



FIRST CALL

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Update from NVSBC

A message from NVSBC Executive Director, Scott Jensen



Greetings!

I am very enthusiastic for the future of NVSBC and our members. Just this week, the national board of directors met for the first meeting of the year and validated a very aggressive and promising strategic plan for NVSBC. This plan reaffirmed the NVSBC vision of leading and promoting the growth, strength, and success of veteran-owned small businesses in the federal marketplace and the corresponding need for federal policies and practices that prioritize veteran-owned business opportunities and reestablish and maintain veteran business opportunities for federal acquisitions consistent with all other protected classes of small business.

With that vision in mind, we once again committed to the mission of providing nationally recognized **Training, Networking, and Advocacy** for veteran small business entrepreneurs in the federal market to ensure they are **Procurement Ready** and have enhanced access to opportunities to start, operate, sustain, and grow **competitive and strong businesses** serving federal agencies and other government contractors. You can also expect to see

expanded advocacy opportunities as we produce policy and legislative agendas that support you and your business in the short term and over the long haul.

You can expect to see clearer and easier methods for engaging with other members, federal agencies, and prime contractors. Finally, you will see growth in the training opportunities for all levels of businesses—from those just starting out to those who are graduating to the next level.

I am convinced that our plans for 2021 and beyond will result in strong competitive businesses for those who choose to join our ranks and will enhance the overall impact on federal acquisition policy in support of the veteran business community at large. With the ongoing transition in the federal government’s leadership, now is the time to act. NVSBC is doubling down on ensuring our members are successful in building back the losses of 2020 and becoming even stronger in the future.

Thank you for joining us in this important mission at this critical time in federal acquisition history!

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

8(a) Firms Granted One-Year Extension Due to COVID

Via an **interim final rule effective January 13, 2021**, firms admitted to the SBA’s 8(a) BD program before September 10, 2020 will automatically receive a one-year extension of their program term (though this may be declined in writing).

The Federal Register notice cites “the urgent need to assist 8(a) small business concerns during the pandemic” to justify the rule and its immediate effective date.

GAO: We Don't (Usually) Hear Limitations on Subcontracting Issues

A recent GAO decision illustrates a number of traps for the unwary when it comes to complying with the limitations on subcontracting rules. This case is helpful for potential protestors, and also for potential bidders on a set-aside contract.

In *D&G Support Services, LLC, B-419245, B-419245.3 (Jan 6, 2021)*, a DHS RFQ sought advisory and assistance services. Upon award to the incumbent, D&G protested to the GAO, among other arguments stating that DHS: “failed to consider that Mayvin’s quotation would not comply with the solicitation’s stated limitation on subcontracting provision.” D&G argued that Mayvin’s large subcontractor, SAIC would “likely” perform more than 50 percent of the requirement.”

The GAO noted that whether a small business vendor can comply with the limitations on subcontracting provision is generally a matter of *responsibility*, which is not an issue that GAO will

consider. An exception to this, however, is when a quotation, on its face, should lead an agency to the conclusion that a vendor could not and would not comply with the subcontracting limitation. However, proving affirmative compliance is not required:

Accordingly, when a vendor submits a quotation in response to an RFQ that incorporates FAR clause 52.219-14, the vendor agrees to comply with the limitation, and in the absence of any contradictory language, the agency may presume that the vendor agrees to comply with the subcontracting limitations. Instead, it is the protester who bears the burden of demonstrating that the quotation should have led the agency to conclude that the vendor did not comply with this limitation.

Because a protestor does not have access to a competitor’s proposal, and because of the requirement that protest grounds be based on facts

rather than speculation (or face dismissal), one can understand why a limitations on subcontracting argument would be an uphill climb in a bid protest. As such, if your only issue is that you suspect an awardee cannot comply with the percentage of work requirements, a well-worded inquiry to the contracting officer may be your best strategy. You’ll also save your protest costs.

The other point illustrated here applies to awardees. In accepting a set-aside award, you’re verifying that you (or others in your socioeconomic category) will perform the requisite amount of work set forth at 13 C.F.R. § 125.6. You are responsible to ensure this happens in contract performance. Maybe issues with your game plan won’t emerge in the procurement stage, but that doesn’t mean you’re off the hook. If an auditor comes knocking two years into the contract, the government accepting your bid is not an excuse for failing to comply.

VA Kingdomware Tiered Evaluation Decision Upheld on Appeal

On January 11, 2021, the Federal Circuit Court of Appeals upheld a decision by the U.S. Court of Federal Claims which found that the VA wasn’t required to restrict a procurement to service-disabled veteran-owned small businesses (“SDVOSBs”) under the Veteran Benefit Act (“VBA”) at 38 U.S.C. §§ 8127-8. *Land Shark Shredding, LLC v. U.S., No. 20-1230*.

In this bid protest action, the VA had published a solicitation seeking shredding and pill-bottle destruction. The VA issued the solicitation using GSA’s Federal Supply Schedule program, using a tiered order of precedence. All businesses could submit proposals, but the VA would first evaluate proposals from SDVOSBs, then VOSBs, and finally all other businesses. Three offerors submitted bids. The protestor, Land Shark Shredding, was an SDVOSB. One other firm was a small business, and the third was a large business. Even though Land Shark Shredding was in the first preference tier, the VA did not award it the contract because its price was more than five times higher than the IGCE. It ultimately made the award at the small business tier.

On appeal, the Federal Circuit held that the CoFC did not err in holding that the VA was properly conducting tiered evaluation, as its market research led it to conclude that the Rule of Two was not satisfied (i.e., that it would receive two offers meeting the requisite criteria). The contracting officer also did not abuse his discretion in not making the award to Land Shark Shredding, particularly considering the huge discrepancy in price with the IGCE and small business awardee.

Though this bid protest did not have the outcome desired by the veteran firm, this case is extremely helpful for purposes of understanding how tiered evaluations under *Kingdomware* work. Access it [here](#), and the VA’s memo on tiered evaluations [here](#).



EVERY TUESDAY @ 1:00 PM EST

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Are You Sure You're "Small?" SBA OHA Provides Guidance

Most firms have no issue with calling themselves "small" under the NAICS codes applicable to them. But did you know that based on a solid relationship with a large prime, that designation may not be accurate?

In *Size Appeal of Darton Innovative Technologies, Inc.*, a firm appealed an SBA Area Office's determination that it was "other than small" under the applicable NAICS code due to its affiliation with a large firm. (SIZ-6085). The Area Office had found the entities affiliated under the identity of interest rule due to economic dependence, noting that 100% of the appellant's revenue for the last three fiscal years came from the large firm.

In upholding the determination, the SBA OHA discussed how a firm could

rebut the presumption of economic dependence on a firm from which it derives more than 70% of its revenue. Only one true exception applies: a recently established firm may be able to show that it is not solely dependent on the other firm, but merely derived revenue from it during its start-up period. SBA OHA noted, however, that "once heavy economic dependence is shown, OHA has seldom if ever found the presumption rebutted."

If you rely on another firm for 70% of your revenue or more, tread lightly in pursuing small business set-side contracts. If found "affiliated," the size of both firms is combined.

*Tip: This case discusses recent changes to the affiliation rule at 13 C.F.R. § 121.103.

February Webinar Series

Tuesday, February 9: CHARLIE MIKE Webinar Series - [Contracting in a Crisis](#)

Wednesday, February 10: The DFARS Webinar Training Series 2021- [DFAR Part 206 – Competition Requirements](#)

Tuesday, February 16: CHARLIE MIKE Webinar Series - [Leading Through Crisis: Turning Adversity Into Advantage](#)

Wednesday, February 17: The DFARS Webinar Training Series 2021- [DFAR Part 207 – Acquisition Planning](#)

Wednesday, February 24: The DFARS Webinar Training Series 2021- [DFAR Part 208 – Required Sources of Supplies and Services](#)



Defective Gov't. Response Saves Appeal Filed Five Years After Claim



In *Wise Developments, LLC*, the Government unsuccessfully attempted to have a contractor's appeal dismissed for untimeliness. (January 6, 2021, CBCA No. 6659). The contractor had been terminated for default in 2014 via a letter sent by the contracting officer that cited the termination for default provision and noted the reasons for termination. It did not, however, include language indicating that the correspondence was a "final decision" or advise the contractor of its appeal rights (namely, to appeal to a government contracts board within 90 days, or to the U.S. Court of Federal Claims within 12 months). Five years later, the contractor submitted a monetary claim (an equitable adjustment), also contending that the termination was wrongful. When the contracting officer relayed that she was "not reconsidering the matter," the contractor appealed to the Civilian Board of Contract Appeals (CBCA). The government filed a motion to dismiss the claim, arguing that the contractor should have appealed the original "final decision" five years ago.

The CBCA allowed the appeal to proceed, citing the notice of appeal rights that must be included in any final decision. In examining the degree to which this would have prejudiced the contractor (i.e., by not knowing how to proceed in challenging a default termination or in seeking monies owed from the contract performance period), the CBCA noted that the letter did not state it was a "final decision" or advise the contractor of the ninety-day deadline to appeal it.

Here, a defective appeal rights notice saved this claim from being barred. However, *don't let there be the question*. In presenting a claim to the government, read [FAR Part 33](#) so you understand what you (and the Government) are required to do.

NVSBC Member Prevails in Constitutional Challenge in Federal Court

If this case sounds familiar, it's because it began in 2019 as a [GAO bid protest decision](#) challenging the VA's decision to route a procurement for imprinted gunlocks and wallet cards for veterans through the GPO and bypass the *Kingdomware* mandate. The VA had invoked the "printing mandate" of 44 U.S.C. § 501 in arguing it had no choice but to hand over the procurement. (The mandate requires that all printing work for executive agencies be conducted through the GPO).

Even though the end item to be acquired was *suicide gunlocks for veterans*, the VA argued that the printing elements of included wallet cards and the imprint on the gunlock required it to hand over the acquisition to the GPO. Then, because this became a GPO procurement, not a VA procurement, the *Kingdomware* Rule of Two mandate requiring the work be set aside for veteran firms did not apply. The protesting firm, Veterans4You, LLC, owned by NVSBC member Tim Farrell and represented by NVSBC member, Sarah Reida, successfully challenged the VA's routing of the acquisition through the GPO with no regard for its set-aside requirements as violating the Rule of Two. The GPO agreed, sustaining the protest and granting Veterans4You its protest costs. (B-417340). Because it sustained the *Kingdomware* challenge, the GAO didn't consider whether the VA had properly invoked the printing mandate.

Days later, the VA (technically, the GPO) turned around and issued what appeared to be exactly the same solicitation. Veterans4You again protested, this time to the U.S. Court of Federal Claims, but this case had a different outcome: ruling from the bench, Judge Lydia K. Griggsby found that the VA had both

mandate and had complied with the VBA by including language in its procurement request that the GPO comply with the VBA to the "maximum extent feasible." (No. 19-931c). This was despite the fact that such language was meaningless – the GPO has no set-aside procedures, and no way to provide any veteran preference.

[On appeal to the U.S. Federal Circuit Court of Appeals](#), Veterans4You prevailed in a unanimous, precedential decision. (2020-1175). To support its argument with respect to the application of the printing mandate, Veterans4You for the first time raised the issue of its constitutionality due to a violation of separation of powers. (The issue was augmented by the CoFC's extremely broad reading of the printing mandate's invocation). Clearly bothered by the constitutional problem [during the oral hearing](#), the Court ultimately ruled in Veterans4You on this basis. The Court concluded that the canon of constitutional avoidance counseled it to construe the printing mandate narrowly and to avoid its application to the procurement at issue. "Printing," according to the Court, only includes "written or graphic published material."

In its holding, the Court didn't touch on *Kingdomware* and the limits it imposes on the VA's ability to route procurements through other agencies. Because the record indicated that the VA had sent the procurement through the GPO because it thought it had to, finding it was not required to do so obviated the *Kingdomware* issue. Had the VA said it was exercising its discretion in procuring the gunlocks via the GPO, however, would it have been permitted to do so considering that the GPO has no means to comply with the VBA? What about procuring through other agencies?

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.