



FIRST CALL

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Update from NVSBC

A message from NEW NVSBC Executive Director, Scott Jensen



I am overjoyed to start this new chapter as the executive director of NVSBC! We have so much important work to do together to ensure that veteran-owned small businesses get fair, equitable, and profitable access to the federal marketplace. I am confident that, working together, we can achieve and exceed our goals.

The last couple of weeks have been a whirlwind of meeting members, partners, board members, volunteers, and federal. Each engagement has been informative and enlightening. I look forward to hearing from and talking to many more of you. Please reach out!

A common thread runs through these conversations—an unwavering dedication and commitment to veterans. It is clear that we all are aligned in the same purpose: to ensure veteran business owners get what they need to succeed when they need it. Thanks to all of you for your tireless efforts in creating those conditions for success for yourselves and for your fellow veterans.

As I start my tenure, please

join me in thanking Scott Denniston for his years of passion-based support to NVSBC and the veteran business owner community at large. Scott is a force of nature! There is no one more passionate or knowledgeable about supporting veteran businesses. Scott has graciously agreed to stay involved and not disappear on us. We know he will always be in our corner supporting our efforts! Thank you, Scott!

Transitions are a good time to acknowledge those behind the scenes. I am grateful for Heather Lee and Earl Morgan and the tireless work they provide NVSBC's members! Also, thank you to our volunteers, chapter leaders, and board members who give their time and talent. The small business community is the engine that drives America's economy. Veterans are an important element of that engine. Not only did we as veterans choose to serve in uniform, but we now choose to take the often-difficult path of supporting the American economy in a new role. It is not easy! NVSBC continues to stand by you and will do all we can to clear your path to success.

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

SPONSOR/GET SPONSORED: IT'S NOT TOO LATE

To date, 50 companies have become new members or renewed their NVSBC membership via our scholarship program, whereby firms have generously offered to "sponsor" such membership. As we have 20 spots remaining, we invite **any** firm that would like to be sponsored to reach out. (To that end, spread the word!). For more information or to make this request, please email Heather Lee at heather.lee@nvsbc.org.

COVID PRESENTS UNIQUE CONTRACT ISSUES

Contractors performing especially services contracts in the midst of the COVID pandemic are encountering a unique set of issues. What happens if before the pandemic, you bid a contract based on estimated quantities that are not being realized because of COVID effects? (This is particularly common in transportation services contracts.). Or if you can't perform under your contract standards because of COVID's effects on personnel?

With respect to the first issue, this is a tricky situation. Especially if you have an IDIQ contract, by nature there is no meaningful "minimum" amount (given that the minimum amount is generally very low). You bid based on **estimated quantities**, however, so in the event those estimated quantities are far off from reality due to a global pandemic no one was expecting, you may be able to seek relief based on a theory of mutual mistake. It's tricky business, however, because if an agency isn't

interested in coming to an agreement that would be equitable under the circumstances, a contractor is stuck in costly and timely litigation while incurring losses under a contract.

With respect to the second issue, there's more light at the end of the tunnel. Especially depending on the FAR clauses in your contract, you could be excused for non-performance due to COVID effects. In particular, check out FAR clause 52.249-10 (Default), which notes that one ground for an excusable delay is an "epidemic."

While there hasn't yet been a government contracts case on COVID specifically (there will be one soon, undoubtedly), those contractors encountering COVID issues might want to check out [Pernix Serka Joint Venture](#), which was decided by the CBCA on April 22, 2020. In this case, the CBCA

acknowledged that the effects of ebola created an excusable delay.

Note, however, that in this case (where the Board denied monetary relief), the effects were not compensable. In other words, if a contractor defaults under a contract because of COVID and also loses money, it can only get legal relief for the former.

As such, if you are feeling the impacts of COVID on a given contract, know that while you may be excused from performing, you can still lose money. Make sure that from the beginning, you communicate issues to your contracting officer, are fully transparent, and are proactive in working toward a resolution. It's what we have to do in this uncertain, difficult time.

SDVOSB OWNERSHIP: NO STRINGS ALLOWED

For those of you who have gone through the CVE process, you've learned a lot about what "ownership" and "control" means. For most folks, the sticky issues are with "control," as these touch on a number of problems that may emerge with a veteran running his or her company (i.e., working remotely, managing multiple divisions, delegating certain tasks to focus on others, having a non-veteran owner who brings financial assistance to the table).

In some instances, however, ownership issues can emerge even when a veteran owns the requisite 51%. This needs to be "direct" and "unconditional," and a side agreement or conditions attached will jeopardize that. This was illustrated in a recent SBA OHA decision, where a contractor lost out on a protested Air Force contract because of impermissible provisions in its Stock Purchase Agreement. These provided improper restrictions on the veteran owner's right to sell his shares (while acknowledging the very limited allowance for the right of first refusal) [See ALOG Corp, SBA No. VET-285](#) (July 21, 2020).

Interestingly, the document that ended up sustaining this protest is NOT one that the CVE typically reviews in its examination process. ***This illustrates that when you are establishing an SDVOSB firm, you should be transparent to make sure issues like this can emerge to be corrected. Disclose all agreements to make sure they're kosher.***



SET-ASIDE FULL-TIME REQUIREMENTS: WHEN YOU GOTTA EAT

One SBA OHA case may have been decided with respect to the 8(a) Program, but its guidance applies to SDVOSBs as well.

In [Sonoran Construction Group](#), a firm appealed its termination from the 8(a) Program on the basis that the individual upon whom eligibility was based did not show he “devote(d) full-time to the business during the normal working hours of firms in the same or similar lines of business.” This implicated 13 C.F.R. § 124.106, with wording that mirrors 13 C.F.R. § 125.13.

In submitting its annual report for the 8(a) Program, the owner of Sonoran disclosed that he worked as an equipment manager for a bank from 7:00 AM to 3:00 PM Monday through Friday. While Sonoran asserted that this work did not conflict with his business activities for

Sonoran and that the owner could work for Sonoran from 4:00 PM to midnight, Sonoran could not comply with the SBA’s request for a “formal request for approval of outside employment” from the bank. Nor could it show that the owner’s hours there did not conflict with the working hours of Sonoran. As such, the SBA OHA found that the SBA was correct in finding that the owner could not devote himself “full-time” as required by 13 C.F.R. 124.106. SBA No. BDP-581 (June 18, 2020).

This case shows how hard it is to show full-time employment for a startup when working for another firm. Your family needs to eat, so what do you do? **The only way to have concurrent employment is if you can legitimately show that you’re putting in the required hours, and it doesn’t matter when those hours happen. That might not apply to every industry, so tread carefully before proceeding.**

SBA IG FINDS “WIDESPREAD” FRAUD IN COVID-19 LOAN PROGRAM

Well, there’s a surprise.

A [July 28 memorandum](#) published by SBA Inspector General Hannibal “Mike” Ware described “serious concerns” of potential fraud within the economic injury loan program created by the Coronavirus Aid Relief and Economic Stimulus Act. The report not only detailed several “organized fraud rings” that use social media to recruit individuals to apply and split the proceeds with fraudsters, but it also identified \$45.6 million in potentially duplicate payments.

No one was equipped to deal with a global pandemic. That includes our federal government.

Contractors Settle Set-Aside Fraud Claims With \$4.3 Million Payment

On May 4, 2020, the DOJ issued a [press release](#) stating that Northland Associates, Inc. (Northland), its president James Tyler, and The Diverse Construction Group, LLC (Diverse) agreed to pay over \$4.3 million to resolve two qui tam cases alleging that the defendants engaged in a decade-long scheme to fraudulently obtain over \$50 million in contracts set aside for SDVOSBs and HUBZones.



According to the press release, those involved made a concerted effort to hide the fact that Diverse did not meet the requirements for these socioeconomic programs, engaging in such conduct as moving boxes around in order to ready an office location for government inspections. Diverse also funneled large sums of money to Northland via a subsidiary in order to hide affiliation.

This kind of cautionary tale shouldn’t be one that any of us need to read provided we act in good faith to ensure compliance with the rules. There’s a big difference between making mistakes, and moving boxes around to pull the wool over the government’s eyes. Still, the government doesn’t like to give out set-aside dollars to those who shouldn’t receive them, so this does remind us to be careful to ensure compliance.

KNOW YOUR PLACE: WHERE DO YOU LODGE A PROTEST?

On August 10, the GAO dismissed a protest to an awardee's eligibility under a procurement's size standard. *Superior Optical Labs, Inc.*, B-418618 (July 7, 2020). Even though the protestor had timely filed with the GAO, it wasn't then eligible to take it up with the SBA because filing with the wrong forum doesn't toll the time period for filing a size protest.

To avoid losing an opportunity, know where to enforce your rights:

Size protests – If you want to challenge an awardee's eligibility based on exceeding an applicable size standard, this must be done to the relevant SBA Area Office via the contracting officer. For a negotiated procurement, this protest must be filed by the fifth business day after notification of the proposed awardee (13 C.F.R. 121.1001-1010).

SDVOSB protests – If you want to challenge an awardee's eligibility based on not meeting the requirements for the federal SDVOSB Program, this determination is made at the SBA's Office of Hearings and Appeals. In the event of a negotiated procurement, a protest must be filed with the contracting officer within five business days of notification of the awardee (13 C.F.R. 125.25-31).

Solicitation Issues – If you want to contest the terms of a solicitation or the way an agency is conducting a procurement, remember that this needs to be filed before the close of the bid due date. Otherwise, this "pre-procurement protest" will be dismissed as untimely. This can be done either at the agency, or with the GAO.

Evaluation Issues - When it comes to other protests (such as issues with evaluation), these need to be filed no later than 10 days after the basis of the protest becomes known (with an exception for timely-requested mandatory debriefings requested in a negotiated procurement). These can be filed either with the agency or at the GAO.

With GAO protests, also remember that a \$350 filing fee applies, and that one must have access to the GAO's EPDS database in order to file a protest. (See 4 CFR Part 21 for more information).

Be prepared! Know your options before you need to use them, so you don't need to scramble. Otherwise you might end up cooked.



*The information contained within *First Call* is for informational purposes and does not constitute legal advice. For further guidance, consult with a federal government contracts attorney.

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.