



888 17TH STREET, NW, 11TH FLOOR  
WASHINGTON D.C. 20006

PHONE 202 857-1000  
FAX 202 857-0200

WWW.PILIEROMAZZA.COM

## CLIENT ALERT

### Recent Developments for the Department of Veterans Affairs' Veterans First Program

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This Client Alert details two recent developments for the U.S. Department of Veterans Affairs' ("VA") Veterans First Program. Last month, the Government Accountability Office ("GAO") released a report detailing its examination of the VA's verification process for VOSBs and SDVOSBs. A few weeks later, the U.S. Court of Federal Claims ("COFC") issued its decision in KWV, Inc. v. United States, a case that dealt with a conflict between the VA's verification process and a post-award VOSB protest determination, as well as a veteran's ability to control his firm from a remote location. Below we examine both developments in more detail.

#### *The GAO Report*

Issued on January 14, 2013, the GAO's report (GAO-13-95) is the latest in a series of reports that have examined the strengths and weaknesses of the VA's verification process for SDVOSBs. The report focuses on the progress the VA has made with regards to verifying the statuses of SDVOSBs, as well as the issues that would have to be addressed before implementing the VA's verification system government-wide.

According to the GAO's report, the most significant impediment to the VA's verification program is that the VA has primarily set short-term goals. While the GAO noted that the VA's Office of Small and Disadvantaged Business Utilization ("OSDBU") recently began to implement longer-term strategies, OSDBU has not instituted self-evaluative measures that could analyze the VA's successes and failures over an extended period. Relatedly, the GAO found that the VA's plans have not been shared with "key stakeholders," and the VA's internal data systems are inadequate. Though the VA intends to replace its data system with one that is better suited to the needs of the verification program, the GAO found that the absence of long-term strategies may undermine the effectiveness of a new system.

The GAO's report also provided several useful insights regarding the current state of the verification program and changes that may be coming in the near future. For example, the VA indicated that, as of October 2012, the Center for Veterans Enterprise ("CVE") was taking approximately 85 days to process new verification applications. Furthermore, the VA has established a goal of contacting applicants via email at least once every 30 days. Looking ahead, the VA stated that it is considering a rule change that would permit transfer restrictions (such as a right of first refusal) on a veteran's ownership. The VA is considering other rule changes in addition to relaxing the ban on transfer restrictions and hopes to issue a final rule by mid-2014.

Rumors have been circulating for some time that the VA might assume government-wide responsibility for SDVOSB certifications. Our take has been that such a transition will not occur in the near future. In its report, the GAO essentially agreed, finding that a number of obstacles stand in the way of implementing the VA program government-wide. The biggest hurdle for expanding the CVE's scope may be the sheer number of new applicants; the GAO estimated that government-wide implementation could add 3,600 to 16,400 firms for the CVE to process. The GAO expressed doubt that the VA could cope with such an increase while it is still working to improve its handling of the 5,000 or so firms currently in the program.

### ***KWV, Inc. v. United States***

On January 25, 2013, the COFC issued its decision in KWV, Inc. v. United States, No. 12-882C (Fed. Cl. 2013). This case stemmed from a post-award protest against KWV's VOSB status for a set-aside contract. In deciding the protest, the VA's OSDBU ruled that KWV was not an eligible VOSB for the contract, even though the CVE had recently verified KWV as a VOSB after a lengthy application and reconsideration process. KWV filed suit with the COFC to challenge the OSDBU's ruling and the court sided with KWV on its motion for a preliminary injunction against the VA.

The KWV case is interesting because it involved a conflict between the CVE verification process and the OSDBU's ruling on a post-award protest. The court found that the CVE's verification of KWV in February 2012 was more thorough compared to the cursory investigation that the OSDBU conducted in August 2012 in response to the protest. Whereas the CVE investigation encompassed a site visit, personal interviews, and supplementary documentation, OSDBU's review seemed to be based entirely on paper records and lacked the context provided by the CVE's broader analysis. Thus, the court was not convinced that the OSDBU had a good reason to find KWV ineligible only seven months after the CVE had verified KWV into the program.

The KWV case is also noteworthy because it involved the issue of control by a veteran who lives outside the state where his firm primarily operates. KWV is a construction firm operating out of Rhode Island. The veteran owner lives half the year in Rhode Island and half the year in Florida. While the veteran is living in Florida, he maintains control over KWV via email, telephone, and other electronic means.

Prior case law has questioned whether a veteran can control his firm when he lives in a different state, particularly when the firm operates in the construction industry where project supervision is vital. One such past case decided by the U.S. Small Business Administration's Office of Hearings and Appeals ("OHA"), First Capital Interiors, SBA No. VET-112 (2007), was directly addressed and distinguished in the KWV decision. The COFC noted that, in First Capital: (1) the company's veteran owner was a full-time resident of California and his business was based in Ohio, three time zones away; (2) the company was not set up for long-distance management; (3) the veteran owner was inexperienced; and (4) the veteran owner's attention was divided between the Ohio company and two other, California-based jobs. Conversely, in KWV,

the veteran owner spends nearly half of each year in Rhode Island; Rhode Island and Florida are in the same time zone; KWV utilizes various forms of technology for long distance control; the owner has extensive management experience; and the owner's sole focus is KWV. For these reasons, the COFC concluded that, unlike the firm in First Capital, KWV could be controlled by the veteran even while he lived out of state.

While the KWV decision does not definitively answer whether a veteran owner may control a business at a distance, the COFC's decision strongly implies that the answer is "yes" when systems are in place to ensure that the owner can steer his company's daily operations. The decision also raises interesting questions regarding protests of VOSBs and SDVOSBs. For example, how much time needs to pass before a CVE determination can be overturned by an OSDBU investigation, and on what basis may the OSDBU decertify a recently admitted concern? The COFC's decision to grant injunctive relief to KWV focuses on the cursory nature of the OSDBU investigation. The judge's ruling seems to imply that the OSDBU would need to identify some change in circumstance between the date of verification and the date of the protest, or, at the least, the OSDBU should consult with the CVE, before the OSDBU issues a protest ruling that turns a recent CVE-verified decision on its head.

The COFC will render a final decision regarding the KWV case within the next several months, and PilieroMazza will continue to monitor the situation for any developments that could impact our clients. In the meantime, if you have any questions regarding the recent GAO report and/or the KWV decision, please contact Jonathan Williams or Grant Madden at (202) 857-1000. Mr. Williams may also be reached at [jwilliams@pilieromazza.com](mailto:jwilliams@pilieromazza.com), and Mr. Madden's email address is [gmadden@pilieromazza.com](mailto:gmadden@pilieromazza.com).