

# LEGAL ADVISOR



## A PilieroMazza Update for Federal Contractors and Commercial Businesses

### SMALL BUSINESS PROGRAMS

#### Congress Makes Confusing Changes to the VA's Verification Program

By Julia Di Vito



The 2017 National Defense Authorization Act ("NDAA"), Pub. L. No. 114-328, which was signed into law on December 23, 2016, contains several notable changes to the current structure of the U.S. Department of Veterans Affairs' ("VA") program for veteran-owned small businesses and service-disabled veteran-owned

small businesses (collectively, "SDVOSBs"). As part of an effort to provide uniformity between SBA's and VA's SDVOSB rules and programs, Congress has expanded the jurisdiction of SBA's Office of Hearings and Appeals ("OHA") to hear appeals from certain SDVOSB decisions by VA. However, the language of the 2017 NDAA regarding these changes raises more questions than it answers.

An SDVOSB that wants to pursue contracts from the VA, that are set aside for SDVOSBs, must be verified by the VA's Center for Verification and Evaluation ("CVE") and listed in the VA's Veteran Information Pages ("VIP") Database as such. CVE's verification process involves an examination of a firm's compliance with the VA's regulations regarding ownership and control of a SDVOSB. Prior to the 2017 NDAA, if a firm applied for CVE verification and was denied, it could ask the Director of CVE to reconsider the denial decision as a form of administrative appeal. Similarly, the cancellation of a verified firm's status or an adverse SDVOSB protest decision by CVE could be appealed internally at VA to the Executive Director of the VA's Office of Small and Disadvantaged Business Utilization ("OSDBU"). The only external review would

be to file a further appeal from the OSDBU's ruling to federal court.

Now, under Section 1832(f)(A) of the 2017 NDAA, a concern whose verification application is denied may appeal the denial of verification to SBA's OHA, rather than the Director of CVE. This appeal right extends to denials related to small business status, the ownership of the business, or the control of the business—the essential requirements for qualifying as a verified SDVOSB. OHA will presumably review the administrative record upon which CVE based its denial decision, which is how OHA currently handles appeals from size determinations, denials of applications to the SBA's 8(a) Business Development program, and other SBA proceedings.

A denial of a verification application is one type of potential adverse decision from CVE. CVE could also deny a re-verification application and it can decide to cancel a currently-verified firm. Because all of these actions amount to a denial of SDVOSB status, we believe logically that all CVE decisions related to denying or cancelling SDVOSB status should be appealed to OHA. However, the NDAA only explicitly addresses denial of verification, so the impact on appeals from a re-verification or cancellation decision is not crystal clear.

Furthermore, under Section 1832(f)(B)(i) of the 2017 NDAA, OHA will also now hear challenges to the inclusion of a firm in the VIP Database. The text of this provision states that:

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*If an interested party challenges the inclusion in the database of a small business concern owned and controlled by veterans or a small business concern owned and controlled by veterans with service-connected disabilities based on the status of the concern as a small business concern or the ownership or control of the concern, the challenge shall be heard by the Office of Hearings and Appeals of the Small Business Administration[.]*

An “interested party” is defined as the Secretary of the VA or, in the case of a SDVOSB awarded a contract, the contracting officer or a small business that submitted an offer for the contract that was awarded to the SDVOSB. Thus, this provision could be read as indicating that a disappointed offeror can challenge an awardee’s inclusion in the VIP Database for a particular contract directly to OHA, without first filing a size or status protest with the VA contracting officer.

**"Under Section 1832(f)(A) of the 2017 NDAA, a concern whose verification application is denied may appeal the denial of verification to SBA's OHA, rather than the Director of CVE."**

It is unlikely that Congress intended to bypass existing laws and regulations to create a direct channel to OHA for protests of VA-verified firms. For example, size protests have always been the purview of SBA Area Offices, and Congress presumably did not intend to change that practice. Instead, it is more likely that Congress intended that OHA would hear appeals of challenges to the size or status of VA-verified firms, after those challenges are first decided by CVE. But, again, the language in the NDAA is unclear. Hopefully, this will be clarified when rules are implemented to establish the procedures for these new appeals to OHA.

The 2017 NDAA also does not clarify exactly when these appeals of VA decisions to OHA will begin. If past practice is a guide, OHA may decline to hear such appeals until rules are implemented, which could take many months. However, according to the NDAA, the new appeal procedures will apply to verification denials and challenges to a firm’s inclusion in the VIP Database made on or after the date of the enactment of the 2017

NDAA, which was December 23, 2016. As such, there may be a lengthy period of limbo between when OHA has jurisdiction for these appeals according to the NDAA, but no rules under which to handle them.

The objective of creating a more uniform program and system for SDVOSBs is laudable and important, and the NDAA is a step in this direction. But, as noted above, the new provisions have left many questions unanswered. Contractors that participate in the VA’s SDOVSB program are in a quandary, as they might be unsure what forum will hear their challenges to or appeals of VA verification issues.

If you are faced with a VA verification issue, contact us to ensure you are aware of the most recent developments in this changing landscape and pursue your appeal in the correct forum.

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