



FIRST CALL

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Update from NVSBC

A message from NVSBC Executive Director, Scott Jensen



Happy New Year!

I hope you were able to find some time to relax and enjoy the holiday! I will admit that I am very excited to put 2020 in my rearview mirror and look forward to what 2021 has for ALL of us!

Thank you for participating in our membership survey as we closed out 2020. Your input is vitally important to us! We were encouraged by the overwhelming positivity of your responses. It was clear that our members respect the mission and the work that NVSBC does in support of our members. It was equally clear that we have work to do. We can always get better. Your feedback reinforced that we must continue to seek out ways to connect and provide networking value in a remote and physically restricted environment. We need to provide clearer understanding and access to the services we provide and the opportunities NVSBC membership brings. We need to tighten our branding and communications to ensure potential members find us attractive and see the merit of joining.

Reviewing the inputs from our survey and reflecting on recent interaction with many of you reinforced the importance of the “C” in NVSBC—*Coalition*. Yes, NVSBC as an organization brings value to members by offering training, networking, and advocacy. We owe it to our members to create opportunities for sustainment and business growth. We will double down in 2021 in expanding our

capabilities to do that. Equally important to the coalition is the contribution our members make to the coalition. When you join this coalition, you join a tribe that needs your support, input, and activity. It is a two-way relationship—and your fellow members rely on that sense of community and commitment to ensure the strength of our coalition. Please take an active role and look for those ways to positively contribute to your fellow members.

What does 2021 hold for us? First, the bright hope of connecting in person once again. VETS21 in Orlando in November will be a welcome return to normal! We are also planning an epic golf tournament in DC in August at the Army Navy Country Club. In the meantime, our “Charlie Mike” webinar series kicks off with an amazing list of contributors in February, and we launched our new members forum on the website at the end of December.

We continue to engage on the Hill and with federal agencies as new policies and changes roll out from the new administration. We will play an active role in the transition of CVE certification from the VA to SBA as dictated in the recent NDAA. This will have a significant impact on veteran small businesses. We will represent our membership coalition members.

Looking forward to a bright 2021!

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

REMEMBER TO RENEW!

With all that lies ahead in 2021, considering the benefits you can receive and contribution you can make to the coalition. If you have not done so, please [renew your membership for 2021](#). We did raise the membership dues by a small amount—the first raise in many years – as necessary to sustain our staff and operations. We appreciate your understanding and patience and deeply value your participation in this coalition.

In Memoriam: Wayne Simpson

It is with a very heavy heart that NVSBC must report the loss of another great veteran small business advocate. Wayne Simpson, a long-time VA employee, passed away on December 17th. Some may remember Wayne from his spirited presentations at VETS. Old timers will remember Wayne as Deputy Director of the Office of Small Business Programs at VA under our own past Executive Director, Scott Denniston.

Wayne started his career in the National Cemetery Administration, responsible for the contracting of marble and granite headstones placed in National Cemeteries around the country. Wayne firmly believed he was given a sacred trust to “Care for Him Who Borne the Battle,” as President Lincoln said in his 2nd inaugural address. In this position he was a strong advocate for small businesses. Wayne then became Deputy Director of Small Business Programs at VA, responsible for ensuring attainment of all small business goals. He was a fierce

advocate for small businesses and leveling the playing field for veteran small businesses. Wayne’s last position was as Executive Director to the VA’s Senior Procurement Official. Wayne retired from the VA eight years ago, moved to North Carolina, and began helping predominately SDVOSBs be successful in proposal development and market research. His real passion was education and teaching veterans how to have lasting success.

As a member of NVSBC Wayne was best known for challenging the VA as to why the SDVOSB and VOSB goals set by the Secretary were always HALF of the previous year’s accomplishments. In fact, you can access his latest Congressional testimony on our behalf at: <https://www.youtube.com/watch?v=FFxT-gctIYe&feature=youtu.be>. Well done, Brother! You will be missed!



Wayne, you will be missed.

2021 NDAA: Subcontractor Experience May Be “Past Performance” in Federal Bids



A provision in the 2021 National Defense Authorization Act (“NDAA”) will require large prime contractors to provide small businesses with past performance reviews and in certain cases, for agencies to consider them. This is a paragraph (“Past Performance Ratings of First-Tier Small Business Subcontractors”) from Section 868 of the NDAA, which also allows certain small businesses to claim past performance credit for work performed as part of a joint venture.

Under the NDAA, when a first-tier subcontractor performs work under a “covered contract” (i.e., one where the prime is required to develop a subcontracting plan, which only applies to large primes), the subcontractor may request a past performance review from the prime. It also doesn’t provide an agency with discretion to exclude past performance reviews provided by large subcontractors, stating: “If a small business concern elects to use such record of past performance, a contracting officer shall consider such record of past performance when evaluating an offer for a prime contract made by such small business concern.”

While this development will help small business contractors who might otherwise have no past performance to provide in federal procurements, certain details are unresolved. The NDAA does not specify how much time the prime has to respond, what the review should look like, or limit agencies on how such reviews are weighted in evaluation consideration. Still, it’s certainly better than nothing.

How COVID Affects Your Bottom Line in 2021

Whether it's via the new \$908 billion stimulus package that has been signed into law, or tax/retirement plan extensions, COVID-19 will affect your business in 2021. Here is our top ten list of impacts you may want to research further:

1. Another round of PPP – The stimulus bill authorizes another \$285 billion for the Paycheck Protection Program, but only small businesses are eligible. To qualify, you must have less than 300 employees per location and have been specifically impacted by the pandemic.
2. If you have an existing PPP loan, you can request an increase – If your loan calculation has increased due to changes in interim final rules, you may request an increase in value regardless of whether the loan has been fully dispersed.
3. The definition of “forgivable” expenses has been expanded – These have been expanded from payroll, payroll-related expenses (including employer-provided group insurance benefits such as group life, disability, vision, or dental insurance) to include expenses such as operations expenditures, property damage costs, and supplier costs.
4. Forgiveness of PPP loans has been simplified – The new law offers a simplified application process for loans under \$150K, which involves submission of a one-page certification.
5. You can deduct your PPP forgiveness expenses (These are now tax deductible).
6. The law clarifies the definition of “seasonal employer,” so it is easier to determine if you qualify for a loan (when you operate for now more than seven months a year, OR earned no more than 1/3 of receipts in any six months in the prior calendar year).
7. Additional support is being provided to minority-owned businesses and businesses located in a “Low to Moderate Income Area” – The law has created two set-asides for small business borrowers with 10 or fewer employees and businesses located in LMI areas for loans up to \$250k.
8. The Employee Retention Tax Credit has been extended to July 1, 2021, with other changes in effect (such as a safe harbor).
9. Tax filing extension – The tax filing deadline of April 15 has not yet been extended, but our hunch is we can expect this soon (although true that COVID-19 is a now a more ongoing situation that can be better planned around).
10. IRA contribution extensions – As with tax filings, we're still looking at April 15 for now.

The “Ostensible Subcontractor” Trap and How to Avoid It



As SDVOSBs performing set-aside contracts, we're all familiar with the Limitations on Subcontracting (“LOS”) rule. This provides that when one wins a set-aside contract, the prime (or others in the same socio-economic category, referred to as “similarly situated”), receive a certain amount of contract dollars. For instance, for service contracts, you as the SDVOSB (along with any SDVOSB subs), must receive at least 50% of what the government pays under the contract.

Even if your proposal shows that you'll comply with LOS rules, there's another somewhat related rule referred to as the “ostensible subcontractor” rule, of which you can run afoul. This rule holds that if you are: 1) unduly reliant on a subcontractor; or 2) the subcontractor will perform the primary and vital requirements of the contract, the prime and the subcontractor will be deemed “affiliated” and size combined for purposes of determining whether the prime meets the size standard applicable to the procurement. If, when combined, the entities are “other than small,” you'll be deemed ineligible for award.

The components of the ostensible subcontractor rule were recently discussed in two decisions issued by the SBA OHA ([Contego 1](#) and [Contego 2](#)). This examined the four factors the SBA OHA will examine in determining “undue reliance,” and it also noted that compliance is determined as of the date proposals are due (i.e., you can't fix problems after the fact). Accordingly, make sure you're familiar with this rule and you have (compliant) dynamics of prime/subcontractor contract performance locked down when submitting your offer!

GAO Protests: Report Says More Worth it Than Not

The GAO recently released its annual protest report for 2020, which provides the skinny on the number of bid protests received at the office, as well as the “effectiveness” rate. For the first time in years, this exceeded 50%, meaning that at least half of protestors got something they wanted from protesting.

In Fiscal Year 2020, 2,137 protests were filed. Of these, only 545 (or roughly 25%) of protests were fought to the bitter end, meaning that the GAO issued a decision to either sustain or deny the protest. With 84 sustains, this means that when the federal agency whose procurement was at issue decided to take it to the mat, they won about 85% of the time. Meanwhile, when the number of sustained protests is combined with the number of protests where the agency took corrective action (agency acknowledging an issue and fixing it), that’s where you derive the 51% effectiveness rate; i.e., the protestor received *some* form of relief. This would also account for the number of protests where, upon receiving the agency report (the agency’s response to the protest and corresponding procurement documents), the protestor elected to withdraw the protest based on the unlikelihood to prevail and the agency’s indication that it would fight the protest rather than take corrective action.

Fifty-one percent sounds like an excellent success rate, and it is. However, keep in mind that the huge bulk of “wins” are when the agency decides to take corrective action, and the GAO won’t second-guess that action even if it isn’t exactly what you want. Most of the time, this amounts to re-evaluation, and the result could be the same award decision and being back where you started.

Also, keep in mind that whether a protest is worth it depends on individual circumstances. Always make sure you timely request a mandatory debriefing, and take a good, hard look at your proposal and where you stacked up to the competition before protesting. Protesting is a tool that can be very effective in protecting the integrity of the procurement process and your own interests, but there’s also a time to let things go.

Three Interesting GAO Bid Protests From 2020

Chronos Solutions, LLC (Oct 1, 2020) B-417870.2, et. al. – In this pre-award protest, a protestor successfully challenged the terms of a solicitation where the agency had failed to consider changes that affected its requirements, to include the effects of COVID-19 and market conditions.

Unico Mechanical Corp. (Oct 29, 2020) B-419250 – In this case, the awardee had protested the award of a FFP contract based on a low price that seemed to indicate the awardee did not fully understand the work required. However, the GAO held that because the solicitation did not call for a price realism analysis, the agency wasn’t required to conduct one.

Benaka Inc. (July 9, 2020) B-418639 – Here, a protestor unsuccessfully challenged its downgrading for having not included information excluded from review when the proposal’s length exceeded page limits by one (and one page deleted). The lesson here is often reinforced in Bid Protest Land—follow directions, or the effects applied by an agency will be upheld.

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 by veteran advocate and attorney, Sarah Reida. 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 Jensen with your comments at: scott.jensen@nvsbc.org.