

Veterans First? VA Should Give Vet Contracting Program Priority

By JONATHAN T. WILLIAMS



George Washington famously observed that, “[t]he willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional to how they perceive veterans of earlier wars were treated by their nation.” No federal agency has been more instrumental in carrying out programs to aid our military

veterans than the US Department of Veterans Affairs (VA). Among many veteran contractors, however, the current perception is that the VA is not doing enough to embrace and implement its Veterans First Contracting Program.

This view is held with good reason. Despite a statutory and regulatory scheme that establishes a contracting priority for service-disabled, veteran-owned small businesses (SDVOSBs) and veteran-owned small businesses (VOSBs) above all others in VA procurements, several decisions, including the recent US Government Accountability Office (GAO) ruling in *Aldevra*,¹ reveal that the VA is not adhering to the “Veterans First” mandate. Quite the opposite, the VA has fought vigorously to defend positions that directly contradict the priority for SDVOSBs and VOSBs, even going so far as to ignore the GAO’s recommendations in *Aldevra*. Furthermore, the VA’s Office of Inspector General (OIG) recently found numerous shortcomings in the verification process for SDVOSBs and VOSBs, a process that has resulted in denials of roughly half of the applications over the last year, many without a sufficient or efficient review.

This article examines the adversarial positions the VA has taken against the Veterans First Contracting Program and questions the wisdom of this approach by the very agency that is uniquely entrusted with the program’s implementation. The article also looks at the challenges facing the VA’s Center for Veterans Enterprise (CVE) in verifying the eligibility of firms for the Veterans First Contracting Program and concludes that it is too soon for Congress to expand the CVE’s role to cover all federal agencies that restrict procurements for SDVOSBs.

Background

In 1999, Congress passed the Veterans Entrepreneurship and Small Business Development Act of 1999 because, al-

though veterans “have been and continue to be vital to the small business enterprises of the United States,” Congress found that “[t]he United States has done too little to assist veterans, particularly service-disabled veterans, in playing a greater role in the economy of the United States by forming and expanding small business enterprises.”² The law established several forms of contracting assistance for veterans, including a goal that at least 3 percent of all prime contract and subcontract awards each fiscal year would be made to SDVOSBs.³ Congress subsequently enacted the Veterans Benefits Act of 2003⁴ to give contracting officers the tools (e.g., sole source and set-aside contracts to SDVOSBs) to meet the 3 percent SDVOSB contracting goal.⁵ The SDVOSB contracting program created under these laws is administered by the US Small Business Administration (SBA) and is applicable to “all Federal agencies that employ one or more contracting officers.”⁶

A few years later, Congress gave the VA its own, separate veterans contracting program via the Veterans Benefits, Health Care, and Information Technology Act of 2006 (VA Act).⁷ The VA’s program, referred to as the Veterans First Contracting Program, applies only to VA acquisitions.⁸ Like the SBA-administered, government-wide program, the Veterans First Contracting Program established contracting goals, gave the VA sole source contracting authority, and permitted the use of restricted competition for SDVOSBs, while adding such authority for VOSBs as well.⁹

The VA’s program is referred to as the “Veterans First Contracting Program” because the VA Act created mandatory contracting priorities for veterans.¹⁰ Specifically, the VA Act provides that VA contracting officers *shall* award contracts based on competition restricted for veteran-owned small businesses when two or more such firms will submit offers and award can be made at a fair and reasonable price.¹¹ The implementing VA Acquisition Regulations (VAAR) confirm that, in almost all cases, the VA must give priority to SDVOSBs and VOSBs in VA procurements.¹² By contrast, the government-wide SDVOSB program “is permissive in nature” because the underlying provision in the Small Business Act indicates merely that contracting officers *may* award contracts based on competition restricted for SDVOSBs.¹³

The VA’s Resistance to the “Veterans First” Priority

Though the VA is in charge of implementing the mandatory Veterans First acquisition initiative, the agency surprisingly has fought *against* the priority for veterans in several recent acquisitions. Three bid protest cases in particular, discussed in turn below, demonstrate how the VA has eschewed corrective action and dug in its heels for

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lengthy legal battles to avoid having to reserve procurements for SDVOSBs and VOSBs.

In the first case, *Powerhouse Design Architects & Engineers, Ltd.*,¹⁴ the protester challenged the VA's failure to set aside several architect-engineering (A/E) procurements for SDVOSBs. The VA had indicated in the sources sought notices that it would conduct the procurements pursuant to the Brooks Act¹⁵ and its implementing regulations.¹⁶ In ruling for the protester, the GAO examined the statutory and regulatory provisions requiring priority for veterans and found "nothing in the VA Act or the VA regulations that exempts A/E procurements from the set-aside requirement."¹⁷ Though the VAAR contains three exceptions to the set-aside requirement, the GAO noted that none are applicable to A/E services.¹⁸ The GAO similarly found nothing in the Brooks Act or its implementing regulations that "suggests a reasonable basis for asserting that A/E procurements are exempt from the VA Act or the VA regulations."¹⁹ The GAO criticized the VA for sidestepping the plain language of the VA Act and VAAR in its defense; instead, the VA offered several unavailing arguments, including an interpretation of its response to a comment about a proposed rule that the GAO found was not entitled to deference.²⁰

Around the same time the GAO decided *Powerhouse*, the US Court of Federal Claims (COFC) published its decision in *Angelica Textile Services v. United States*.²¹ In *Angelica*, the VA had restricted the subject contract for firms eligible under the AbilityOne Program, rather than the Veterans First program.²² The COFC considered the proper order of priority between the two programs and held that the Veterans First Contracting Program should have trumped the AbilityOne Program based on explicit VA guidance stating just that.²³ *Angelica* is noteworthy because the VA failed to follow its own guidance, and, moreover, because the VA decided to fight the protest rather than take corrective action. In fact, the VA defended the protest by challenging the validity of its own guidance, asserting that the guidelines could be ignored and did not have the force of law.²⁴ Not surprisingly, the COFC found that the VA's position against its own guidance was "not well taken" and ruled against the VA.²⁵

The *Powerhouse* and *Angelica* decisions were prologue to *Aldevra*, a bid protest decided in October 2011 in which the VA again fought (and lost) a challenge to the Veterans First priority. *Aldevra* dealt with the priority between the Veterans First Contracting Program and acquisitions under the Federal Supply Schedule (FSS) procedures. The VA took the position that FSS procurements are not subject to the Veterans First mandate, arguing, as in *Powerhouse*, not based on the plain language of the VA Act and the VAAR, but on an interpretation of its responses to rulemaking comments. In moving to dismiss the protests, the VA warned the GAO that to rule against the VA "would result in a weird and whimsical unraveling of procurement priorities and programs that have inured to the benefit of both the public and government for many decades."²⁶

The GAO again rejected the VA's arguments because it

found "nothing in the VA Act or the VAAR that provides the agency with discretion to conduct a procurement under FSS procedures without first demonstrating whether the acquisition should be set aside for SDVOSBs."²⁷ The VA's responses in the rulemaking referenced the applicability of 48 C.F.R. part 19 to FSS procedures, but as the GAO noted, FAR part 19 governs the separate, SBA-administered procurement program for SDVOSBs that "is permissive in nature."²⁸ Because the Veterans First Contracting Program is governed by mandatory statutory language and implemented through the VAAR, it is not subject to "the exception in the FAR that permits agencies to award task and delivery orders under the FSS without regard to government-wide small business programs . . ."²⁹ Thus, the GAO found no reason to veer from the plain language of the VA Act and the VAAR, which require the VA to give priority to the Veterans First program in VA acquisitions.³⁰

Perhaps the most notable aspect of *Aldevra* occurred after the GAO decided the case. Though executive branch agencies such as the VA are expected to follow the GAO's recommendations, the VA moved quickly after *Aldevra* to inform its acquisition officials and personnel that the VA would not follow the GAO's ruling. On October 17, 2011, the VA's deputy assistant secretary for acquisition and logistics, Jan R. Frye, issued a memorandum to all VA acquisition personnel stating that the "VA is of the opinion GAO's interpretation [in *Aldevra*] is flawed and legally incorrect." As a result, the Frye memorandum stated, the VA will wait for the issue to be decided by the courts. In the meantime, the VA will ignore *Aldevra* and dig in for further resistance and litigation against the Veterans First mandate.³¹

Unfortunately for the veteran contracting community, *Powerhouse*, *Angelica*, and *Aldevra* are not the only examples of the VA's resistance to the Veterans First program. While the VA clearly believes that veterans should be given priority in at least some procurements,³² the VA is contesting the Veterans First priority "in several other protests currently pending before [the GAO]."³³ The VA has also faced substantial criticism, and several bid protests, in connection with its multibillion dollar Transformation Twenty-One Total Technology procurement (known as "T4"), for which the VA used a two-tiered award methodology that did not consider veteran-owned offerors until after the VA had made multiple awards to nonveteran offerors on an unrestricted basis. And last year, the VA fought a protest against its failure to set aside a procurement for SDVOSBs, despite market research and comments from the SBA, both of which indicated that either a set-aside or sole source for SDVOSBs was required.³⁴

It is unclear why the VA, the agency specifically entrusted to aid veterans and administer the Veterans First Contracting Program, would choose to litigate against its own Veterans First guidance and statutory mandate. This hardly seems like good policy for the VA, and it is preventing the veteran contracting community from realizing the full promise of the Veterans First program. The VA should reconsider its "let the courts decide" approach. Instead, the

VA should seek to avoid protracted legal battles with its core constituents and, of its own initiative, interpret the reach of the Veterans First Contracting Program as expansively and favorably for veterans as possible.

Challenges in the CVE Verification Process

In addition to fighting against the mandate of the Veterans First Contracting Program, the VA is facing challenges in implementing the program's verification process. Of the two federal procurement programs for SDVOSBs, only the Veterans First Contracting Program requires firms to pass an upfront eligibility review before they can participate in the program.³⁵ Verification is conducted through the VA's CVE and, when successful, results in a listing in the VA's Vendor Information Pages ("VIP") database, found at www.VetBiz.gov, with an SDVOSB or VOSB seal of approval.³⁶ According to the VAAR, being listed as verified in the VIP database is a component of SDVOSB and VOSB eligibility for the Veterans First Contracting Program.³⁷

In October 2010, Congress passed the Veterans Benefits Act of 2010 requiring the VA to accelerate the verification of firms that had previously self-certified in the VIP database.³⁸ All firms must now be listed and verified in the VIP database before they are eligible for a contract award through the Veterans First Program.³⁹

The Veterans Benefits Act of 2010 forced the CVE to immediately review the eligibility of thousands of veteran-owned contractors. Such an undertaking would have been a difficult challenge for most agencies in this era of fiscal austerity. While many veterans believe the CVE performed admirably under the circumstances, the VA OIG found significant room for improvement in the VA's verification process. In a July 2011 report, the VA OIG noted that the Office of Small Disadvantaged Business Utilization (OSDBU) at the VA "lacks the performance management information needed to determine if it has the right staffing mix and processes in place to address the backlog of businesses requiring eligibility verification due to the implementation of the Veterans' Benefits Act of 2010."⁴⁰ The VA OIG also observed that "OSDBU lacks reasonable assurance that CVE is operating effectively to eliminate VA's current backlog of business verifications and is properly maintaining the Vet-Biz VIP database. . . ."⁴¹

A big part of the problem with the verification process is that the CVE is now too quick to deny applications. The focus on eliminating fraud and abuse appears to have swung the pendulum too far in the other direction; in the last year, close to half of all applications were denied.⁴² Though many applications were surely denied for appropriate reasons, a fair share of firms have been denied because the CVE overlooked portions of its rules or applied the rules in overly restrictive, impractical, and nonbusiness friendly ways. The CVE has also denied many firms because of minor and easily correctable conflicts in their corporate records. Furthermore, the CVE denied at least one firm located in a community property state because, in the CVE's view, the state law entitled the nonveteran spouse to

half of the veteran's ownership interest. The CVE determined that because the spouse was entitled to half of the veteran's ownership, the veteran actually owned only one-half of his shares in the company, which reduced his ownership to below the required 51 percent.

There is no question that the CVE has a difficult job to balance the integrity of the program with fair and timely results for all. But preventing ineligible firms from getting into the program is no more important than making sure eligible firms are not unfairly kept out. To limit the number of incorrect denials, the CVE should engage in more give-and-take with applicants before denials are issued. Doing so would provide applicants with a greater opportunity to address the CVE's concerns, correct or clarify corporate records, and eliminate grounds for denial. In short, the CVE should spend more time during the application process working to help applicants become eligible, instead of requiring firms to address the CVE's concerns (well-founded or not) post-denial via a new application or request for reconsideration.

Such an approach would help to lessen the record number of reconsideration requests that have deluged the CVE in the last few months.⁴³ As much as possible, the CVE should rule on a reconsideration request within 60 days,⁴⁴ but the agency has been well behind this target. As of October 18, 2011, the VA had nearly 900 such requests. This represents a threefold increase in the historical rate of reconsideration requests⁴⁵ and is a poor reflection on the underlying verification process. The VA is shifting and adding resources to strengthen and speed up the process, but many veteran-owned firms that were wrongly denied admission remain in limbo in the reconsideration process and unable to pursue contracts awarded through the Veterans First program.⁴⁶

Verification of SDVOSB Joint Ventures

The challenges in the verification process extend to joint ventures as well. Though joint ventures are an increasingly popular tool among small business contractors, the VA has interpreted the CVE verification requirement in a way that limits the usefulness of joint ventures for firms in the Veterans First Program. Specifically, the VA has held that joint ventures must be listed as verified in the VIP database to be eligible for award.

Although the GAO has deferred to the VA on this issue,⁴⁷ the VA's reasoning is suspect because the regulation that provides distinct eligibility criteria for joint ventures contains no requirement for listing and verification in the VIP database.⁴⁸ To the contrary, the joint venture regulation indicates that a joint venture is eligible for contracts through the Veterans First Contracting Program if "[a]t least one member of the joint venture is an SDVOSB or VOSB concern, and makes the representations in paragraph (b) of this section."⁴⁹ Thus, the party that must make the representations in paragraph (b)—which contains the requirement for verification in the VIP database⁵⁰—is the SDVOSB or VOSB member of the joint venture, not the joint venture itself.

The VA's interpretation is further belied by the fact that

both the joint venture regulation and the representations contained in paragraph (b) include size eligibility criteria.⁵¹ According to the VA's interpretation, joint ventures must comply with the joint venture rule and make the representations in paragraph (b). This interpretation makes the joint venture size requirement superfluous because paragraph (b) also requires offerors to be small.⁵² An interpretation that renders a regulation meaningless "violates basic principles of statutory and regulatory construction."⁵³

The view that joint ventures should not have to be separately listed and verified in the VIP database is consistent with a recent ruling of SBA's Office of Hearings and Appeals (OHA) pertaining to SDVOSB joint ventures in the government-wide program.⁵⁴ It is also the more reasonable interpretation when accounting for the practical realities of the CVE verification and reconsideration processes, which can take many months to complete. Because joint ventures are limited to a few specific contract opportunities and are not used "on a continuing or permanent basis for conducting business generally,"⁵⁵ contractors do not customarily form joint ventures until a suitable contract opportunity arises. By the time an opportunity is identified, it will most often be too late to go through the multimonth process to gain CVE verification before proposals are due and award is made. This severely restricts the utility of joint ventures for SDVOSBs and VOSBs and unfairly burdens them with the additional time and expense of more verification processes.

Proposal to Expand the CVE's Role

Notwithstanding the challenges facing the CVE verification process, in September 2011, the Senate Committee on Small Business and Entrepreneurship unanimously passed the Small Business Contracting Fraud Prevention Act of 2011 (S. 633). The bill would end the current practice of self-certification for SDVOSBs that use the government-wide program, thereby expanding the CVE's role to cover the verification of SDVOSBs in both of the federal procurement programs for veterans.

Though S. 633 passed the Senate, it faces an uncertain future.⁵⁶ There are concerns about the VA's resources to handle another significant increase in application volume.⁵⁷ Additionally, there are questions about how the CVE would harmonize the differences between the VA and SBA programs and give effect to the SBA's exclusive role as the arbiter of small business status.⁵⁸

There is good reason to proceed cautiously in merging the eligibility processes for the two programs into the CVE, as there is already a lot of confusion regarding the differences between the two programs. For instance, contracting officers have sent SDVOSB status protests both to the VA OSDBU and the SBA,⁵⁹ and a contractor has tried to appeal a VA status determination to OHA.⁶⁰ In a more recent example, the COFC in *Bluestar Energy Services, Inc. v. United States*⁶¹ rejected the plaintiff's claim that it could self-certify its SDVOSB status for a Defense Logistics Agency solicitation, stating that "[a]lthough self-certification may be acceptable, it is not available in this case,"

based on several VA regulations.⁶² The court apparently overlooked that a non-VA procurement falls under the separate, government-wide SDVOSB program for which self-certification is permitted under the SBA's regulations.⁶³

Consolidation of the verification processes (if not the entire contracting programs) into the CVE (or the SBA) could someday eliminate the confusion and streamline the barriers to entry into the federal procurement market for veteran-owned firms. However, as evidenced by the many issues with the CVE verification and reconsideration processes to this point, there is no reason to believe that the CVE is ready to handle its existing portfolio of contractors, let alone all federal agencies. Therefore, the best approach for the VA at this time is to focus its efforts and resources on handling the backlog of reconsideration requests and improving its interactions with applicants before denials are issued so less reconsideration requests need to be filed.

Conclusion

Despite the criticisms in this article, it should be reiterated that the VA provides many forms of assistance for our military veterans, including through the Veterans First Contracting Program. Of note, the VA tops all federal agencies with over 20 percent of its procurements going to SDVOSBs and VOSBs.⁶⁴ However, the VA can and should be doing better. Even discounting the VA OIG's concerns about the veracity of the VA's contracting statistics,⁶⁵ the VA is still spending roughly four out of every five procurement dollars outside of the Veterans First Contracting Program. Given the VA's critical role for veterans, it should be leading the charge for veterans in its acquisitions at a much more sizable percentage.

To this end, the VA should reconsider its decision to litigate against the Veterans First mandate, and in particular, its rejection of the GAO's recommendations in *Aldevra*. It is neither good policy for the VA nor consistent with its obligations under the VA Act to interpret the reach of the Veterans First Contracting Program narrowly until the courts tell the VA otherwise. Rather than continuing to spend precious resources on further legal battles, the VA should accept the broad Veterans First mandate and redouble its efforts to ensure that the eligibility verification process is fair and efficient for all applicants. The VA should also relax its interpretation of the joint venture verification requirements so more SDVOSBs and VOSBs can utilize this valuable contracting tool. Lastly, Congress needs to allow the CVE more time to get its house in order before expanding the CVE's purview. These steps are necessary so our veterans will get the most out of the Veterans First Contracting Program and have the best possible chance to "realize the American dream that they fought to protect."⁶⁶ PL

Endnotes

1. *Aldevra*, B-405271; B-405524 (Oct. 11, 2011).
2. 15 U.S.C. § 657b note, Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, § 101(3), 113

Stat. 233, 234 (1999).

3. *Id.* at 247.

4. Pub. L. No. 108-183, § 308, 117 Stat. 2651 (2003).

5. *Id.* at 2662. President Bush later issued Executive Order 13360, which imposed duties on federal agencies to “more effectively implement” the 3 percent contracting goal and their newfound authority to reserve certain procurements for SDVOSBs. See 69 Fed. Reg. 62549 (Oct. 26, 2004).

6. FAR § 19.1402.

7. Pub. L. No. 109-461, §§ 502–03 (codified at 38 U.S.C. §§ 8127–28 (2006)); see also 48 C.F.R. § 819.7001.

8. VAAR § 819.7002; see also 74 Fed. Reg. 64619, 64622 (Dec. 8, 2009) (“VA is required to give priority in contracting to small businesses owned and controlled by veterans, but the program is not intended to have government-wide applicability under the FAR.”).

9. Pub. L. No. 109-461, § 502, 120 Stat. 3403, 3431–32 (2006). The Veterans First Contracting Program “is a logical extension of VA’s mission to care for and assist veterans in returning to private life. It provides VA with the new contracting flexibilities to assist veterans in doing business with VA. SDVOSBs and VOSBs will obtain valuable experience through this VA program that can be useful in obtaining contracts and subcontracts with other government agencies as well.” 74 Fed. Reg. at 64622.

10. 74 Fed. Reg. at 64622 (“Sections 8127 and 8128 of title 38, U.S.C., contain provisions that authorize VA to create a VA-specific procurement program to provide contracting preference to SDVOSBs and VOSBs.”).

11. 38 U.S.C. § 8127(d).

12. VAAR §§ 819.7004(a)-(b), 819.7005(a).

13. *Aldevra*, *supra* (citing 15 U.S.C. § 657f(b) and Mission Critical Solutions, B-401057 (May 4, 2009)).

14. Powerhouse Design Architects & Eng’rs, B-403174, *et seq.* (Oct. 7, 2010).

15. See 40 U.S.C. § 1101, *et seq.* (Supp. III 2006). The Brooks Act provides policies and procedures for the selection of architects and engineers on federal government contracts. See *id.*

16. See 48 C.F.R. subpart 36.6.

17. *Powerhouse*, *supra*.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Angelica Textile Servs. v. United States*, 95 Fed. Cl. 208 (2010).

22. *Id.* at 211–12; see also *id.* at n.2 (explaining that the AbilityOne Program involves a list “of products and services that must be purchased by federal governmental agencies from qualifying nonprofit entities employing handicapped and disabled persons”).

23. *Id.* at 222–23. The VA guidance at issue in *Angelica* states that for all procurements issued after January 7, 2010, VA contracting officers must first consider using the Veterans First Contracting Program before putting a procurement on the list for the AbilityOne Program. *Id.* at 213–14.

24. *Id.* at 221–22.

25. *Id.* at 222.

26. VA Mot. Dismiss, B-405271; B-405524, filed July 20, 2011, at p. 5. The governmental benefit VA alluded to here appears to be, at least in part, the fees the VA receives for its role in administering certain schedules. *Id.* at p. 6 (discussing the VA’s use and administration of FSS contracts).

27. *Aldevra*, *supra*.

28. *Id.*

29. *Id.*

30. The GAO cited favorably to *Aldevra* in Kingdomware Technology, B-405727 (Dec. 19, 2011).

31. Consistent with this approach and its obligation under 31 U.S.C. § 3554(b)(3), the VA notified the GAO, on October 28, 2011, that it does not intend to follow the GAO’s recommendations in *Aldevra*. Subsequently, it was reported that the VA had decided to comply with the GAO’s recommendations in *Aldevra*. See Jill R. Aitoro, *In an about*

face, VA cancels protested solicitations, WASH. BUS. J., Dec. 12, 2011, <http://tinyurl.com/cdjagtd>. However, in a January 4, 2012 opposition to a new GAO protest by Aldevra, the VA maintained that *Aldevra* “is fundamentally flawed” and “was incorrectly decided.”

32. See, e.g., VA Information Letter 001AL-09-06 (Aug. 17, 2009) (providing that VA ammunitions acquisitions are subject to the Veterans First Contracting Program).

33. *Aldevra*, *supra*.

34. This case, Crosstown Courier Servs., Inc., B-404485 (Dec. 28, 2010), was dismissed for procedural reasons. Although the SBA filed comments in support of the protest, the GAO dismissed the protest because the *pro se* protester did not file comments on time.

35. The SBA considered creating a certification program but decided that doing so was unnecessary, opting instead for self-certification. See Small Business Size Regulations; Government Contracting Programs, 69 Fed. Reg. 25262, 25265 (May 5, 2004); see also 13 C.F.R. § 125.15(a) (discussing the representations of SDVOSB status that must be made with the firm’s initial offer (which includes price) for a contract); FAR § 19.1403(a)-(b). The SBA verifies SDVOSB self-certifications through protests and appeals of SDVOSB status. *Id.* at 25262 (“The SBA’s regulations provide for a mechanism to check SDVO SBC status through protests and appeals.”).

36. See VAAR § 804.1102 (describing the VIP database listing and verification requirements for contract eligibility).

37. See, e.g., VAAR § 802.101 (defining SDVOSBs and VOSBs as firms that are listed as verified in the VIP database).

38. Veterans Benefits Act of 2010, Pub. L. No. 111-275, § 104, 124 Stat. 2864 (2010); see also 74 Fed. Reg. at 64619 (“In the past, vendors could register themselves in the VA vendor database and self certify the accuracy of the information provided.”).

39. VAAR § 804.1102 provides that firms listed in the VIP database, but not verified, are eligible for award prior to Jan. 1, 2012. However, in October 2010, the VA issued a class deviation to VAAR § 804.1102 to provide that all prospective awardees must be listed and verified in the VIP database. See VA Acquisition Policy Flash! 11-09, Clarification: Class Deviation from VA Acquisition Regulation (VAAR) 804.1102 (Oct 2010). Unverified firms listed in the VIP database as of October 13, 2010, were eligible for an accelerated, 21-business day verification process upon notification of a prospective award. However, firms not listed in the VIP database as of Oct. 13, 2010, are not eligible for fast-track verification and must go through the regular CVE verification process to be eligible for award. See FedCon RKR JV LLC, B-405257 (Oct. 4, 2011).

40. VA OIG, “Audit of Veteran-Owned and Service-Disabled Veteran-Owned Small Business Programs,” 10-02436-234, July 2011, p. 21.

41. *Id.* at p. 18.

42. See Prepared Statement of Thomas J. Leney, Executive Director, Small and Veteran Business Programs, Office of Small and Disadvantaged Business Utilization, U.S. Department of Veterans Affairs, to the U.S. House of Representatives, Committee on Veterans’ Affairs (July 28, 2011) (stating that “[s]ince the implementation of P.L. 111-275, we have verified approximately 2,000 firms and denied approximately 1,600”).

43. According to the VA’s rules, most applicants that are denied may request reconsideration. See 38 C.F.R. § 74.13.

44. *Id.* at § 74.13(b).

45. According to an e-mail from the VA’s “Reconsideration Team,” while only approximately 20 percent of denied firms have traditionally sought reconsideration, the reconsideration rate is now over 60 percent.

46. Several recent bid protest decisions have confirmed that, without verification in the VIP database, SDVOSBs and VOSBs are not eligible for contracts awarded through the Veterans First Contracting Program. See Corners Constr., B-402465 (Apr. 23, 2010); CS-360, LLC v. United States, 94 Fed. Cl. 488 (2010); *FedCon RKR*, *supra*.

47. See Pro South-Emcon, a Joint Venture, B-405267 (Aug. 18, 2011) (citing A-1 Procurement, JVG, B-404618.3 (July 26, 2011)).

48. See VAAR § 819.7003(c).

49. *Id.* at § 819.7003(c)(1).
50. *Id.* at § 819.7003(b).
51. *Id.* at §§ 819.7003(b)(2) and (c)(2).
52. *Id.*
53. Mid-Atlantic Bus. Fin. Co., SBA No. DEV-643 (2000) (citing *Gustafson v. Allroyd Co, Inc.*, 513 U.S. 561, 574–75 (1995) and *United States v. Alaska*, 521 U.S. 1, 59–60 (1997)).
54. See *Constr. Eng'g Servs., LLC*, SBA No. VET-213 (2011) (finding that because a separate SBA regulation governs contract eligibility for SDVOSB joint ventures, only the SDVOSB member in the joint venture, as opposed to the joint venture itself, must adhere to the eligibility criteria for individual SDVOSBs).
55. 74 Fed. Reg. at 64626.
56. See, *Featured Interview, Mr. Sam Graves (R-MO), Chairman, House Small Business Committee, VETLIKEME*, Vol. 2, No. 5 (Sept.-Oct. 2011), at 8 (transcript of October 12, 2011, interview in which Chairman Graves said that “[s]elf-certification is a difficult issue. No one wants to see fraudulent businesses taking opportunities away from legitimate SDVOSB. However, I am also conscious of the fact that small businesses already bear the brunt of compliance with regulations, and I want to proceed cautiously before putting another burden on legitimate SDVOSB.”).
57. *Id.* (Chairman Graves stated, “Before Congress considers charging the VA with verification for all SDVOSBs, I want to make sure that the VA has the capacity and systems to efficiently verify status.”) at 10.
58. *Id.* (Chairman Graves stated, “I have no problem with the VA determining who is a service disadvantaged veteran, but only the Small Business Administration should be able to determine who is a small business, otherwise we risk having conflicting decisions from the two agencies.”) at 12.
59. See *United Med. Design Builders, LLC*, SBA No. VET-197 (2010).
60. See *Reese Goel JV*, SBA No. VET-199 (2010).
61. *Bluestar Energy Servs., Inc. v. United States*, 100 Fed. Cl. 607 (2011).
62. *Id.* at 620.
63. See *Apex Limited, Inc.*, B-402163 (Jan. 21, 2010) (discussing the need to use the right regulations for the applicable SDVOSB program).
64. See *supra* n.42.
65. See July 2011 VA OIG Report, *supra* n.40, at p. i (“Although VA reported awarding 23 and 20 percent of its total procurement dollars, respectively, to VOSBs and SDVOSBs in FY 2010, we projected that these figures were overstated by 3 to 17 percent because of awards made to ineligible businesses.”).
66. See *supra* n.2.