



NAVIGATING THE VA'S VERIFICATION PROCESS FOR VETERAN OWNED COMPANIES

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A PilieroMazza Webinar

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PRESENTED BY

Pilieromazza Government Contracts Group

Jon Williams, Partner

jwilliams@pilieromazza.com

(202) 857-1000



Peter Ford, Associate

pford@pilieromazza.com

(202) 857-1000





OVERVIEW

- ❖ VA requirements, common applicant mistakes, and practical tips for hot-button CVE verification issues, including:
 - Board of Directors and Quorum Provisions
 - Transfer Restrictions
 - Veteran Involvement in Day-to-Day Business Activity
 - Veteran Qualifications & Compensation
 - Significant Business Relationships with Other Firms
 - Community Property
 - Trusts
 - On-Site Examinations
 - Joint Ventures

- ❖ Q&A



BOARD OF DIRECTORS AND QUORUM PROVISIONS

❖ VA Requirements

- A veteran must control board of directors (38 C.F.R. § 74.4(f))
- Non-veterans cannot control or have the power to control board of directors (38 C.F.R. § 74.4(g)(1))
 - Non-veteran control of the board of directors can occur directly through majority voting rights, or indirectly where bylaws allow non-veterans to prevent a quorum or block action (i.e., “negative control”) (38 C.F.R. § 74.4(i)(1))



BOARD OF DIRECTORS AND QUORUM PROVISIONS

- ❖ Common Mistakes in Bylaws & Operating Agreements
 - Non-veteran directors must be present at a board of directors meeting to satisfy the quorum requirement
 - Non-veteran directors can satisfy the quorum requirement without the presence of the veteran director
 - Vote of non-veteran directors is necessary for the board of directors to take action
 - Board of directors can take action without the vote of the veteran director



BOARD OF DIRECTORS AND QUORUM PROVISIONS

❖ Tips

- If possible under state law, establish a board of directors with only one director (the veteran)
- Provide the veteran director with supermajority voting rights
- Appoint non-veterans as non-voting, advisory or honorary directors
- Specify that the veteran director's presence alone is sufficient to satisfy the quorum requirement
- Kick issues to the shareholders in the event of deadlock by the board of directors



BOARD OF DIRECTORS AND QUORUM PROVISIONS

❖ Other Issues

- CVE's interpretation of 38 C.F.R. § 74.4(f)
- State law concerns
- Control in the context of limited liability companies
- Permitted minority shareholder protections
- Relevance of SBA's Office of Hearings and Appeals decisions
- Is this good business practice?



TRANSFER RESTRICTIONS

❖ VA Requirement

- A veteran's ownership of his/her company cannot be subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on assignments of voting rights, or any other type of arrangement that could cause the veteran's ownership benefits to go to another (other than death or incapacity) (38 C.F.R. § 74.3(b))



TRANSFER RESTRICTIONS

- ❖ Common Mistakes in Bylaws, Operating Agreements & Shareholders Agreements
 - Owners cannot freely transfer their ownership interests
 - Owners must offer their ownership interest to the other owners before selling to whoever they want (e.g., a “right of first refusal”)
 - Ownership automatically transfers to someone else or the company upon certain designated events, such as the owner's bankruptcy or divorce



TRANSFER RESTRICTIONS

❖ Tips

- Keep it simple: eliminate all transfer restrictions
- Or, carve the veteran out of transfer restrictions
- Owners need to consider whether this makes sense



VETERAN INVOLVEMENT IN DAY-TO-DAY BUSINESS ACTIVITY

❖ VA Requirements

- A veteran owner must show “sustained and significant time” invested in the applicant firm, but does not need to work full-time for the applicant firm (38 C.F.R. § 74.4(c)(1))
 - If the veteran works outside of the applicant firm, he/she must submit a written statement to explain why the outside activities do not have a significant impact on his/her ability to manage and control the applicant
- A veteran manager must devote full-time to the applicant firm during normal business hours (38 C.F.R. § 74.4(c)(3))
 - Work in a wholly-owned subsidiary may count



VETERAN INVOLVEMENT IN DAY-TO-DAY BUSINESS ACTIVITY

❖ Common Mistakes

- The veteran owner has outside employment and/or outside business interests and does not submit the required written statement to explain the outside interests
- The veteran owner lives far away from where the applicant firm does most of its work and does not explain how he/she is able to manage the firm's activities
 - This makes the veteran look like a figurehead, or “Rent-A-Vet”



VETERAN INVOLVEMENT IN DAY-TO-DAY BUSINESS ACTIVITY

❖ Tips

- VA may not tell you to submit a separate statement to explain your outside interests and management of the applicant firm, but you must do so if the veteran has outside interests, owns multiple businesses, or lives far from where the applicant does most of its work
 - Use the statement to discuss hours worked by the veteran, duties performed, nature of business, how technology is utilized to manage the company from remote locations, etc.
 - Carefully review personal tax returns and use written statement to explain all of veteran's ownership in other entities, including passive investments and real estate holding companies



VETERAN INVOLVEMENT IN DAY-TO-DAY BUSINESS ACTIVITY

- ❖ Tips (continued)
 - Don't overlook your résumé
 - Make sure the veteran's résumé reflects his/her management-related duties and responsibilities within the applicant firm
 - Compare the veteran's résumé with the résumés of non-veteran owners and officers
 - Make sure the veteran is signing corporate documents (i.e., contracts, checks, and leases)
 - Make sure the applicant's website and public profiles (i.e., SAM.gov, DSBS, Dun & Bradstreet, etc.) contain current and consistent information about the applicant



VETERAN QUALIFICATIONS & COMPENSATION

❖ VA Requirements

- Veteran must have managerial experience of the extent and complexity needed to run the applicant (38 C.F.R. § 74.4(b))
- Veteran need not have technical expertise or required licenses, but must have managerial and supervisory control over those who do (38 C.F.R. § 74.4(b))
- Veteran must hold the highest officer position (38 C.F.R. § 74.4(c)(2))
- Veteran must be the highest compensated unless there is a business reason to pay someone else more (38 C.F.R. § 74.4(g)(3))



VETERAN QUALIFICATIONS & COMPENSATION

❖ Common Mistakes

- Veteran has limited managerial and/or industry experience and is heavily reliant on other, non-veteran owners who have critical licenses and experience
- Application does not clearly convey the veteran's experience to the VA through the resume, written statement, and other supporting documents
- Application does not include a written statement explaining how the applicant is helped by having a non-veteran receive the highest compensation from the business



VETERAN QUALIFICATIONS & COMPENSATION

❖ Tips

- Although the veteran does not need to have technical expertise, CVE prefers the veteran to have some experience in the applicant's main industry
- Update the veteran's résumé to emphasize previous managerial and industry experience, educational background, certifications, skills, etc., that are similar to the applicant's line of work
- Make the veteran the license qualifier, if possible
- Corporate governance documents should describe different officer positions if the applicant has officers, and descriptions should make clear that veteran holds highest officer position



VETERAN QUALIFICATIONS & COMPENSATION

❖ Tips (continued)

- Keep accurate meeting minutes
- Provide a separate, written statement discussing how taking a lower salary helps the VOSB—CVE may not tell you to do so
- Carefully review all employee payroll records prior to submission
- Increase year-end distributions to make sure the veteran is the highest compensated



SIGNIFICANT BUSINESS RELATIONSHIPS WITH OTHER FIRMS

❖ VA Requirement

- Non-veterans or entities may be found to control the applicant firm when the applicant is so dependent on business relationships with non-veterans or entities that the applicant is unable to exercise independent business judgment without great economic risk (38 C.F.R. § 74.4(i)(4))
- Similar to SBA small business rule on “affiliation”



SIGNIFICANT BUSINESS RELATIONSHIPS WITH OTHER FIRMS

❖ Common Mistakes

- Administrative services agreement with a large firm makes veteran-owned firm reliant on the large firm for back-office functions, proposal writing, and other aspects of day-to-day business
- Veteran firm shares office space and facilities with another firm, for free or below-market rates
- Veteran firm receives loans, bonding, and other financial assistance from another firm
- Veteran firm earns a significant percentage (75%+) of its revenue on subcontracts from one firm



SIGNIFICANT BUSINESS RELATIONSHIPS WITH OTHER FIRMS

❖ Tips

- Veteran firm should do as many of the back office functions as possible on its own
- If the veteran firm has a relationship with another business, separate the two companies as much as possible
- Don't put all your subcontracting apples in the same prime contractor's basket
- Avoid (or greatly reduce) common ownership, management, employees, and facilities with another firm
- Agreements between the applicant and other firms should include commercially reasonable terms



COMMUNITY PROPERTY

❖ VA Requirement

- If the veteran resides in a community property state, VA will consider the applicable state community property laws in determining whether the veteran unconditionally owns the applicant firm (38 C.F.R. § 74.3(f))



COMMUNITY PROPERTY

- ❖ Common Mistake
 - Veteran owners residing in community property states are not aware of how the VA interprets community property so they have not taken the necessary steps



COMMUNITY PROPERTY

❖ Tip

- Prepare a “Transmutation Agreement” and include the agreement with your application to VA
 - The Transmutation Agreement states that the veteran’s ownership of the applicant firm is not community property



TRUSTS

❖ VA Requirements

- The veteran's ownership must be direct (38 C.F.R. § 74.3(a))
- Ownership held in trust may be treated as direct veteran ownership if the trust is revocable, and if the veteran is the grantor, a trustee, and the sole current beneficiary of the trust (38 C.F.R. § 74.3(a))



TRUSTS

❖ Common Mistakes

- A non-veteran trustee has control (either affirmative or negative) over the veteran's trust
- A veteran owner whose ownership is held in trust submits only the trust agreement to the VA and does not explain how the trust satisfies the VA's requirements



TRUSTS

❖ Tips

- Carefully review the terms and conditions of the trust prior to submission and amend the trust if necessary
- Provide the VA with a separate, written statement explaining how the trust meets the requirements of 38 C.F.R. § 74.3(a), even if the VA does not tell you to do so



ON-SITE EXAMINATIONS

❖ VA Requirements

- VA may conduct a verification examination on a random (unannounced) basis, or if VA receives credible information indicating that a firm no longer meets the eligibility requirements (38 C.F.R. § 74.20(a))
- VA may conduct a verification examination (full or partial) at one or all of a firm's office locations (38 C.F.R. § 74.20(b))
- VA may review any information related to a firm's eligibility (38 C.F.R. § 74.20(b))



ON-SITE EXAMINATIONS

- ❖ Common Mistakes
 - The veteran's office is not ready for an inspection
 - The veteran's employees are not ready for an inspection



ON-SITE EXAMINATIONS

❖ Tips

- VA has a bigger budget for on-site verification examinations, so there has been an increase in the number of on-site exams
 - Expect to undergo an on-site exam, possibly more than once
 - VA is conducting post-admission on-site exams
 - Appearance of affiliation can lead to an on-site exam
- Be prepared!
 - If the visit is announced, the veteran owners must be present
 - Prep your office and have records in a file available for review
 - Equipment should be present
 - Be mindful of your daily calendar entries
 - Prep for interviews, and prep your employees as well, so answers are consistent with the information you submitted to the VA



JOINT VENTURES

❖ VA Requirements

- A joint venture must be a separate legal entity (38 C.F.R. § 74.1)
- A joint venture must be majority owned and controlled by a verified SDVOSB or VOSB
- A joint venture must be separately verified and listed in VetBiz.gov



JOINT VENTURES

❖ Common Mistakes

- The joint venture is not separately verified and listed in VetBiz.gov
- The veteran-owned firm in the joint venture is still in the process of getting verified when the joint venture submits its application
- The joint venture is formed by contract only, not as an LLC or other separate legal entity



JOINT VENTURES

❖ Tips

- Do not file simultaneous verification applications for the veteran-owned firm and the joint venture – the veteran-owned firm must be approved first
- Get the joint venture verified prior to submitting a proposal
- A joint venture agreement will need to be submitted to VA and must comply with SBA's joint venture requirements found at 13 C.F.R. § 125.15(b)(2)
- The joint venture must meet the applicable prime contractor performance of work requirements (13 C.F.R. § 125.15(b)(3))
- Control and ownership requirements still apply (for the most part)



Any Questions?

Thank you for joining us today.

If you would like to speak with Jon Williams or Peter Ford about navigating the VA's verification process, please contact them as follows:

Jon Williams

jwilliams@pilieromazza.com

(202) 857-1000

Peter Ford

pford@pilieromazza.com

(202) 857-1000