FIRST CALL

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Update from NVSBC

A message from NVSBC Executive Director, Scott Jensen

June started with a bang for the NVSBC! As we go to print, we wrap up our "Veterans ETA 2021 Capital Fueling Veteran Entrepreneurship" virtual symposium. We are so grateful to our cohosts at sbLiftOff, the over 50 sponsors who made it possible, and most importantly the close to 500 participants who joined us for this incredible event. In case you missed it, we were honored to have the Administrator of the SBA, Isabella Casillas Guzman, kick things off. Coming on the heels of Memorial Day where we all took the time to pay respect to those who paid the ultimate sacrifice, it was poignant that Administrator Guzman highlighted that her grandfather gave the full measure in World War II and emphasized how important the veteran small business community is to her work at the SBA. She also acknowledged the longstanding and fruitful relationship NVSBC shares with the SBA and noted that she looks forward to deepening our partnership in supporting the efforts to starting, sustaining, and growing veteran small businesses.

This event and the corresponding public acknowledgement of the importance of the NVSBC in representing a coalition of veteran-owned small businesses reinforces the need for and importance of coming together as a group in representing the needs of our veteran-owned businesses. Single voices are drowned out in the crowd! Groups that unite and band together are heard. That is what we do under the banner of NVSBC—provide a united voice. Now is as critical time as any in our history as we see major movements in everything–from veteran business verification, to corporate tax policy changes, to federal policies that can open the door to major procurement opportunities for our small businesses. It takes all of us working together and banding together. It also takes more and more voices. NVSBC is bringing that voice to Washington D.C. We need more members to strengthen that voice. Please reach out to your veteran friends and business associates. Let them know about the work NVSBC is doing on their behalf. Encourage them to join and add their voice to our movement.

June is not an anomaly! We have much more planned for this year! Keep an eye out for all our opportunities to meet, learn, and engage. Join us for golf in DC in August. Register now for VETS21 in Orlando in November. VETS21 promises to build upon the current momentum. We will knock your socks off with an agenda, speakers, and exhibitors that will leave you wanting more and more! Join now and get the earl bird registration price!

All the best!

Scott

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

GSA Posts Second Request for Information for its New IDIQ Services Multi-Agency Contract Program

This second RFI, posted to Sam.gov, seeks to identify the capabilities available in the service provider community and their alignment with anticipated requirements Responses to the survey will inform GSA's decision-making as this unique contract program is developed. All feedback provided will be reviewed and considered. The RFI will remain open through June 21, 2021. Access the listing here.

VA Tiered Evaluation: When Can You Protest?

Every veteran firm competing in federal space knows that the Veterans Benefits, Health Care, and Information Technology Act ("VBA") requires the VA to set aside procurements for veteran firms. This provision is otherwise known as the "Rule of Two," with the obligation to set aside arising when the VA's market research indicates that two or more veteran firms will submit offers and that the award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d).

In recent years, protests based on this requirement have skyrocketed, in large part due to the *Kingdomware* U.S. Supreme Court decision of 2016 which held that the VA's obligation to set aside contracts for veteran firms is mandatory, not discretionary. In part due to protests, and in part due to the need to conduct its procurements more efficiently (rather than having to re-solicit after having not being able to make an award set aside for SDVOSBs), on February 8, 2018, cascading set-asides, also known as "tiered evaluations," became authorized at the VA. A Procurement Policy Memorandum ("PPM") was issued to provide guidance and procedures for the use of tiered evaluations, which allows VA contracting officers to "cascade" down tiers of bidders instead of resoliciting efforts in their entirety (PPM 2018-04). As is consistent with 38 U.S.C. § 8127(h), contracting officers are to move through a statutory priority of set-asides when evaluating the basis for award of an effort, beginning at the SDVOSB tier by order of preference.

When competing for VA contracts as a veteran firm, how do you know that the VA is meeting its obligations per the *Kingdomware* decision? This is especially considering that the VA has introduced a system of evaluation with an extremely vague standard–if the contracting officer can't make the award at a "fair and reasonable" price that offers the "best value" to the government, the VA can move to the next tier. Other than referring to the IGCE, how does the VA know that an offer is the "best value?" The VA isn't allowed to pass on what's behind "Door #1" (the SDVOSB tier) in the hopes that it can score a better deal with a lower tier, but what are the rules? The PPM doesn't spell anything out, so it's hard to question the VA's exercise of discretion unless an award results to a firm in a lower tier at a higher price.

If the VA issues an amendment that announces it is withdrawing the tier that you are in, *this means you were excluded from award*. Ask for a debriefing. To protest that the VA wrongfully moved to a lower tier, you need details. That debriefing may provide you with them. If the VA refuses, you can raise the alarm upon award to a lower-tier concern. The VA cannot argue you were untimely–you had no basis to protest before award because they didn't give you details.

SBA OHA Has Change of Heart Over Purple Heart

In the kind of decision that comes only once every blue moon, Judge Chris Holleman of the Small Business Administration Office of Hearings and Appeals ("SBA OHA"), overturned his own finding that a service-disabled veteran-owned small business ("SDVOSB") did not meet the requirements of the Small Business Administration's SDVOSB Program.

In this result of a request for reconsideration, a protestor, Blue Cord DevGroup LLC, had originally successfully argued in its SDVOSB status protest that Purple Heart Heroes, LLC (Purple Heart), the awardee of a lease issued by the VA, did not qualify as an SDVOSB. One reason alleged was that Purple Heart was not actually controlled by Zachariah Gore, the service-disabled veteran owner. In sustaining this protest ground, Judge Holleman found: "He (Gore) does not have managerial experience of the extent and complexity needed to run the concern, [and] Catalyst is so crucial to PHH's business operations that Mr. Gore cannot exercise independent business judgment without great economic risk, and … he lives too far from PHH's headquarters to adequately supervise the company." In other words, the SBA OHA found *three reasons* that Purple Heart did not meet the control requirement.

Purple Heart argued that it had shown that Gore had the necessary managerial experience, Heart itself. Judge Holleman agreed on reconsideration that he had erroneously assessedle Gore's work record. He also found that Purple Heart had not been provided the opportunity to rebut the presumption that the veteran did not control the firm despite not being within close proximity. In its request for reconsideration, Purple Heart had provided ample evidence to overcome the presumption. Also, analogous case law supported Purple Heart's arguments regarding its ability to exercise independent business judgment (and that the case relied on previously was not as similar to the facts at issue). Accordingly, the SBA OHA reversed its own decision and found Purple Heart eligible for the award.

Past Performance: Rely On a Proposal's Four Corners

All federal contractors are aware that they bear the responsibility of preparing a well-written proposal. If you are the incumbent, or well-established in your field, you still need to make sure your proposal addresses each requirement and conveys all the information you want the agency to know.

One wrinkle with this is a rule relating to past performance. In certain limited circumstances, an agency has an obligation to consider "outside information" bearing on an offeror's past performance when it is "too close at hand" to require the offerors to shoulder the inequities that spring from an agency's failure to obtain and consider that information. *See, e.g., International Bus. Sys., Inc.,* B-275554 (1997). For example, the GAO has held that an agency could not ignore information regarding a protestor's performance of a recent contract involving the agency, same services, and the same contracting officer. Thus, if you've omitted good past performance, or an awardee has omitted bad past performance, upon protest you *may* be able to prevail because the agency had the duty to look beyond the four corners of a proposal.

A recent bid protest illustrates that you shouldn't rely on this wrinkle. In *Cotton & Company, LLP*, B-418380.4 (March 2021), a protestor unsuccessfully argued that an agency should have considered numerous news articles that cast doubt on the awardee's past performance. The GAO held that such news articles were not the "type of information" that the solicitation required it to the evaluated, and also accepted the agency's explanation that had not been aware of the articles (prompting a potential duty to investigate).

What does this tell us? Write a strong proposal, and don't expect extraneous information to change an award decision

Upcoming CHARLIE Mike Webinars

The Small Business Participation Commitment . . . Maximizing Your Score as a Small Business Offeror for an Unrestricted DoD Acquisition
Speaker: Stephanie Sherwood, CPSD, CPCM, SB Program Manager/Small Business Liaison Officer, Weston Solutions, Inc. (Tuesday, June 8)

The NAIC-ed Truth About Federal Procurements
Speaker: Guy Timberlake, Co-Founder and Chief Visionary Officer, GovCon Club™ (Tuesday, June 15)

Advanced Teaming Strategies to Accelerate Small Business Government Revenue
Speaker: Joshua Frank, Managing Partner, RSM Federal (Tuesday, June 22)

SBA Closes Paycheck Protection Program

On June 1, the Small Business Administration issued the following statement on the closure of the Paycheck Protection Program ("PPP") to new loan guaranty applications:

> "The Paycheck Protection Program provided over 8.5 million small businesses and nonprofits the lifeline they needed to survive during a once-in-generation economic crisis. I've heard story after story from small business owners across the country about how PPP funds helped them keep the lights on, pay their employees -- and gave them hope," said SBA Administrator Isabella Casillas Guzman. "At the same time, millions of underserved businesses – particularly our smallest businesses and those owned by women and people of color – were left out of early rounds of relief. I'm proud of the work we did to begin to rectify these inequities -- in 2021, 96% of PPP loans went to small businesses with fewer than 20 employees. Moving forward, we will continue to prioritize equity in all SBA's programs and services."

The PPP has provided over $798 billion in economic relief to small businesses and nonprofits across the nation, keeping employees employed and helping businesses survive. It is only one of eight disaster relief programs established by Congress to assist small businesses during the COVID-19 pandemic. Other programs include Economic Injury Disaster Loan (EIDL), EIDL Advance, Targeted EIDL Advance, Supplemental EIDL Advance, Restaurant Revitalization Fund, Shuttered Venue Operators Grant, and the SBA Debt Relief Program.

The DOD's New CMMC Requirements and the False Claims Act

On September 29, 2020, the DoD issued an interim rule that implements its Cybersecurity Maturity Model Certification ("CMMC") program—the final rule is expected any day as of this writing. The CMMC will be a *major* change for government contractors, as the DoD will phase in stricter regulations over the course of the next four years requiring contractors to obtain third party assessment of their implementation of cybersecurity protocols to enhance the protection of controlled unclassified information ("CUI") within the DoD supply chain. Senator Grassley and the DOJ recently expressed support for wielding the False Claims Act ("FCA") like a "sledgehammer" to police compliance with the CMMC program and cybersecurity-related fraud. As such, ensuring that your business complies with the CMMC should be an absolute priority.

Over the next four years, DFARS 252.204-7021, which carries the substantive CMMC requirements, will be phased in to all DoD contracts and solicitations. DoD Contracting Officers are now required to check the Supplier Performance Risk System ("SPRS") database to ensure government contractors have a valid SPRS assessment. This includes the renewal of options under an existing contract.

The new CMMC rules, similar to the NIST SP 800–171 assessment requirements, will provide that government contractors have a current (within three years) CMMC certificate during the *duration* of a government contract. CMMC Third Party Assessment Organizations (C3PAOs) will be designated by the DoD to assess and certify a contractor's compliance with the CMMC. C3PAOs can assign five levels of CMMC certification ranging from "Basic Cyber Hygiene" to "Advanced/Progressive". Of note, a Level 1 certification will not make a contractor eligible to handle CUI. That only occurs when a contractor achieves Level 3 certification.

The False Claims Act ("FCA") was originally enacted to protect the federal government against the onslaught of false claims following the Civil War. The 1986 FCA Amendments drafted by Senator Chuck Grassley strengthened *qui tam* relator rights in the FCA by increasing a relator's recovery in various situations and thus making it more attractive for relators to bring *qui tam* actions.

Government contractors need to be *acutely* aware of a few things over the phase-in years with respect to CMMC compliance and the FCA. First, CMMC compliance requirements will be a sprawling and possibly continuously moving target (depending on a contractor's level of compliance) for any DoD government contractor for the foreseeable future. Under the CMMC, DoD contracts will have over 110+ points of failure which numerous IT personnel will be watching, as well as potential *qui tam* relators. If a contractor falls out of compliance with even a single CMMC requirement and fails to appropriately rectify the matter, *qui tam* relators could allege that contractor falsely obtained Government funds by stating compliance with CMMC. Second, given the DoD's emphasis on compliance with the CMMC regulation, it is highly likely that payouts to DoD Government contractors who are not in compliance with the CMMC will be viewed as material. This as a particularly high litigation risk area.

Contributed by Tyson Marx of Ward & Berry, PLLC

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.