PILIERO MAZZA PLLC
ATTORNEYS AT LAW

888 17TH STREET, NW, 11TH FLOOR
WASHINGTON D.C. 20006
PHONE 202 857-1000
FAX 202 857-0200
WWW.PILIEROMAZZA.COM

July 12, 2013

UPLOADED VIA REGULATIONS.GOV

Mr. Tom Leney
Executive Director
Center for Veterans Enterprise (00VE)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

Re: RIN 2900-AO63-VA
Comments on Ways to Improve the Veteran-Owned Small Business (VOSB) Verification Guidelines

Dear Mr. Leney:

We are writing in response to the Department of Veterans Affairs' ("VA") call for comments on ways to improve the guidelines for the VA's VOSB Verification Program (the "VA Program"). See VA Veteran-Owned Small Business (VOSB) Verification Guidelines, 78 Fed. Reg. 27882 (May 13, 2013). In our practice, we represent many veteran-owned firms that apply to and participate in the VA Program. We also work with firms that participate in the various procurement programs for small businesses administered by the Small Business Administration ("SBA"). We applaud the VA for seeking comments on ways to improve the guidelines for the VA Program and we are pleased to offer our suggestions based on our experiences with the program.

We have grouped our comments below according to the questions the VA posed in its Federal Register notice. These comments are timely submitted by July 12, 2013.

Question 1: What could be changed to improve the clarity of the regulations? Where might bright lines be drawn to more clearly indicate compliance with the regulations and reduce potential for misinterpretation? Where might the addition of bright line tests create unintended consequences?

Comments:

- ***Harmonize the VA's rules with the SBA's SDVOSB rules***

As a threshold matter, we note that the VA appears to have patterned its rules off the SBA's rules for both the Service-Disabled Veteran-Owned Small Business ("SDVOSB") and

8(a) Business Development programs, which has created a lot of confusion because it gives veterans two sets of similar, but different, rules with which to comply. To alleviate this confusion, we believe that an overarching goal of the VA should be getting its rules in line with the rules governing the SBA's SDVOSB program, and away from those of the 8(a) program.

- ***Change the guidelines to make joint ventures a more viable option for veterans***

In our practice, joint ventures are a common and useful tool for small businesses hoping to perform larger projects that they would not be able to perform on their own. The SBA's rules permit a joint venture to be considered an SDVOSB for a procurement so long as one of the joint venture partners is an SDVOSB. There is no requirement for the SBA to separately approve an SDVOSB joint venture. However, the VA only permits a joint venture to be considered an SDVOSB for a procurement if the joint venture itself goes through the Center for Veterans Enterprise ("CVE") verification process. We do not believe this is an explicit regulatory requirement – rather, we believe it is a function of how the VA has interpreted its rules and could be altered with a new interpretation.

Eligibility of SDVOSB joint ventures for VA procurements is governed by VA Acquisition Regulation ("VAAR") § 819.7003(c). This regulation states, in relevant part, that "[a] joint venture may be considered an SDVOSB or VOSB concern if . . . [a]t least <u>one member of the joint venture</u> is an SDVOSB or VOSB concern, and makes the representations in [VAAR § 819.7003(b)]." VAAR § 819.7003(c)(1) (emphasis added). We interpret this to mean that the SDVOSB partner to the joint venture, not the joint venture itself, is required to make the representations in VAAR § 819.7003(b), which include, among other representations, a representation as to being "[v]erified for eligibility in the VIP database." VAAR § 819.7003(b)(3). Interpreted this way, VAAR § 819.7003(c) does not require an SDVOSB joint venture to be separately verified by CVE. Rather, the regulation only requires that the SDVOSB partner to the joint venture go through the CVE verification process for the joint venture to be considered an SDVOSB.

Requiring veterans to undergo a second verification process for their joint venture creates inefficiencies and limits the use of joint ventures. If one of the joint venture partners has already been verified by CVE, the verification should be applied to the joint venture. Such an approach would be consistent with how the SBA deals with SDVOSB joint ventures and would make it easier for SDVOSBs to take advantage of joint ventures for VA procurements.

Approaching joint ventures as we are suggesting would also be consistent with the definition of a joint venture. Joint ventures are not supposed to be ongoing entities; they are supposed to be limited ventures formed for a particular contract, or a few contracts. However, because the VA requires the joint venture to be separately verified, it is very difficult for veterans to form a joint venture for a specific contract. Often times, the window to bid a contract comes

and goes before the veteran could realistically hope to get the joint venture through the CVE verification process. We believe this is why we have done a number of joint ventures for our veteran clients on non-VA projects, but very few through the VA Program. Joint ventures are useful tools for veterans and should be more readily accessible for participants in the VA Program.

We believe our suggested interpretation does not require a rule change and would be more favorable for veterans in maximizing the benefits of joint ventures. Alternatively, to avoid confusion based on the VA's prior interpretation and GAO case law, the VA could amend its regulations to make clear that joint ventures do not need to be separately verified as long as one of the joint venture partners has current CVE verification.

If the VA believes it needs to continue separate verification of joint ventures, we suggest the VA adopt procedures similar to how the SBA reviews joint ventures for 8(a) contracts. The SBA does not require an 8(a) joint venture to be approved at the time of proposal submission. Rather, the parties submit the joint venture application to the SBA within 20 business days of the expected contract award, and the SBA then must review and approve the joint venture by the time of contract award. This would be akin to a fast-tracking process that would permit SDVOSB joint ventures to concurrently submit their joint venture to the VA for approval while also submitting a proposal for a contract, and then the joint venture would be eligible for the contract as long as the VA approved the joint venture by the date of contract award.

- ***The VA should continue to permit reasonable transfer restrictions and should allow other reasonable protections for minority shareholders***

In the past, we have had clients decline to pursue CVE verification because the owners were not able to agree on the lack of transfer restrictions. The Court of Federal Claims' ruling in Miles Construction was an important, business-friendly ruling for veterans because reasonable transfer restrictions will help veterans to attract minority partners to help run and grow their businesses. And these restrictions do not impede the veteran's ownership and control of his company because the restrictions only come into play once the veteran has decided to sell his interest and leave the company.

Subsequent to Miles Construction, we understand that the VA has determined that transfer restrictions will no longer be held against an applicant firm. We believe this is the correct conclusion based on the court's ruling and is consistent with the SBA. However, it is unclear whether the VA will permit all transfer restrictions, or only those that are reasonable. In order to protect against fraud and abuse, while also allowing for reasonable protection for minority owners, the VA should amend its rules to state that reasonable transfer restrictions such as rights of first refusal and tag-along rights are not prohibited. However, the VA should reserve the right to review the transfer restrictions to ensure they do not go beyond customary provisions.

An example would be when the veteran owner must offer a right of first refusal to the non-veteran owner, at a set purchase price for a nominal amount well below fair market value. But short of extreme circumstances like this, we suggest that transfer restrictions should not be viewed as a barrier to entry for veteran firms.

Moreover, the VA should make clear that it will not be concerned at all with transfer restrictions when the firm is 100% owned by veterans.

The VA can do more than the transfer restrictions to provide reasonable protections for minority shareholders. These protections, in turn, will help veterans to attract investors and partners and grow their businesses. The program should not be set up to favor single-man operations. We have heard from many clients who feel they need to be the only owner in order to have the best shot of getting into and staying in the program.

To this end, we suggest that the VA revisit how it approaches minority protections in operating agreements, bylaws, and shareholders agreement. The first thing the VA should do is ensure that corporations and LLCs are treated the same – we have seen some interpretations that "all means all" for LLCs, meaning the veteran must control all decisions for the LLC, while the same is not true for corporations. We believe the "all means all" approach for LLCs is inappropriate and unfairly penalizes owners of LLCs.

Further, when we have worked with the VA on behalf of applicants, the VA has accepted a few protections for minority shareholders such as unanimity requirements for authorization of new shares, amending the bylaws to change the number of directors, and modification of the shareholder agreement in a way that would materially alter the rights of the existing shareholders. We believe the VA should permit more unanimity requirements for extraordinary corporate actions. In our experience with the SBA, that agency accepts unanimity requirements for the following corporate actions:

- Any amendment, modification, supplement, or repeal, in whole or in part, of the Company's Articles of Organization or Incorporation, and the Bylaws or Operating Agreement;

- Admitting new or additional owners, including admitting any transferee of a member or owner;

- Loans or advances to owners, affiliates, or family members of the owners;

- Withdrawal of an owner;

- Electing to be taxed as a corporation rather than a partnership for federal income tax purposes;

- Initiation of any claim or litigation and any final decision to continue prosecution of or settle such litigation or claim;

- Dissolution of the entity; and

- Entering into contracts or incurring debt in an amount over a certain amount, such as $100,000, as the business partners determine.

➢ ***Several aspects of the veteran control provisions should be clarified and brought more in line with the SBA's SDVOSB rules, instead of the SBA's 8(a) rules***

38 C.F.R. §§ 74.4(f)(1)(i)-(iii) identifies three situations where CVE will deem a veteran to control a corporation's board of directors and, in turn, the corporation itself. See 38 C.F.R. § 74.4(f)(1)(i)-(iii). Yet, we have worked with several corporate clients who have been denied CVE verification for lack of veteran control, despite satisfying the requirements of 38 C.F.R. § 74.4(f). Since implementing its rules, the VA has issued a verification assistance brief which suggests that, in the context of a corporation, compliance with 38 C.F.R. § 74.4(f) is necessary but not wholly sufficient to demonstrate veteran control. It does not make sense to us that this regulation exists to show veteran control, yet the VA will not find compliance with the rule to be sufficient to show veteran control. We suggest that the VA should change its interpretation of the existing rule.

We also suggest that the VA should eliminate the requirement that the veteran be the highest compensated person in the firm. There is no such requirement for the SBA's SDVOSB program, which creates issues for firms wishing to participate in both programs. Moreover, we do not believe compensation should be a critical measure of veteran control. Again, a veteran needs to be able to attract minority partners to help the business succeed. By essentially placing a cap on the amount of compensation a non-veteran can earn, this requirement has the effect of detracting minority owner participation. The VA currently permits a veteran to explain why he is in control even if he does not earn the highest compensation. The fact that the VA permits such an explanation to overcome the requirement to earn the highest compensation demonstrates that who earns the highest compensation is not a useful measure of control. And requiring veterans to automatically explain this often leads to time-consuming and expensive explanations that are not necessary because the compensation has no bearing on control.

For these reasons, we suggest that the highest compensation requirement should be removed from the regulations. The VA could still request information about compensation and this could be used as one of the factors in questioning a veteran's control, at which point the VA

could ask the veteran for an explanation. But the compensation issue should not be something the veteran is required to explain upfront, and it should not be a reason in-and-of-itself to deny a veteran admission into the VA Program.

The VA should also modify the "full-time" management requirement. Currently, the VA's rules allow a veteran owner to work less than full time for the firm so long as the veteran can "show sustained and significant time invested in the business." 38 C.F.R. § 74.4(c)(1). Yet, the rules also state that "[o]ne or more veterans or service-disabled veteran owners who manage the applicant or participant must devote full-time to the business during the normal working hours of firms in the same or similar line of business." Id. at § 74.4(c)(3). These two separate, though related, rules are inconsistent. We submit that, if the veteran owner is permitted to work on less than a full time basis as long as he shows sustained involvement in the business, the rules should not separately require a veteran to manage the business on a full-time basis.

- ***The VA's rules should leave size issues to the SBA***

Currently, the VA's rules allow the VA to find that a veteran does not control his company if "[b]usiness relationships exist with non-veterans or entities which cause such dependence that the applicant or participant cannot exercise independent business judgment without great economic risk." 38 C.F.R. § 74.4(i)(4). There is no similar regulation for the SBA's SDVOSB program. Recently, we have seen an increase in the number of cases where the VA has questioned an SDVOSB's eligibility based on this regulation. The problem, in our view, is that the regulation draws on principles of affiliation and small business status that are the SBA's exclusive purview under 13 C.F.R. § 121.103. In several cases, the VA has appeared to use concerns about affiliation to find that a veteran does not control his company. Affiliation concerns should be addressed by the SBA, not the VA.

Notably, the language at issue in 38 C.F.R. § 74.4(i)(4) was rejected by the SBA's Office of Hearings and Appeals ("OHA") several years ago in DooleyMack Gov't Contracting, LLC, SBA No. VET-159 (2009). In this case, the SBA had concluded that a veteran did not control his company because "business relationships exist which cause such dependence that [the veteran] cannot exercise independent business judgment without economic risk." The OHA judge overturned the SBA's analysis because the judge found that the SBA had confused the affiliation control principles under 13 C.F.R. § 121.103 with the veteran control principles under 13 C.F.R. § 125.10. The type of control that is relevant for affiliation purposes is not the same type of control in terms of veteran control of a company. The problem with the language in 38 C.F.R. § 74.4(i)(4), like the language rejected in DooleyMack, is that it conflates affiliation control with veteran control. The VA should decide veteran control and leave affiliation control to the SBA.

The VA's regulations also provide that the CVE will determine affiliation by applying the SBA's affiliation rules. See 38 C.F.R. § 74.5. Another VA rule allows the CVE to deny an application if the CVE determines that a concern does not qualify as small, even if the SBA has not issued a size ruling for that firm. Id. at § 74.13(d). Under this rule, a firm whose application is denied because of a size ruling by the CVE may subsequently request a formal size determination from the SBA, but the firm would have to file a new application with the CVE after receiving a size determination from the SBA. In these ways, the CVE is able to perform size and affiliation analyses that should be left to the SBA.

Allowing the CVE to make size and affiliation determinations when reviewing an SDVOSB application appears to be inconsistent with the VA's statutory mandate, which indicates that small business status for the VA's Program is determined based on the Small Business Act, which the SBA is entrusted to implement. Furthermore, VAAR § 819.307(a) recognizes that all protests pertaining to the size of an SDVOSB must be sent to the SBA for a size determination. Since the VA understood that questions about size issues in a post-award protest should be sent to the SBA, it is unclear why the VA determined that it could decide size issues on its own for SDVOSB applications.

- ***The VA needs to finalize the interagency agreement with the SBA for handling SDVOSB protests, or the VA needs to expand its post-award protest rules***

The Miles Construction case demonstrates an issue with the current VA rules governing post-award SDVOSB protests. The rules are fairly sparse, which gave rise to a due process concern in Miles Construction. It seems to us that the VA did not expect to handle post-award protests for very long, as the intent was for these protests to go to the SBA, so the VA's rules are fairly simple. But it has now been several years and the interagency agreement is still not in place. If the VA will continue to handle SDVOSB protests, then it needs more expansive protest regulations so all parties better understand the protest process.

Ideally, there should be an appellate-level review for post-award protests at OHA, or administrative law judges within the VA. Veterans who operate in the SBA program benefit from the publicly available decisions interpreting and applying the SBA's SDVOSB regulations. The additional layer of agency review is also beneficial by providing a third-party review at a level above the initial decision-makers without forcing the veteran to initiate a law suit in federal court, which is too costly for many. Making agency-level decisions publicly available would also help make the process more transparent and assist veterans to better understand and adhere to the VA's rules. In our experience, the OHA appeal process is very helpful for veterans and small businesses, many of whom are successful in overturning SBA decisions through appeals in a much simpler process than going to federal court. The fact that OHA decisions are publicly available also benefits the small business community at large.

- ***The VA should clarify the rules regarding changes in ownership***

Currently, the VA's rules provide that "[a] participant may remain eligible after a change in its ownership or business structure, so long as one or more veterans or service-disabled veterans own and control it after the change and the participant files a new application identifying the new veteran owners or their new business interest." 38 C.F.R. § 74.3(e). A separate rule states that a verified SDVOSB may lose its eligibility status for "[f]ailure by the concern to provide an updated application (VA Form 0877) within 60 days of any change in ownership." 38 C.F.R. § 74.21(c)(10). It is not clear how a verified firm should notify the VA or what information it needs to provide. We suggest the rules should be clarified to state that verified firms must upload a new VA Form 0877 within 60 days after change in ownership, at which point the VA will contact the firm to determine if the change in ownership affected the firm's eligibility and the VA will determine what documents it would like the veteran firm to submit. The rules should also make clear that, unless and until the VA finds otherwise, the firm remains eligible to bid on and receive set-aside contracts notwithstanding the change in ownership.

- ***Bright-line tests are not likely to be feasible***

We understand the desire of some for bright-line tests, but they are easier said than done. Our concern is about the precision with which these tests would need to be developed, otherwise they would risk being over- or under-inclusive. That said, certain circumstances, such as when a firm is 100% owned by veterans, might lend themselves to a bright-line test or at least simplified criteria for establishing veteran ownership and control.

Question 2: It has been suggested that VA should develop a list that would clearly delineate what constitutes ownership and control and what constitutes lack of control or ownership. Should a list like this be included in the rule, and if so, what should be on the list?

Comments:

Including a list in the VA's rules that clearly delineates what constitutes ownership and control and what constitutes lack of control or ownership raises a concern similar to that associated with the addition of bright-line tests. That is, under most scenarios, the benefits are likely outweighed by the unintended consequences. Unless the list encompasses every control and ownership-related issue contemplated by the VA's rules, there is going to be an increased risk of fraud and abuse because some firms will not be properly vetted.

As an alternative, we suggest including a short list in the VA's rules identifying factors/scenarios that lead to a rebuttable presumption of unconditional ownership and control.

Such a list would be helpful for veterans and applicant firms and, at the same time, also eliminate concerns of possible fraud and abuse because the VA would be permitted to rebut the presumption if it had a compelling reason to do so. Again, the 100% veteran-owned firm comes to mind as one scenario that should simplify the process for determining ownership and control.

In addition, we believe that a similar list should be included in CVE's standard operating procedures ("SOP") for the VA Program. In this regard, we note that the SOPs issued by CVE earlier this year are very bare-boned and provide little guidance for applicant firms. Rather, the SOPs, for the most part, simply outline the responsibilities of the individuals involved in the application review process and identify the different documents to be reviewed. They do not explain how, for example, a CVE examiner reviews the provisions of a corporate applicant firm's bylaws to determine whether the control requirements are satisfied. Therefore, we believe there is a need for CVE to revise its SOPs to make them more user friendly for the veteran community. To that end, we suggest that CVE create a single, comprehensive SOP similar to that published by the SBA for the 8(a) program. This would lessen the confusion many firms experience in seeking to understand and use the VA's SDVOSB program.

Question 3: Are there changes to VA's regulations that could be made to reduce the economic impact on VOSBs?

Comments:

To reduce economic impact on SDVOSBs, we recommend that CVE continue prescreening verification applications as part of the Pre-Determination process implemented this past May. Notifying veterans about potential eligibility issues during the initial screening stage will reduce denials and, in turn, reduce the economic impact on SDVOSBs associated with having to file reconsideration requests.

In fact, we believe the process should be expanded upon so that all applicant firms are eligible for Pre-Determination. Currently, the Pre-Determination process is only made available to firms with "easily rectifiable denials." The process should be made available to every applicant firm, regardless of whether the eligibility issue can be easily rectified. More back-and-forth with applicants would also help the VA to lessen the number of cases that require multiple reconsideration requests. The VA should strive to provide all bases for denial in the initial denial letter. And in the rare cases when this is not possible, the VA should consider providing an expedited review process for all reconsideration requests that may be necessary after the first one.

Extending the re-verification timeline by another year or eliminating it all together would also serve to reduce economic impact on SDVOSBs. Once a firm gets into the 8(a) program, it must make some annual showings, but it is not required to essentially re-apply every year or two

years like the VA's re-verification process. Firms are obligated to notify the VA about changes, so it is unclear why the VA forces firms to basically reapply every couple of years.

The VA should also give some thought to a system similar to the online repository used for the SBA's Woman-Owned Small Business ("WOSB") program. Rather than go through an upfront verification process, WOSBs have the option of using an online repository to upload and store documents providing their WOSB eligibility. Right now, SDVOSBs must upload documents providing their eligibility to CVE at the time of applying to the program. Rather than make the verified SDVOSB re-submit documents in the future, the VA could maintain the firm's documents in the online system and put the onus on the firm to upload any changes to the existing documents or new documents that impact its continuing eligibility for the VA Program. This would greatly reduce the burden on firms that have undergone no changes to their ownership and management.

We also believe that more should be done to expedite the protest and verification processes so that SDVOSBs will not lose valuable contract opportunities while waiting for an initial decision or to overturn an administrative error. To that end, CVE should consider re-implementing fast-tracking.

In addition, some form of temporary stay of contract award pending the outcome of an expedited protest and appeal process would be beneficial, similar to what is provided for in the SBA's rules. Recently, a proposal was issued to modify FAR § 19.302 to provide that, when a post-award appeal from an SBA protest determination is filed with OHA, the procuring agency's contracting officer shall consider suspending contract performance until OHA decides the appeal. A similar provision in the VAAR would provide some protection against the loss of valuable contracts based on an administrative error in the CVE verification process. The VA could also implement an expedited reconsideration or appeal process in the event of a pending contract award so veterans awarded an SDVOSB contract would have a chance to contest an adverse eligibility determination before the VA withdraws the contract. In short, more can be done to balance the need to expeditiously move forward with new contracts against the importance of ensuring that eligible firms do not lose valuable contract awards due to administrative errors in the verification process.

Question 4: Are there changes to VA Form 0877 (application) that could streamline the process?

Comments:

Our comments above address this question.

Question 5: What verification process improvements could help to increase efficiency and reduce burden for VOSBs?

Comments:

Our comments above address this question.

Question 6: What additional training tools or assistance might be offered to create more clarity for stakeholders and help them more efficiently and effectively navigate the verification regulations?

Comments:

A single, comprehensive SOP for the VA Program, similar to that published by the SBA for the 8(a) program, would create more clarity for applicant firms and allow them to more efficiently and effectively navigate the verification regulations. Obviously, having to revise its current SOPs would be both costly and time-consuming for CVE upfront. But the payoff would be in reduced time spent in educating firms and in going through denials and reconsideration requests because applicants would have a better understanding of how the VA interprets and applies its rules. In addition, public decisions on applications and post-award protest decisions would serve the same purpose and better educate the SDVOSB community.

More outreach to veterans, including workshops to help them understand the requirements for corporate documents and governance, would also improve clarity for applicant firms. Again, the VA has recently indicated that it is moving in this direction, which is good news for the veteran community. However, without publicly-available appeal decisions, veterans will continue to be at a disadvantage in trying to understand how the VA is interpreting and applying its regulations.

Question 7: What documents, records, or other materials could the Office for the Center for Veterans Enterprise use to distinguish legitimate VOSBs/SDVOSBs from businesses that fraudulently seek contracts from the Government?

Comments:

Based on our experience, CVE already reviews a significant amount of documents, records, and materials. In fact, we regularly hear from clients that they feel CVE is requesting information and documentation over and beyond what should be required to determine whether the firm is an eligible SDVOSB. The VA's rules, specifically 38 C.F.R. § 74.20(b), provide CVE examiners with the authority to "review any information related to the concern's eligibility requirements" and, on more than one occasion, we have witnessed CVE invoke this authority to

its fullest extent. Thus, we believe that the documents, records, and materials CVE is currently requesting of applicant firms should be sufficient to distinguish legitimate SDVOSBs from businesses that fraudulently seek contracts from the VA. Requesting even more documentation would likely have the effect of increasing economic impact and burden on SDVOSBs and decreasing efficiency, which we believe does nothing to improve the current VA rules.

Question 8: Would a special Hotline to report suspected ineligible VOSBs/SDVOSBs help the Government ensure that contracts are awarded to legitimate VOSBs/SDVOSBs?

Comments:

We question whether a special hotline would help solve the problem, instead of creating new problems in terms of resources to man the hotline and how to distinguish between credible complaints and those that are not. We believe this has the potential to overburden the VA and legitimate SDVOSBs who are unfairly targeted by a disgruntled competitor who calls the hotline.

Rather than implement a new process such as a hotline, we suggest the VA should focus instead on strengthening a process that already exists to ensure contracts are awarded to legitimate SDVOSBs: namely, the post-award protest process. As discussed above, the process currently suffers from sparse rules and a question about whether the protests should be going to the SBA or the VA, and whether they will be subject to appellate review. We believe improving the protest process would address this issue more effectively than a hotline.

In closing, we appreciate your attention to this matter and for undertaking this important project on behalf of the veteran contracting community. Please do not hesitate to contact us if you have any questions about our comments or if we may be of further assistance as you continue your efforts to improve the guidelines for the VA Program.

Sincerely,

PILIEROMAZZA PLLC

Jonathan T. Williams
Peter B. Ford