans into business owners servicing the federal government.*

### SBA Increases 8(a) Economic Limits

As of July 15, the limits on net worth, adjusted gross income, and fair market value of assets for the 8(a) program have gone up. If you are interested in pursuing 8(a) status, be aware of the following new caps:

- Net worth of “disadvantaged” individual: \$750K
- Gross income over three years: \$350K
- Fair market value of assets: \$6 million.

## Joint Ventures: “Unanimity” Requirements Lose Contracts

In *Seventh Dimension, LLC*, the SBA OHA considered the level of control necessary for an SDVOSB joint venture. Here, the joint venture at issue consisted of a mentor-protégé team between Aquila Alliance LLC (the “SDVOSB”) and General Dynamics Information Technology (“GDIT”)(VET-6057, June 11, 2020).

As an initial note, this case illustrates the importance of ensuring that your legal documents pass muster, even if you don’t need to have the agreement vetted through the CVE. This case involved an Army procurement, and the joint venture was protested upon award.

While the joint venture’s agreement provided for a Member’s Committee that was authorized to “exercise complete and exclusive control,” and this consisted of two members from the SDVOSB and one from GDIT, the agreement also identified several items

that required unanimous approval of the joint venturers. These included the decision to bid on projects, entering into any contract with the government, entering into subcontracts valued at \$500K, incurring debt, incurring expenses valued at more than 5% of the joint venture’s budget, and settling litigation.

When a disappointed offeror, Seventh Dimension, filed an eligibility protest, the SBA OHA deemed the joint venture an eligible SDVOSB. On appeal, however, the SBA OHA reversed this decision, finding that control “must be unequivocal” and that such unequivocal control did not exist given the unanimity requirements.

This case is a cautionary tale for a few reasons. First, as mentioned, even if your joint venture agreement does not require CVE approval, make sure it would pass muster in the

event of a protest. Second, think about what is important to include in your agreement. Here, the venturers were booted because their agreement provided for “unanimity” in making important decisions. Was this even necessary? If you’re part of a team, wouldn’t you want both members onboard for important decisions? Accordingly, this joint venture may have lost a contract due to provisions in its joint agreement it didn’t even need.




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## GAO Report: Subcontracting Plans Need Better Oversight



For some federal contracts, a large prime must submit a small business subcontracting plan, as described in FAR 52.219-9. Contractors must then report on subcontracting achievements and make a “good-faith” effort to keep to the plan. A recent GAO report issued on small business subcontracting plan compliance concluded that agency oversight of these programs requires improvement. For example, during the pre-award stage, COs from all agencies reviewed the subcontracting plans in most but not all cases. Also, during contract performance, the GAO found that contracting officers did not ensure contractors met their reporting requirements in most of the reviewed contracts.

The [GAO report](#) is a reminder to enter with caution when teaming with large primes. In being held to a subcontracting plan, this doesn’t even link to the small businesses listed in a proposal. This merely has to do with dollars and percentages to small firms on the team.

We are all too familiar with stories of a large prime recruiting businesses in socioeconomic categories to receive small business credit, only to leave them out of the action come award time. As such, let this GAO report be a reminder – if you team with a prime, try to get a “guaranteed workshare” in your teaming agreement. Make sure that when they’re held to their subcontracting plan, the firm they’re using for credit is YOU.

## Virginia Leads Charge in Mandating Employer COVID-19 Policies

On July 15, the Virginia Safety and Health Codes Board approved temporary emergency standards to prevent the spread of the coronavirus in Virginia workplaces. Expected to go into effect during the week of July 27, the new workplace safety standards are the first of their kind in the country. The regulations will impose large monetary penalties on companies that fail to implement various COVID-19 safety measures, to include:

- Assessment of Job Risk Levels
- Notification Requirements – Employers must notify employees when a co-worker has been tested positive for COVID-19 (keeping personal details confidential).
- Return to Work Policies – Employers must develop and implement policies and procedures for known COVID-19 or suspected

COVID-19 cases. Employees who are known, or suspected to be test positive for COVID-19, cannot return to work for 10 days or until they receive 2 consecutive negative test results.

- Enforcement of Physical Distancing Policies and Procedures
- Focus on Adequate Sanitation, Disinfecting, and Personal Protective Equipment.

These regulations will be enforceable by the Virginia Department of Labor and Industry's Occupational Safety and Health Program, which can inspect workplaces and impose financial penalties for violations based on the agency's standard scale of violations. Maximum penalties range from \$13,494 per violation to \$134,937 per violation.

Many of you likely have already implemented COVID-19 policies. Virginia's new law provides a good roadmap of what to do . . . and what you soon might *have* to do.

### FAR Final Rule Increases Micro-Purchase and Simplified Acquisition Threshold

While many federal agencies have already increased the thresholds for micro-purchase and simplified acquisition via deviations, the FAR has officially been updated as well. Effective August 31, 2020, the FAR has solidified the following thresholds:

- \$10K for micro-purchase (previously \$3,500)
- \$250K for simplified acquisition threshold (previously \$150K).

Interesting Fact: The increase to the simplified acquisition threshold should help small businesses. Purchases above the micro-purchase threshold, but not over the simplified acquisition threshold, shall be set aside for small business if two or more small firms are expected to compete. *See FAR 19.502-2.* Perhaps you can leverage this rule to your advantage?

## A Primer for Challenging Solicitation Restrictions on Competition



In a rare decision of its kind, the GAO recently held that an agency's RFQ requirements unreasonably restricted competition. This is a rare win because in general, so long as an agency can provide a reasonable basis for a certain requirement, the GAO will defer to the agency. This is key in considering a protest on this ground: if you believe a requirement is too restrictive, utilize the Q&A state of the solicitation to procure an answer for why the agency deems it necessary. The answer should enable you to determine whether you have a viable protest ground. Alternatively, it may prompt the agency to revise the solicitation to remove the provision.

In *Booz Allen Hamilton, Inc.*, B-418449 (May 18, 2020), the Marine Corps had sought financial statement audit support services to help audit readiness for its fiscal year 2020 Full Financial Statement Audit. The RFQ required the awarded prime contractor or its affiliate to be an independent public accountant ("IPA"). Booz Allen argued that this requirement unduly restricted the competition and exceeded the scope of the underlying contract. The GAO agreed that this requirement was not necessary for the agency to meet its needs. Nor had it compiled any evidence that an IPA would do a better job, as asserted by the program manager (without basis). In general, this is a good case to check out if you find yourself with a questionable RFQ, as it enumerates your standard to successfully protest. And remember – issues with a solicitation must be protested **before** offers are due!

## Protest Lessons: Late is Late, Even in a Pandemic

As we know, the “late is late” adage, whether with respect to the receipt of proposals, or in filing a bid protest, can be brutal. We’ve seen cases where the GAO found it was reasonable for an agency to reject a proposal for coming in through an email server mere minutes late (despite having been sent with time to spare before the deadline); and we’ve seen cases where the GAO has refused to consider a protest electronically filed at 5:31 PM when the deadline is 5:30 PM. Now, the GAO has issued a decision that holds that not even a stay-at-home order issued due to a global pandemic excuses a late filing.

In *Sysco Corporation*, B-418466.2 (July 6, 2020), the GAO denied a request for reconsideration that followed a dismissal of a protest for a late filing. There, the protestor had filed its protest without an attorney (pro se), and then later retained counsel when it needed someone with access to information subject to the protective order. The attorney then needed to respond to the Agency Report (the Agency’s legal position and documents provided in response to the protest). Per GAO regulations, if this is not done within 10 days, a protest will be dismissed.

Unfortunately, at the time this was occurring (late March), states were beginning to issue lockdown orders. This include that of the attorney’s, who also did not have a printer at home or the ability to access the GAO’s EPDS network. The attorney emailed the GAO multiple times for an extension, but one was not granted.

The (inflexible) rule this case illustrates is clear: if you are late and it is not the government’s fault (here, EPDS *was* functional), you are sunk. The regulations say to respond to the Agency Report in 10 days, Sysco did not do so, and so case closed. Literally.

### Don’t Let COVID Affect Your NVSBC Membership!

During this challenging time, many small businesses are struggling. In 2019 we ended our year with 528 members. To date, 380 of you have renewed.

Accordingly, we created a program called "Sponsor/Get Sponsored." Our motto of **Vets helping Vets** is never more important than now. We not have **79 sponsorships** from companies who want to help anyone struggling. **33 sponsorships have already been awarded, meaning we still have 46 available.**

If you are struggling, and **would like to continue membership via a sponsor.** I would ask that you please send Heather Lee at (heather.lee@nvsbc.org) an e-mail with your company name, and POC with email address. This opportunity may also be shared with non-members.

**If you are in a position to sponsor,** please send Heather Lee your company name, along with your POC (with email address), and how many companies you want to sponsor at \$295 each. (She will contact you for payment). Also let her know if she may release your information to the sponsored company.

We are a team and don't want anyone left behind! Semper Fidelis!

## FIRST CALL

The NVSBC is pleased to offer “First Call” to its members. In our active duty careers, “first call” was the notice to get up and get moving to usher in a new day. We will provide you with all the important information you need to get up and moving to success in the federal marketplace. This publication is prepared with the help of veteran advocate and attorney, Sarah Schauerte. Access her company website and blog at: <http://www.legalmeetspractical.com>.



### Ideas?

If you have ideas for future content for First Call, or how to maximize the benefit NVSBC offers to its members, we always welcome input. Please contact Scott Dennison with your comments at: [scott.denniston@nvsbc.org](mailto:scott.denniston@nvsbc.org).