

**FOLLOW-UP ON THE U.S. DEPARTMENT OF
VETERANS AFFAIRS SERVICE-DISABLED
VETERAN-OWNED SMALL BUSINESS
CERTIFICATION PROCESS**

HEARING
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT AND
INVESTIGATIONS
AND
SUBCOMMITTEE ON ECONOMIC OPPORTUNITY
OF THE
COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
ONE HUNDRED TWELFTH CONGRESS
FIRST SESSION

NOVEMBER 30, 2011

Serial No. 112-35

Printed for the use of the Committee on Veterans' Affairs



U.S. GOVERNMENT PRINTING OFFICE

71-432

WASHINGTON : 2012

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

COMMITTEE ON VETERANS' AFFAIRS

JEFF MILLER, Florida, *Chairman*

CLIFF STEARNS, Florida	BOB FILNER, California, <i>Ranking</i>
DOUG LAMBORN, Colorado	CORRINE BROWN, Florida
GUS M. BILIRAKIS, Florida	SILVESTRE REYES, Texas
DAVID P. ROE, Tennessee	MICHAEL H. MICHAUD, Maine
MARLIN A. STUTZMAN, Indiana	LINDA T. SANCHEZ, California
BILL FLORES, Texas	BRUCE L. BRALEY, Iowa
BILL JOHNSON, Ohio	JERRY McNERNEY, California
JEFF DENHAM, California	JOE DONNELLY, Indiana
JON RUNYAN, New Jersey	TIMOTHY J. WALZ, Minnesota
DAN BENISHEK, Michigan	JOHN BARROW, Georgia
ANN MARIE BUERKLE, New York	RUSS CARNAHAN, Missouri
TIM HUELSKAMP, Kansas	
MARK E. AMODEI, Nevada	
ROBERT L. TURNER, New York	

HELEN W. TOLAR, *Staff Director and Chief Counsel*

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

BILL JOHNSON, Ohio, *Chairman*

CLIFF STEARNS, Florida	JOE DONNELLY, Indiana, <i>Ranking</i>
DOUG LAMBORN, Colorado	JERRY McNERNEY, California
DAVID P. ROE, Tennessee	JOHN BARROW, Georgia
DAN BENISHEK, Michigan	BOB FILNER, California
BILL FLORES, Texas	

SUBCOMMITTEE ON ECONOMIC OPPORTUNITY

MARLIN A. STUTZMAN, Indiana, *Chairman*

GUS M. BILIRAKIS, Florida	BRUCE L. BRALEY, Iowa, <i>Ranking</i>
BILL JOHNSON, Ohio	LINDA T. SANCHEZ, California
TIM HUELSKAMP, Kansas	TIMOTHY J. WALZ, Minnesota
MARK E. AMODEI, Nevada	

Pursuant to clause 2(e)(4) of Rule XI of the Rules of the House, public hearing records of the Committee on Veterans' Affairs are also published in electronic form. **The printed hearing record remains the official version.** Because electronic submissions are used to prepare both printed and electronic versions of the hearing record, the process of converting between various electronic formats may introduce unintentional errors or omissions. Such occurrences are inherent in the current publication process and should diminish as the process is further refined.

CONTENTS

November 30, 2011

	Page
Follow-Up on the U.S. Department of Veterans Affairs Service-Disabled Veteran-Owned Small Business Certification Process	1

OPENING STATEMENTS

Chairman Bill Johnson, Subcommittee on Oversight and Investigations	1
Prepared statement of Chairman Johnson	37
Hon. Joe Donnelly, Ranking Democratic Member, Subcommittee on Oversight and Investigations, prepared statement of	39
Chairman Marlin A. Stutzman, Subcommittee on Economic Opportunity	3
Prepared statement of Chairman Stutzman	38
Hon. Timothy Walz, Democratic Member, Subcommittee on Economic Opportunity	3
Hon. Bruce L. Braley, Ranking Democratic Member, Subcommittee on Economic Opportunity, prepared statement of	39

WITNESSES

Thomas J. Leney, Executive Director, Small and Veteran Business Programs, Office of Small and Disadvantaged Business Utilization, U.S. Department of Veterans Affairs	5
Prepared statement of Mr. Leney	40
Accompanied By:	
John H. "Jack" Thompson, Deputy General Counsel, Office of General Counsel, U.S. Department of Veterans	
Gregory D. Kutz, Forensic Audits and Investigative Service, U.S. Government Accountability Office	27
Prepared statement of Mr. Kutz	42
Ralph O. White, Managing Associate General Counsel for Procurement Law, Office of General Counsel, U.S. Government Accountability Office	29
Prepared statement of Mr. White	46

SUBMISSIONS FOR THE RECORD

Steve L. Gonzalez, Assistant Director, National Economic Commission, American Legion	50
Robert G. Hesser, Vetpreneur, LLC, Herndon, VA	53

**FOLLOW-UP ON THE U.S. DEPARTMENT OF
VETERANS AFFAIRS SERVICE-DISABLED
VETERAN-OWNED SMALL BUSINESS
CERTIFICATION PROCESS**

WEDNESDAY, NOVEMBER 30, 2011

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON VETERANS' AFFAIRS,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS AND
SUBCOMMITTEE ON ECONOMIC OPPORTUNITY,
Washington, DC.

The Subcommittees met, pursuant to notice, at 10:07 a.m., in Room 334, Cannon House Office Building, Hon. Bill Johnson [chairman of the Subcommittee] presiding.

Present from Subcommittee on Oversight and Investigations: Representatives Johnson, Donnelly, and Barrow.

Present from Subcommittee on Economic Opportunity: Representatives Stutzman, Bilirakis, Amodei, and Walz.

**OPENING STATEMENT OF CHAIRMAN JOHNSON,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS**

Mr. JOHNSON. Well, good morning. This hearing will come to order.

I want to welcome everyone to today's follow-up hearing on the VA's service-disabled veteran-owned small business certification process.

I thank the Members of the Subcommittee on Economic Opportunity for their participation today and their efforts in improving the process for veteran-owned and service-disabled veteran-owned small businesses to do business with the VA.

In July, we held a hearing on this certification process. And at that time, Mr. Tom Leney was relatively new to his position as the executive director of Small and Veteran Business Programs at VA's Office of Small and Disadvantaged Business Utilization commonly referred to as the OSDBU.

At that hearing, we promised a follow-up discussion with Mr. Leney to see how his planned improvements for the process and certifying veteran-owned small businesses had been implemented after several months.

Today is that follow-up. I look forward to hearing of the progress made toward achieving these goals and how much longer it will be until the goals are finally realized.

I also have concerns regarding recent actions taken by the VA's senior procurement executive in response to the recent GAO

Aldevra decision which states that the VA should make efforts to contract with veteran-owned small businesses when feasible and in accordance with the Veterans First Contracting Program.

GAO recently upheld a bid protest filed by the Aldevra business on a VA contract and recommended that VA rebid that contract. Despite clear legislative and committee report language outlining the intent of the Veterans First Contracting Program, the VA decided that GAO's decision would not apply to its contracting operations and that it would continue as it pleased, doing away with the preference for VOSBs and SDVOSBs in much of its contracting.

The VA has made it clear in correspondence and meetings following the Aldevra decision that it has no intention of attempting to clear up its own questions about Veterans First. Despite acknowledging the problem, the VA is not trying to solve the problem nor did it even ask Congress or this committee those questions that needed to be answered years ago.

Even after the Aldevra decision and the VA's response, efforts by these two Subcommittees to help explain parts of the new law that the VA had trouble understanding several years after its passage were met with a lack of cooperation on the VA's part.

Instead the VA is determined to run this through the court system eliminating key opportunities for VOSBs to contract with the Federal Government.

When the VA cannot or chooses not to implement clearly written legislation, we have a problem. This is not rocket science. The Veterans First Contracting Program exists to help the VA set the standard in Federal Government contracting with VOSBs and SDVOSBs.

With Congress and the Administration sharing a goal of increasing contracting with VOSBs and SDVOSBs, the Veterans First language facilitated the achievement of that goal.

The law contains clear wording on how the VA can achieve that goal while simultaneously helping our veterans do business and not hindering the VA in its contracting efforts.

With straightforward language such as the secretary shall give priority to a small business concern owned and controlled by veterans, it is difficult to understand the VA's failure to correctly interpret this law which also provides reasonable accommodations when a VOSB or SDVOSB cannot fill the need.

We need to get this right. The certification process must ensure that VOSBs and SDVOSBs are efficiently processed and certified. We then must ensure that these same businesses are able to compete for the appropriate contracts. Otherwise, there is no point in having these businesses in the system if the VA is going to ignore them.

I look forward to today's testimony on improvements made in the certification process since our last hearing and the further improvements we can look forward to in the near future. I also look forward to discussion on how we can make the actual contracting system with VOSBs and SDVOSBs work as it is intended.

I am, however, disappointed that the VA's testimony barely touches on the Aldevra topic despite knowing for 30 days that it would be a part of this hearing. This is no surprise to anyone.

And since the VA's October meeting with committee staff, we have seen no great effort on the VA's part to improve this situation.

I now yield to the acting Ranking Member, Mr. Walz, for an opening statement.

**OPENING STATEMENT OF HON. WALZ, DEMOCRATIC MEMBER,
SUBCOMMITTEE ON ECONOMIC OPPORTUNITY**

Mr. WALZ. Well, thank you, Mr. Chairman, and to our witnesses for coming today, for holding this joint hearing. I believe this follow-up hearing deserves this Committee's full attention.

And because small business concerns do overlap into the jurisdiction of Oversight and Investigation, we are certainly happy to work with the Economic Opportunity Subcommittee to ensure proper oversight.

The tough economic times that we are in make it as important as ever to properly address transparency, programmatic policy concerns, and thoroughly review the service-disabled veteran-owned small business or SDVOSB certification process. Providing contracting opportunities to our deserving veterans through this process is important.

But when you have a successful program such as the VA's Small Business Contracting Program and you are awarding millions of dollars, it potentially attracts unqualified businesses whose intentions are unfortunately to commit fraud. This is why it is as important as ever for the VA to implement and enforce fraud prevention measures.

During this joint hearing, I look forward to look at the following things: An overview of the VA's preventative measures and monitoring controls to minimize vulnerability or fraud; VA's disbarment procedures; staff training to identify and monitor potential fraud; VA's verification process such as how they verify SDVOSBs; and the process of conducting announced site visits.

These are just some of the items I have on today's agenda. I believe that unless we remedy these concerns, the same problems that have haunted this really important program and the problems with verification will remain.

I want to thank you, Mr. Chairman, for your leadership and I yield back.

Mr. JOHNSON. I thank the gentleman for yielding back.

I now yield to the chairman of the Subcommittee on Economic Opportunity, Chairman Stutzman, for his opening comment.

**OPENING STATEMENT OF HON. STUTZMAN, CHAIRMAN,
SUBCOMMITTEE ON ECONOMIC OPPORTUNITY**

Mr. STUTZMAN. Thank you, Chairman Johnson.

First, let me express my appreciation for offering to join forces on enabling service-disabled veteran-owned small businesses to compete for contracts with the Department of Veterans Affairs.

Let me begin by adding some context to why we are here today. In 1999, the President signed legislation that became Public Law 106-50 which established a government-wide goal for all Federal agencies to award 3 percent of their contract dollars to small businesses owned and controlled by service-disabled veterans.

Until that time, there was no goal for service-disabled veteran-owned small businesses or SDVOSBs. Since then, there have been several laws and an executive order that made it clear that Federal agencies are to make every effort to award at least 3 percent of their acquisition dollars to service-disabled veteran-owned small businesses.

This legislative effort has continued with the passage of two laws that established and reinforced Section 8127 of Title 38 to provide VA with special tools and priorities to meet and hopefully exceed the 3 percent goal.

By most indicators, the intent of Section 8127 has been met. But meeting the 3 percent goal is not the sole intent of Section 8127. Another goal is to establish a database of validated veteran and service-disabled veteran-owned small businesses that any government agency can access as part of their efforts to meet the 3 percent goal. And that is why there are still significant problems.

Today, VA data shows contract awards exceeding 20 percent and I congratulate them for that effort. However, the process in achieving those numbers has been painful at best. Until recently, implementation of the database of validated veteran and service-disabled veteran-owned small businesses required by Public Law 109-461 has been less than professional to put it kindly.

The VA is still recovering from its initial reluctance to implement the law. Its policy of allowing self-certification of ownership and control status instead of actively performing the validation function prescribed in the law was frankly a disaster.

As a result, as we will hear today, millions of contract dollars went to businesses that did not meet the veteran or disabled veteran-owned and controlled status.

I also find VA's recent decision to ignore GAO's finding in favor of a protest by Aldevra, a service-disabled veteran-owned small business, as evidence of a continuing reluctance to fully embrace the clear requirements of Section 8127.

The law does not require VA to set aside all contracts for SDVOSBs or award all contracts to SDVOSBs. More importantly, nowhere in Section 8127 is there a provision exempting acquisitions using the Federal supply schedule.

If nothing else, setting aside contracts using the FSS will provide VA contracting officers additional flexibility in meeting the SDVOSB goals.

Let's assume for the moment that those who believe the provisions of Section 8127 go too far and that they give too much advantage to SDVOSBs are correct. To those, I would point out the literally dozens of Federal agencies who continue to fail miserably to meet even the 3 percent goal.

For example, DoD, the largest department in the Federal Government, awarded only 1.82 percent to SDVOSBs in fiscal year 2010. I suspect DoD could do better if they limited janitorial awards to those SDVOSBs in that business. So if VA is picking up part of the slack for the rest of the Federal Government, so be it.

Finally, my staff and I have been hearing with increasing frequency that many legitimate SDVOSBs are having an extremely difficult time being validated and several have even had to close down as a result.

While I understand that verification rules must be enforced to ensure non-SDVOSBs are kept out, there must be a balance. I am interested to hear from Mr. Leney about how he can better strike this balance and expedite reconsideration for many of these small businesses.

I am also concerned about what happens to the very dubious arbitrary decisions to deny status to businesses by contractors hired to validate the ownership and control status. And I suggest that may be as a result of a lack of clear regulations on things like survivorship and conflicts with state laws.

Thank you, Mr. Chairman, and I will yield back.

Mr. JOHNSON. Thank you, Mr. Chairman, for being here.

I thought we were going to have a statement from your Ranking Member from your Subcommittee, but I think he is not—

Mr. JOHNSON. Yeah.

Mr. JOHNSON. Okay. Well, thank you both, for both Subcommittees' participation.

And I now invite the first panel to the witness table. On this panel, we will hear today from Mr. Tom Leney, the executive director of Small and Veteran Business Programs at VA's Office of Small and Disadvantaged Business Utilization.

Mr. Leney, your complete written statement will be made a part of the hearing record and you are now recognized for five minutes.

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 ACCOMPANIED BY JOHN H. "JACK" THOMPSON, DEPUTY GENERAL COUNSEL, OFFICE OF GENERAL COUNSEL, U.S. DEPARTMENT OF VETERANS AFFAIRS

Mr. LENEY. Thank you, Chairman Johnson, Chairman Stutzman, Ranking Member Walz, and Members of the Subcommittees.

I want to thank you for inviting me to testify on the VA's implementation of veteran-owned small business provisions in the Veterans Benefits Health Care Information Technology Act of 2006 and the Veterans Benefit Act of 2010.

I would like to briefly summarize my statement for the record so we can address your questions and concerns.

The Vet First Program enables the VA to provide preferences to veteran small businesses. VA has used this program to lead the Federal Government in contracting with veteran small businesses.

In the last fiscal year, the VA awarded more than \$3 billion to veteran firms. The VA far exceeded the procurement goals of 3 percent for SDVOSBs. We also exceeded the higher VA goals of 12 percent for veteran small businesses overall, providing nearly 22 percent of our total procurement to veterans.

This is real money in the hands of veteran small businesses and it establishes the VA as a leader in this arena.

At the same time, the VA has actively implemented the statutory verification provisions that you have given us in Public Law 109-461 so that procurement preferences go only to legitimate firms.

I would like to update you on the progress VA has made to improve the verification program and our plans to continue improving

it so that legitimate veteran businesses have greater access to VA procurement opportunities.

As promised, we have completed the removal of all non-verified firms from the vendor information pages 3 months ahead of schedule.

When I last met with you in July, it took an average of 127 days to process an initial verification application. We have now reduced that to 75 days.

In April, some applicants had waited months to receive word that there was an issue with their veteran or service-disabled, service-connected disability status. Veterans now receive their status within 48 hours.

In response to valid complaints regarding lack of information on status of initial applications, we have established a policy that applicants receive updates at all key points in the process and the current standard for the CVE help desk to provide a response is one business day.

In addition, applicants can now receive an update on demand via vetbus.gov.

Along with more frequent correspondence, we have launched our Verification Assistance Program to clarify the regulatory requirements and to explain the most frequent reasons for denial.

This program enables applicants to eliminate common errors up front and helps legitimate firms to receive favorable decisions more quickly.

In July, the GAO followed up its May 2010 evaluation of CVE verification and identified some challenges and vulnerabilities that the VA has since overcome.

Among the issues identified were training, use of site visits, and debarment of ineligible firms.

In addition to expanded internal training, CVE has initiated a program to train all of its staff members as certified fraud examiners.

We reduced the potential for ineligible firms to become verified by creating a Risk Mitigation Program that requires high-risk firms to undergo a site visit in addition to a document review.

We have increased the number of site visits nearly ten-fold from calendar year 2010 to calendar year 2011.

We have also increased training of the acquisition staff. In the past 6 months, we provided training to more than a thousand contracting officers.

The VA is serious about debarring companies who misrepresent their status. VA has developed and formalized specific processes and criteria related to debarment. They can be found on the VA Debarment Committee Web site.

It is important to note, however, that most firms that we find to be ineligible are not intentionally misrepresenting their status and are not committing fraud.

Those firms that do provide false information or material information are referred to the VA's Office of Inspector General.

Mr. Chairman, we were also asked to address the October GAO decision upholding a bid protest by an SDVOSB. My statement for the record addresses the VA acquisition policy position on the Aldevra decision. And Jack Thompson, the VA's deputy general

counsel, is with me today to answer any questions you may have on that issue.

In conclusion, the VA Verification Program has made significant progress in the last 6 months. We have overcome many of the challenges and vulnerabilities that were raised by the GAO and OIG reports.

And I am confident that we are protecting the integrity of the Verification Program. We are not satisfied and we are not done improving the process.

Mr. Chairman and Members of the Subcommittee, that concludes my statement. I am pleased to answer any questions you may have.

[The prepared statement of Thomas J. Leney appears on p. 40.]

Mr. JOHNSON. I thank you for your testimony. And we will begin questions at this point. And I begin with myself.

Mr. Leney, you state that VA has consistently interpreted the Vet First Program as VOSBs having priority over any other class of small businesses when VA is conducting full and open competition procurements.

In 2009 testimony, Jan Frye stated that the Vet First provisions are preferences in open-market contracting for veteran entrepreneurs.

Can you outline for us the purchasing priority hierarchy at VA and explain where these VOSBs fall in the hierarchy?

Mr. LENEY. Sir, there is hierarchy for procurement within the VA and within the Federal Government. Vets have priority within all open-market purchases.

Mr. JOHNSON. What priority? Where do they fall in the hierarchy?

Mr. LENEY. On the open-market purchases, they fall first. They are first priority.

Mr. JOHNSON. No, open market is like the eighth category in the priority. Where do the VOSBs fall in VA's hierarchy? You are saying it is all the way down in open market?

Mr. LENEY. Veteran-owned small businesses do not receive priority under FAR Part 18 purchases. The acquisition policy related to these issues is—

Mr. JOHNSON. Let me help you a little bit because I am not sure. You are having trouble crafting your answer here.

On June 19th of 2007 as written in VA's information letter, VA expressed that Public Law 109-461 changes the priorities for contracting preferences within VA placing SDVOSBs and VOSBs first and second respectively in satisfying VA's acquisition requirements.

On August 20th, 2008 in the Federal Register, VA again noted that Public Law 109-461 requires the secretary to give priority to a small business concern owned and controlled by veterans.

If we go back to the June 20th, 2007 testimony, this approach changes the small business hierarchy within VA placing service-disabled veteran-owned small businesses and veteran-owned small businesses first and second respectively in satisfying VA's acquisition requirements.

And the Veterans Benefits Act, if we look at October 26, 2010, the United States Court of Federal Claims, the ANGELICA decision stated that in part the Veterans Benefits Act is a specific man-

date to the department and only to the department to grant first priority to SDVOSBs and VOSBs in the awarding of contracts.

So let me ask you again. Where do VOSBs and SDVOSBs fall in your current practice of priority within the Veterans Administration for contracting opportunities?

Mr. LENEY. Mr. Chairman, the VA has an obligation to balance a number of objectives that you have provided.

Mr. JOHNSON. Where Mr. Leney, I want a straightforward answer. Where in the priority scheme do VOSBs and SDVOSBs fall?

You said there is a priority and a hierarchy. Putting them in open source which is the eighth category down is not first and second as previously identified in VA acknowledgment of the Title 38 requirements.

So straightforward answer. Where do they fall?

Mr. LENEY. Well, I appreciate the opportunity to become engaged in acquisition policy issues. I am not the right person to answer that question directly.

Mr. JOHNSON. Who is the right person?

Mr. LENEY. It would be our chief of acquisition policy. As an advocate for small businesses within the VA my focus has been on helping small businesses by promoting the verification process and—

Mr. JOHNSON. Well, you know, we started asking these questions 30 days ago. And we were told that the people appearing before this Subcommittee today would be able to answer those specific questions.

So, Mr. Thompson, you were the one that was identified as being able to answer those specifics.

Mr. THOMPSON. Well, I—

Mr. JOHNSON. Where do VOSBs and SDVOSBs fall in that priority?

Mr. THOMPSON. Within department set-asides, service-disabled veteran-owned small businesses are number one. Other veteran-owned—

Mr. JOHNSON. That is not what Title 38 says. It does not say for VA set-asides. It says in the contracting acquisition process, they were to be placed as number one and number two. And that has been acknowledged by the VA in the past.

Mr. THOMPSON. Sir, I respectfully disagree. VA has always been of the opinion that the correct interpretation of those Veterans First provisions is that within all set-asides, service-disabled veteran-owned businesses stay on top.

Mr. JOHNSON. Well, Mr. Thompson, I would submit to you that that is contrary to what the GAO says.

Where are you getting your authorization? Where in the law does it say that it is based on set-asides and not the overall contracting requirements and provisions? Give me a reference. Where is the law? Where in the law does it say that it is set-asides?

Mr. THOMPSON. I believe you are referring to the issue in the Aldevra decision.

Mr. JOHNSON. Partly.

Mr. THOMPSON. And the reason VA attorneys, the principal reason VA attorneys are not persuaded by GAO's Aldevra decision is

because it does not contain analysis of all of the words of that statute.

The set-aside law provides that for purposes of meeting the secretary's annual goals for contracting with VOSBs and SDVOSBs, the department shall set aside contracts for them if certain conditions are met.

I respectfully disagree that Congress said we are to use this set-aside authority in all cases, but rather as a tool for meeting the secretary's goals.

GAO's opinion did not discuss this important qualifier that Congress placed on this set-aside authority, that is it was to be used for purposes of meeting the secretary's contracting goals.

As Mr. Leney noted in his opening statement, VA has more than met, it is surpassing the secretary's small business contracting goals and, therefore, in our opinion, VA is meeting both the letter and the spirit of that Public Law.

Mr. JOHNSON. Mr. Thompson, we are not so concerned about percentages as we are about process. And the process according to the law and according to the GAO opinion is that SDVOSBs and VOSBs are not being considered in the right priority. And how the VA can simply choose to ignore what the GAO is recommending, I would commend to the VA that that deserves much more scrutiny.

We have seen only a few examples in previous administrations where GAO findings were ignored or not followed. And I can assure you that we have lots of concerns about this.

The clock is now running, gentlemen, so I am not sure how long I have got, but I am going to yield to the Ranking Member for his questions. We are going to have multiple rounds. I have lots of them, so we are going to be coming around again.

Mr. DONNELLY. Mr. Leney, the SDVOSB contract accounting for \$3.2 billion in government-wide contracts during fiscal year 2010, we verified the eligibility of 5,000 SDVOSB firms.

How many firms are in the queue that you are reviewing right now to become eligible?

Mr. LENEY. Sir, we now have about 8,000 firms verified—

Mr. DONNELLY. Okay.

Mr. LENEY [continuing]. Within the VIP. And we have approximately 1,700 firms in the queue.

Mr. DONNELLY. What has to be done to get those additional 1,700 firms certified and what is the timeline that you are using on those?

Mr. LENEY. Right now the timeline for initial verification is on average, we are able to verify firms within 75 days which is a considerable reduction in time required. About 95 percent of all firms are receiving an initial determination within the 90 day goal.

So it is really a case of continuing the process and continuing to refine and improve the process. We have applied additional resources to the verification process to ensure that we can meet those objectives.

Mr. DONNELLY. In fiscal year 2011, the prime contracting goal for VOSB was 12 percent. For SDVOSB, it was approximately 10 percent.

What is the impediment, if there is any, on bringing those numbers higher and to ensuring that our VOSBs have the opportunity to become even more a part of our contracting processes?

Mr. LENEY. Well, the good news is with regard to those goals is we have substantially exceeded them. In 2011, we gave more than 19 percent of our procurement dollars to SDVOSBs and almost 22 percent to VOSBs. And even in our Federal supply schedules, we gave 13 percent of our Federal supply schedule dollars to veteran-owned firms.

So we continue to attempt to identify maximum practical opportunities for small businesses, particularly veteran small businesses, to do business with the VA.

Mr. DONNELLY. What we would like to see is monthly data on the certification statistics and on what percentage is going to our VOSBs and SDVOSBs so we can see that the effort, the service given by our vets is being recognized and rewarded on the contracting portion as well.

Is that going to cause you any difficulty to make sure that we can get those on a monthly basis?

As just indicated, my numbers were a little behind. I'm thrilled to hear we are at 8,000, you know, hoping to push it to 9,000 because there are 1,700 in the queue.

Is that something that you can provide us with, monthly numbers on that?

Mr. LENEY. Yes. We can provide reports as required to the Committee on the status of verification. In the last month, we verified an additional 116 firms.

One of the challenges that we are presented with is the reality that applications do not come in a consistent fashion. And as we attempt to be good stewards of resources and apply our resources effectively—

[The VA subsequently provided the following information:]

**VA Veteran-owned small business (VOSB) Verification Report
As of November 30, 2011**

	November 2011
Total businesses in the Vendor Information Pages (VIP)	8,040
Businesses approved	162

Nota Bene: All businesses in VIP are verified. There is no direct correlation between the number of businesses approved each month and the increase in the number of businesses in VIP. This is due to companies being denied on re-verification and companies who had been denied subsequently receiving approval in the request for reconsideration process.

Mr. DONNELLY. What do you mean they do not come in a consistent fashion?

Mr. LENEY. Well, in October, we may get 300 applications. In November, we may get 20.

Mr. DONNELLY. Okay. Well, you know, whatever the number is, the number is, but that enables us to see that there is continual progress on this front.

Mr. LENEY. We can provide reports as required by the Committee.

Mr. DONNELLY. Thank you very much.

I yield back.

Mr. JOHNSON. I thank the gentleman for yielding.

I will go to the chairman, Chairman Stutzman, for his questions.

Mr. STUTZMAN. Thank you, Mr. Chairman.

I would like to go down the road a little bit on understanding how you certify certain businesses. We have heard from veteran-owned small businesses that they were denied verification because as required by California State law, they had an executive board for their company and it was determined that this showed they did not have ownership and control despite the fact that the veteran held all of the stock.

We have also heard other complaints about the denials based on the existence of a corporate board.

Can you explain CVE's reasoning for decisions like this and the process that they use in determining who is eligible and who is not?

Mr. LENEY. Yes, sir. Our process for determining eligibility is based on 38 CFR 74 of the regulation that promulgates the standards established in Public Law 109-461.

There is no prohibition on a firm being eligible for the Vet First Program based on the fact that they have a board. There is no prohibition based on the fact that a particular state requires them to have multiple members on the board.

As established in the regulation, however, there is a prohibition on verifying the eligibility of a firm when the veteran does not have full control of the organization.

You can have a board. If the board has the capacity to out-vote the veteran, based on the regulation, he is not in control of the board. If the board has the ability to make decisions for the corporation that are binding and legal, even if the owner were to fire the board the next day, because he appointed the board, that firm would not be eligible for verification because a decision could be made that the owner was not in control of. It would be binding on the firm.

Mr. STUTZMAN. You are saying it is not a veteran-owned business at that point?

Mr. LENEY. It is a veteran-owned business, but the regulation requires it to be both veteran owned and controlled. A very small number of firms, less than 5 percent, are denied verification based on ownership issues. More than 90 percent of the denials that occur in the process of verification are a function of control.

Mr. STUTZMAN. Is that in Federal statute?

Mr. LENEY. Control—

Mr. STUTZMAN. The Federal statute requires ownership—

Mr. LENEY. Owner controlled?

Mr. STUTZMAN [continuing]. And control?

Mr. LENEY. Yes, sir.

Mr. STUTZMAN. Would that be consistent with SBA's policy?

Mr. LENEY. The policy that the CVE is responsible for implementing is 38 CFR 74 and that is the regulation that we are focused on implementation.

In my discussions with the SBA, they also require ownership and control and they do a status when they do status verification.

Mr. STUTZMAN. Okay. Thank you.

Are veterans with DoD disability discharge eligible for SDVOSB status if they are not included in the VA's BIRLS database that lists veterans with a VA disability rating?

Mr. LENEY. A veteran has to have a disability status to be eligible for the SDVOSB Program. We have made a modification 6 months ago. If a person was not in the BIRLS, the veteran was not in the BIRLS database, we rejected their application.

Currently our policy is if they are not in the BIRLS database, we continue to process their application, but we require them to be in the BIRLS database before making a final verification decision because that is the basis for ensuring that veterans are, in fact, service disabled that we utilize in the VA.

Mr. STUTZMAN. Okay. Thank you, Mr. Chairman. That is all I have right now.

Mr. JOHNSON. I thank you.

Mr. Leney, you mentioned that the VA exceeded its procurement goals by reaching nearly 20 percent of SDVOSBs and nearly 22 percent of VOSBs.

Are the 20 and 22 percents, are those clean numbers, meaning is there a zero overlap between those two numbers?

Mr. LENEY. There is overlap between the two numbers, sir. The 22 percent that go to veteran-owned small businesses includes the nearly 19 percent that go to service-disabled veteran-owned small business.

So as you look at those numbers, the vast majority of our procurements that go to veteran-owned businesses go to service-disabled veterans.

Mr. JOHNSON. My apologies. My peripheral vision blanked out on me there. Mr. Walz, no, please, please continue. I apologize.

Mr. WALZ. No, no. Thank you, Mr. Chairman.

Again, thank you for being here, Mr. Leney. Thank you for you and for the work you are doing and for your service. And as you can see, this committee is committed to getting it right. And sitting behind you are numerous folks, small business owners, veterans, veterans' advocates, and we all want to get there.

And I always say at these hearings I am certainly the VA's staunchest supporter. But at times, I can be the harshest critic because this is one of those examples. This is a great program. It is an important program. We must get it right.

And I know the battle that you are in and it is that razor's edge on the fraud, waste, and abuse, at the same time moving resources to the veterans. It appears like we might be in one of those odd cases where the attempt to fight fraud is actually becoming waste in itself. And that is a very challenging one for me.

The question I had, and in your testimony, Mr. Leney, you said you are serious about disbarment. You stood up the Committee in September of 2010 and by October of 2011, we have disbarred one business.

According to the GAO's report is what we are getting, when they spot check, they estimated that there were at least ten businesses that they could verify that were not veteran-owned small businesses in that hundred million. At the pace we are going, we will have those ten disbarred by 2022.

Now, the question sitting behind us is, that is a problem. And what we are asking for is, is only thing we want to see on this committee, and I know it is the only thing you want to see is, is qualified veteran-owned small businesses getting the priority to get the contracts, do business, grow their business, and serve the VA and other veterans to the best of their ability.

Do you think it is being portrayed uncharacteristic or unfairly, I should say, that there is a slowness here and that there is a resistance to what the GAO said and there is a resistance to making changes because that is certainly the way it feels to me?

So I know this is somewhat of a subjective question because I have no doubt that your hundred percent commitment is to delivering the resources to veterans in the best way and shepherding the taxpayer dollars in a responsible manner.

How come it appears like there is a disconnect here? What are we missing that is making it appear, because I think you are seeing a lot of unanimous agreement that there is a problem here?

Mr. LENEY. Sir, I absolutely believe that we share the goals that you just stated, not only myself as the director of Small and Veteran Business Program, but the senior leadership at the VA, absolutely sure of those goals. And I am absolutely confident there is no hesitation to pursue aggressively the goals that were laid in 109-461. I think the numbers speak for themselves. In terms of—

Mr. WALZ. Was my number correct on disbarment? It was wrong?

Mr. LENEY. We have actually made seven disbarment decisions at the Debarment Committee and I am happy to provide for the record the details for that.

[The VA subsequently provided the following information:]

VA Response: VA is serious about debaring companies who misrepresent their status as a VOSB or SDVOSB, and in September 2010 formed the 8127 Debarment Committee, named after the portion of the U.S. Code that implements the Veteran small business acquisition portions of P.L. 109-461. VA has developed and formalized specific processes and criteria related to the 8127 Debarment Committee which can be found on the Committee's Web site at: (<http://www.va.gov/oal/business/8127debarments.asp>). The Committee consists of representatives from the Office of Acquisition, Logistics, and Construction (OALC); the Office of Small and Disadvantaged Business Utilization (OSDBU); the Office of General Counsel (OGC); and the Veterans Health Administration (VHA). The Committee will review referrals for debarment and make formal recommendations to the debaring official pursuant to the procedures in VAAR 809.406-3.

As of December 2011, the Committee had debarred seven separate firms and ten individuals associated with those firms. These firms are:

- Seabreeze Contracting, Inc.
- Triton Services, Inc.
- Chevron Construction Services, LLC
- Mitsubishi Construction Corp.
- KDV, Inc.
- T.E.M. Group, Inc.
- DAVID Construction, Inc.

Of this seven, one firm has completed the debarment period and is no longer listed in Excluded Parties List System (EPLS) listing. This firm is:

- DAVID Construction, Inc.

Of this seven, two have filed a lawsuit against VA in Federal district court, and the court directed VA to remove the names of the firms from EPLS pending resolution of the litigation. These firms are:

- KDV, Inc.

- T.E.M. Group, Inc.

The remaining four firms are currently debarred and listed in EPLS. These firms are:

- Seabreeze Contracting, Inc.
- Triton Services, Inc.
- Chevron Construction Services, LLC
- Mitsubishi Construction Corp.

Mr. WALZ. Okay.

Mr. LENEY. We have referred over 60 cases in the last 12 months to the Office of Inspector General. So there is absolutely no resistance within the VA to supporting and maintaining the integrity of the 109-461 Veterans First Verification Program.

The senior leadership of the VA has put resources into it. The challenges we face is the implementation of resources. When it comes to hiring, when it comes to contracting, these things do not happen overnight.

I think in the last 6 months, we have made major strides. As I said in my opening statement, we are not satisfied. We are not done.

And I apologize, Mr. Chairman, for my stuttering in response to your question, but these are very important issues of acquisition policy. And I would like to submit for the record from the VA a response that we can lay out in detail both our Vet First preferences and how they link to FAR Part 18.

Mr. WALZ. Mr. Leney, if I could ask you. On some of these firms, it is high risk. I hear what you are saying. We want to give you all the tools necessary. And I think with the GAO and the IG and things, those are all tools to streamline the process.

Do we do unannounced visits to high-risk firms?

Mr. LENEY. Yes, sir, we do. One of the things we established about 4 months ago was a program of unannounced visits. As part of our Risk Mitigation Program, we now rank firms based on a number of factors in terms of their risk to the VA and the taxpayer.

We not only do unannounced visits with respect to high-risk firms as a part of the application process, we now have established visits to already verified firms based on their risk category.

We have also included a random element to that. We have instituted random site visits for verified firms because we realize that verification is a snapshot in time.

Mr. WALZ. Do you think those things are helpful? Are those tools helpful? Is this good best practices in terms of fraud and management?

Mr. LENEY. Yes, sir, I believe so. It works for the IRS and it is working for us as well.

Mr. WALZ. Okay. I yield back, Mr. Chairman. Thank you for the time.

Mr. JOHNSON. I thank you and thank you for your indulgence. I apologize that I did not scan down.

Mr. Leney or Mr. Thompson, I apologize. We have more Members showing up. I got to get my scan down. I yield to our colleague from Florida, Mr. Bilirakis.

Mr. BILIRAKIS. Thank you, Mr. Chairman. I appreciate it.

I recently had a veteran small business roundtable and the difficulty they have encountered with the verification process is extensive.

I particularly am concerned that the reconsideration process is taking much too long and could inhibit the legitimate veteran small business owners from opportunities to create jobs and keep their doors open.

Specifically one of my constituents, and I would like to discuss this with you, Mr. Leney, but specifically one of my constituents competed in a 17 month VA bid process and was awarded a multiple award task order contract in mid October.

He found out that he had been denied service-disabled veteran-owned small business status and submitted a request for reconsideration. However, his business needs to be verified by December 6, 2011 to meet the deadline to maintain the multiple award task order contract.

Yet, under the first in, first out methodology, it seems improbable that this time frame will be met which will cost jobs, of course.

I worry that a process intended to help veterans is hurting them, Mr. Chairman.

What solutions would you suggest to this circumstance? Would it be feasible to expedite requests for reconsideration pending a documented contract award that will reflect specific deadlines or, in the alternative, would it be possible to maintain a conditional verified status until the reconsideration review is complete?

I am concerned about the lack of due process under the current reconsideration structure and how this lack of due process affects legitimate service-disabled veteran-owned small businesses.

Can you specifically answer those questions and if you can, please, I would like to get them in writing and maybe share with the Committee as well?

Thank you. Mr. Leney, please.

Mr. LENEY. Sir, I would be happy to provide for the record information with regard to the specific situation that you referred to. But I would like to address some of the more general and important issues that you raised.

First, I want to reassure the Committee there is an absolute commitment to due process both in our initial verification and our request for reconsideration. One of the prices we are paying for a commitment to due process is time.

I mentioned in response to Congressman Walz's question the ebb and flow of applications. We have received recently a dramatic surge in requests for reconsideration. And at one point going, almost a thousand requests for reconsideration came in within 45 days.

Our priority has been to ensure that those firms when patiently in line to receive a verification determination get that in a timely way. Every request for reconsideration—it is important to note is those firms have failed to meet the requirements of Public Law 109-461.

I have a difficult time putting those firms in front of firms that have, as far as we know, met all of the criteria and, again, are waiting patiently in line.

We have shifted resources in CVE to put more resources against requests for reconsideration. I have made a policy decision to not disadvantage those firms who are undergoing initial verification and to avoid sending us over the 90-day limit so that those firms can have some expectation that we will meet our objective and meet our goals in their initial verification.

That has resulted quite frankly in the fact that we are now not meeting our objective in terms of turning around all of our requests for reconsideration within 60 days. But it is not a capricious process.

In order to ensure that a firm that has been determined to not meet the requirements, that firm is now a higher risk, when they submit a request for reconsideration, we do a complete reevaluation. All of those firms are referred to our Office of General Counsel to ensure that they do receive due process and that we make an accurate determination.

Many of them receive site visits because their issues are more complex. And our first priority based on the communications we receive from this body are to ensure the integrity of the process to ensure that when the GAO and the IG come by the next time and they are coming back that they report to you that we have maintained the integrity of the program and that ineligible firms are not being verified.

And, unfortunately, sir, that takes time.

Mr. BILIRAKIS. Thank you, Mr. Chairman.

I would like to follow up with you on this.

Mr. LENEY. Be happy to do that, sir.

Mr. BILIRAKIS. And the lack of communication as well and what these folks are doing wrong, what the requirements are. They need to know these things.

And, you know, this guy has a contract, Mr. Chairman, and this is creating jobs in my district.

So I would like to follow up with you on that. Thank you, sir.

I yield back.

Mr. JOHNSON. Thank you.

We are going to go to Mr. Amodעי to see if he has questions.

Mr. AMODEI. Thanks, Mr. Chairman. I do not at this time. I yield back.

Mr. JOHNSON. Okay. Well, thank you.

Then I would like to follow up a little bit on yours just quickly.

How does a company get a contract if they have not been verified?

Mr. LENEY. Sir, they do not—

Mr. JOHNSON. Well, they did. That is what you said, right?

Mr. BILIRAKIS. Absolutely.

Mr. JOHNSON. Okay. So how do they get a contract if they have not been verified?

Mr. LENEY. There are a number of firms that currently have contracts with the VA who were verified under the self-certification process.

Mr. JOHNSON. This is a new one. They were awarded the contract in October. That is recently. How does that happen?

Mr. Thompson, you got any ideas?

Mr. LENEY. Sir, I am not aware of any firms—I am not aware of any firms to include that one receiving a contract from the VA that is not verified.

Mr. JOHNSON. Okay. Well, I look forward to hearing some feedback on that further discussion then because it sounds like we have a dichotomy.

Mr. LENEY. If I could clarify. My understanding, what does occur is we have firms that submit proposals for procurements. Prior to award, contract officers are required to check the vendor information pages to ensure that firms are, in fact, verified.

At that time, we have had requests by contract officers, hey, I have an apparent awardee and we need them to be verified.

Unfortunately, our response is we are happy to verify firms that have submitted applications and have been through the process, but we do not currently have a program of accelerating the—

Mr. JOHNSON. Is it typical to even consider? Why would we consider a firm and entertain a proposal from a firm that is not verified?

Mr. LENEY. You raise an excellent point, Mr. Chairman. And we have clarified to the acquisition community that they now check, as part of my training to the thousand contracting officials in the VA, they now check VIP upon receipt of proposals because it is a waste of good government resources.

Mr. JOHNSON. When did that policy go into effect?

Mr. LENEY. The policy was always in effect, sir. We clarified that policy and conducted training because there were instances where contracting officials did consider proposals prior to confirming verification.

Mr. JOHNSON. Well, it appears somebody is not following the internal rules then if indeed this contractor or this firm was considered. I am glad you have clarified that and hopefully—

Mr. BILIRAKIS. Mr. Chairman, will you yield? I understand that he was certified under the old process.

Mr. JOHNSON. Okay.

Mr. BILIRAKIS. He did the recertification and that is what he is waiting for. And he has secured the contract and he has to be recertified. And this is a legitimate small business. I can attest to that. But he has to be recertified by December 6th. Otherwise, he loses the contract.

Mr. JOHNSON. How long does it take once a company is certified, how long does it take to get them into system so that they are visible and can compete for contracts?

Mr. LENEY. Currently that time is measured in hours. It was—

Mr. JOHNSON. It is measured in hours?

Mr. LENEY [continuing]. Measured in weeks. Right now upon determination, whether it is a denial or an affirmation, we immediately now post it into the VIP system—

Mr. JOHNSON. Okay.

Mr. LENEY [continuing]. That same day.

Mr. JOHNSON. So if a company is verified today, you are saying within hours—

Mr. LENEY. Yes, sir.

Mr. JOHNSON [continuing]. They would show up in the system? Are you familiar with a company called Ironclad?

Mr. LENEY. The name is familiar, sir. I would hesitate to speak to the details.

Mr. JOHNSON. They received their congratulatory verification letter on November 7th. Any idea why they are not in the system?

Mr. LENEY. I would have to check, sir, because I would be surprised that they are not in the system given the changes that we have made. If they received a congratulatory letter on November 7th, they should have been in the system on the same day.

Mr. JOHNSON. Well, as of today, they are still not in there. So I—

Mr. LENEY. I will be happy to check on that, sir, and provide you a response for the record to find out why not.

Mr. JOHNSON. Yeah. I would like some feedback.

Mr. LENEY. Your testimony specifically mentions the tools to aid veteran entrepreneurs provided in the Vet First Program, yet, as you are aware from the recent Aldevra decision by GAO, VA does not always use these tools according to the VAO analysis.

Do you think VA is fully utilizing the Vet First Program given its stated preference for using the Federal supply schedule?

Mr. LENEY. Sir, while I do not claim to be an expert on acquisition policy, I do believe that the department does have an obligation to balance a number of objectives.

First we have an obligation to seek best value for the 23 million veterans we support. We have an obligation to promote competition and to reduce costs to the Federal Government. And we have an obligation to help veteran businesses in the Federal procurement process.

And as we balance these obligations, I think we have made use of the Federal supply schedules in a positive way. Forty percent of our Federal supply schedule dollars go to small businesses. Across the government, the figure is 20 percent. Thirteen percent of our Federal supply schedule dollars go to veteran businesses.

So I think we are making use of the Federal supply schedules. And it allows us to support veterans. It allows us to provide opportunities to veteran firms. It also allows us to be good stewards of the taxpayers' dollars.

The Federal supply schedules are an important tool for all agencies within the government to include the VA. We use that tool. We use that tool to get to veteran businesses.

And so my efforts have been to encourage and to educate veteran small businesses on how to get on these Federal supply schedules so we can—

Mr. JOHNSON. Based on your preference for using the Federal supply schedule, where do the VOSBs and SDVOSBs fall in open source, where do they fall on that Federal supply schedule?

Mr. LENEY. You mentioned our preference to use the Federal supply schedules.

Mr. JOHNSON. Yeah.

Mr. LENEY. Only about 20 percent of our procurement is done through the Federal supply schedule. Eighty percent is done in the full and open marketplace. Within that 20 percent, we do 13 percent to veterans. Currently veterans do not, as Mr. Thompson stated, do not have a preference. Our position is, our understanding of

the law is that veterans do not have a preference within the Federal supply schedule.

Mr. JOHNSON. When did your interpretation of the law change, Mr. Lenev?

As I reiterated earlier, as early back as October 26 of 2010, the United States Court of Federal Claims, the ANGELICA decision stated that the Veterans Benefit Act is a specific mandate to the department and only to the department to grant first priority to SDVOSBs and VOSBs in the awarding of contracts.

You go even further back than that. April 28th of 2010 in a VA information letter, the VA again noted that on December 22nd, 2006, Public Law 109-461, the Veterans Benefits Health Care and Information Technology Act of 2006 was signed. Sections 502 and 503 of the legislation authorized a unique veterans first approach to specific VA contracting implemented as the Veterans First Contracting Program.

And going back to the June 20th, 2007, this approach changes the small business hierarchy within VA placing service-disabled veteran-owned small businesses and veteran-owned small businesses first and second respectively in satisfying VA's acquisition requirements.

It does not talk about percentages. It does not talk about the Federal supply schedule or any of that. It says first and second respectively in satisfying the VA's acquisition requirements.

When did your interpretation of the law change?

Mr. LENEV. Our interpretation of the law has not changed. But in terms of that interpretation, I defer to our deputy general counsel, Mr. Thompson.

Mr. THOMPSON. Sir, he is correct. We have always interpreted the Veterans First legislation as it is sometimes called as establishing within the hierarchy of set-asides the primacy of service-disabled veteran-owned small businesses.

Mr. JOHNSON. Mr. Thompson, nothing in previous VA statements on this issue says anything about VA set-asides. And the GAO disagrees with your interpretation of the law.

Mr. THOMPSON. I understand GAO is of a different opinion.

Mr. JOHNSON. And can you please tell us, tell this committee—

Mr. THOMPSON. Uh-huh.

Mr. JOHNSON [continuing]. How VA considers itself exempt from the requirements laid out in Title 38, Section 8127 of Public Law 109-461? You see, the Federal Government cannot be sued for not meeting goals, but the Federal Government can be sued for not adhering to the law. And that is what this committee is concerned about.

Your department is supposed to be looking out for veteran-owned businesses. Why is there such reluctance from the department to follow the intent and the spirit of the law as identified by the GAO?

Mr. THOMPSON. Sir, as I indicated, we have a different interpretation than GAO. And, you know, our interpretation has consistently been that Public Law 109-461 did several things, among them establishing service-disabled veteran-owned businesses as having primacy within the categories of all set-aside categories.

It also authorized VA and only VA to do restricted competitions that are limited to VOSBs and SDVOSBs for purposes of meeting the secretary's goals. And VA has been meeting those goals. It has complied with the letter and with the spirit of the law in our humble opinion.

Mr. JOHNSON. I am going to yield to the Ranking Member to ask some questions. Just one final follow-up on this issue.

Obviously there is great disagreement with the VA's interpretation of the law. The GAO disagrees. I disagree.

Is there going to be a review to go back and look at this because you have been told by the GAO that your interpretation is wrong?

Mr. THOMPSON. We have been told by GAO. GAO recommendations are just that to Federal agencies. This issue is still being discussed with the executive branch. There has been no final decision as to what position the Administration will take on this issue. And so as soon as that is resolved, we will certainly be back in touch.

Mr. JOHNSON. I yield to Mr. Donnelly.

Mr. DONNELLY. Mr. Leney, with the prime contracting goals at 12 percent for VOSB and 10 percent for SDVOSB, and we exceeded those, why can't those goals be 25 and 25 or 35 and 35? Do we have enough contractors to meet those numbers and shouldn't our efforts in the VA above all—not even above all Federal agencies, but as an example to all Federal agencies that we not shoot for the lowest number but push hard for higher numbers? What will hold us back from moving those to a higher percentage?

Mr. LENEY. I believe that the VA has served as an example in this arena. We are a leader in this area. We have exceeded the goals. We have not attempted to do minimum necessary. We have not—

Mr. DONNELLY. I did not say that. What I am trying to say is how can we move those numbers higher? And, for instance, what would stop us from doing 25 and 25 this year and 35 and 35 next year?

Mr. LENEY. You asked a very important question, what are we doing to move those numbers higher, and we are doing a number of things.

First of all, with respect to verification is to promote the number of firms that are being verified while at the same time ensuring that only eligible firms are verified because if we fail in that regard, then we put at risk all of the firms who are receiving the preferences and the benefits of the Vet First Program.

Secondly, we have initiated an aggressive program to directly connect veteran-owned small businesses with procurement decision makers within the VA.

At the national veterans conference back in August, we brought more than 250 procurement decision makers to New Orleans.

Mr. DONNELLY. So who sets the 12 and 10?

Mr. LENEY. In this case, the secretary set expanding goals.

Mr. DONNELLY. Then it would be the Secretary we would go to to say can we make it 25 and 25 for next year?

Mr. LENEY. Yes, sir. At the end of the day, the secretary drives the train at the VA.

I would just caution you that as we put more and more of our procurement dollars into a relatively small group of firms that we

run the risk of—whenever we limit competition via set-asides, we run the risk of increasing the cost to the government in terms of its procurements.

Mr. DONNELLY. Well, let me ask you this. And we run the risk. If our veterans can match them on price, shouldn't we be giving it to our veterans?

Mr. LENEY. If we have veteran-owned businesses that are qualified, if we have veteran-owned businesses that are competitive, absolutely. And in our program, when we have those situations, we give preference to veterans.

Mr. DONNELLY. And I understand your concern because you want to be a good steward of the taxpayers' dollar. But at the same time, if we can do it at 12 and 10 and we are already pushing way over our number and we look and we say let's shoot for 25 and 25 and we are able to do it in a taxpayer-funded protected way, wouldn't that be a good thing?

Mr. LENEY. I think it is a good thing and I support maximum practical opportunities to small businesses and particularly veteran-owned small businesses. And that is what we seek to do is to identify maximum practical opportunities and get to those businesses. I am not able to speak to whether or not 25 is the right number or 22 is the right number.

Mr. DONNELLY. I am not saying that is the right number. I am saying why don't we continue to push our numbers in an effort to continue to try to pay back the people who have put their lives on the line for our country.

I yield back, Mr. Chairman.

Mr. JOHNSON. I thank the gentleman for yielding back.

Mr. Stutzman.

Mr. STUTZMAN. Thank you.

And I think that is an excellent point in what Mr. Donnelly is saying is, and if I understood his comments correctly, is what is the harm in trying to pursue more? I mean, if this is the VA, it should be a priority in finding and contracting to those veteran-owned businesses.

It should not be an obligation. It should really be at the top of our priority list. And I think back to the question that the chairman is asking is why not?

And the question here is, why are there fully eligible firms being denied because of state community property laws? Any comments? It sounds like there are fully eligible businesses out there that are being denied.

Mr. LENEY. Mr. Chairman, I am not aware fully eligible businesses are being denied. We have had an issue with and we have examined the issue of community property laws in a number of different states.

And we have actually provided some assistance as part of our Veteran Assistance Program, our Verification Assistance Program to clarify how a firm can meet the community property requirements of their state while still meeting the requirement to have ownership and control.

The problem that we encountered in the past was the lack of understanding and how to address both of those issues. And we provided clarification to applicants on how they—and we are getting

applicants who are, in fact, from community property states who are being verified.

Mr. STUTZMAN. Are they being denied?

Mr. LENEY. Sir?

Mr. STUTZMAN. Are they being denied?

Mr. LENEY. If an applicant has not met the requirements of 38 CFR 74, they are denied. If they have not taken the action to disassociate and to ensure that they have 51 percent ownership, then they are denied. And in some cases, applicants primarily through ignorance have not met those requirements.

Mr. STUTZMAN. Can you give us an interpretation for the 60 percent increase in the last 2 months on the number of denials that are requesting reconsideration?

Mr. LENEY. Yes, sir. That is primarily a function of our efforts to move a larger number of firms through the process. We have had great success in completing verification decisions on initial applications. As a result, more decisions have come out. And when you have more decisions, we are denying almost 50 percent of those applications because they do not meet the requirements of the law.

Mr. STUTZMAN. And it appears you have hired contractors to assist with verification. How do you determine whether their employees are qualified to make verification decisions?

Mr. LENEY. No verification decisions are made by contractors. All verification decisions are made by government employees. Without the support of government contractors from SDVOSBs, I would not be able to sit here and demonstrate any progress over the last 6 months.

Mr. STUTZMAN. It just sounds to me like our veteran-owned businesses, small businesses are having to scrap and scrap for—I mean, they should not be getting their crumbs. They should not be the ones that are having to fight so hard.

I mean, is this typical for any other small businesses?

Mr. LENEY. Sir, I came out of the small business community and I will tell you that I have enormous respect for small businesses because small businesses do scrap. They have to be scrappy.

Mr. STUTZMAN. I agree with that. I am a small business owner and I agree with that.

Mr. LENEY. It is not our intent to make it difficult or more difficult for small businesses to be successful. It is I believe our responsibility as provided by this body to ensure that when we give preferences to veteran-owned businesses that they are eligible to receive those preferences. And that is what we seek to do and that is what we are working very hard at.

We realized we are also trying to balance the challenge of ensuring that you do not confront us with a failure to ensure that only eligible businesses get verified and to ensure that we do have due process. Our rules are not capricious. Our process is not capricious.

Yes, we use contractors to assist us with this process in order to speed up. We have expanded the number of contractors we use in the process. Why? Because I had an imperative to get 127 days to get an initial determination made down to less than our 90 day commitment that we have made to small businesses. And we have successfully done that.

But we have a process. Is it as streamlined as I want it to be? Absolutely not. Is it a lot better? Absolutely yes.

Mr. STUTZMAN. Let me ask you this because I am a nonveteran and I am a small business owner. And if I am trying to get a contract, is it easier for me to get a contract than it would be for a veteran-owned small business?

Mr. LENEY. Not in the VA. Not in the VA because currently in the VA, if you look at our numbers, last year we did 37 percent, actually a little over 36 percent to small businesses. Twenty-two percent went to vet—two-thirds of our small business dollars go to veterans.

So if you are a small business, my advice to you and my advice to small businesses who are not veterans is the VA is probably not a lucrative market for you because we do give preference to veterans and we have demonstrated that.

Mr. STUTZMAN. Thank you.

I will yield back.

Mr. JOHNSON. Thank you for yielding back.

Mr. Walz.

Mr. WALZ. Thank you, Mr. Chairman.

Thank you, Mr. Leney.

We are trying to get at this and I cannot help but think this is somewhat of a microcosm of what goes on in the country, that we are polarized. We have the either/ors. We are all in here together working on the same cause. We have the private sector. We have the government sector.

But I also am certainly not going to defend what we are not moving quickly enough.

I was going to ask and not facetiously or whatever, how many of those contractors helping on the contractor verification process were veteran businesses?

Mr. LENEY. Every contractor that we used in the verification process is a veteran-owned business.

Mr. WALZ. That is great.

Mr. LENEY. Every company.

Mr. WALZ. And how did you come to that? How did you do that? How did you fill that or how did you succeed at a hundred percent in that because the question I think that has been very important asked today is, if the VA is not going to give the highest veteran preferences, who then? Who then? There is nobody else to do it. I argue that with our offices that we have a hiring preference and my last hire comes right back from Iraq and gets hired. We have to live by our own rules. I am just curious on that. That is good.

How did you get that done? So you got a hundred percent of these contractors that are helping with verification are veteran-owned small businesses that is great and that is a positive story. How did we get to that?

Mr. LENEY. Well, we took advantage of the tool that you provided us which is 109-461 and opted into the Vet First Program. We were able to reach out to service-disabled veteran-owned small businesses who are fully qualified and fully competitive.

And I am fully satisfied that we have received quality work at a competitive price from these firms. And there are many, many

service-disabled veteran-owned small businesses and veteran-owned small businesses that fall in that category.

My focus is to ensure that we enhance the opportunities for those businesses and that is why we have undertaken a major effort within the VA to enhance their ability to deal directly with program decision makers.

Mr. WALZ. And this is where I am going to be your staunchest supporter on this. I want to tell that story. That is good. You have some folks behind you that I do not think have been overly appreciative. I think they are glad to hear that.

My question is, is part of this equation that we are talking some carrot and doing some of this? Is the stick to be there?

What I want to know is, if you are a business and you are applying fraudulently on the backs of veterans, I think we should smoke you in the public like you have never been smoked because I tell you whether there is a legal precedence, the public's perception of that business trying to scam off veterans will be enough to keep people away from it.

Can we give more tools to make sure that that hammer that drops, you better think twice about signing that paper? If you do not have the DD214 and you are not going to be in there working the number of hours doing this, there is going to be hell to pay because what you are doing is not just defrauding the taxpayers, you are cheating a veteran who is coming back from serving this Nation.

Is that a part that can help? Is that part of the equation that would strengthen your ability to cut down on these because it just seems like you are being bombarded with these?

And I am asking the staff up here who has the audacity to put in a false claim as a veteran-owned business knowing you are taking away from a deserving veteran? Is that a place where we can help you?

Mr. LENEY. I want to assure you of a couple things. One, we agree that we are also opposed to any fraudulent business doing business with the VA or any part of the Federal Government.

I think it is important to note that a very, very small percentage of those firms that we deem to be ineligible to participate in Vets First are intentionally misrepresenting or are pursuing a fraudulent endeavor.

All of those that we believe to be in that category, we refer to the IG for action. As I said, we have referred over 60 firms.

However, that is 60 firms out of over 2,000 that we have denied verification. There is—

Mr. WALZ. Are the rules so unclear that people do not know? Is that what is happening here, the rules on what a veteran-owned small business?

I was just asking here. The colonel was sitting here. If he and I as both veterans decided we wanted to do this, how would you verify us? I got a 214. He has got a 214. We are going to invest some money. We are going to hire our kids to work in the company or whatever. Would we get a contract? What would stop us from getting a contract?

Mr. LENEY. Less than 1 percent of the denials are a function of the owner not being a veteran. There are very few instances that I have seen in the last—

Mr. WALZ. Okay.

Mr. LENEY [continuing]. Six months, very few where the person who asserts that I am a veteran is, in fact, not. That is the outlier. That is the extreme outlier.

Mr. WALZ. The reason for getting thrown is control of the company—

Mr. LENEY. Yes, sir.

Mr. WALZ [continuing]. And the rules?

Mr. LENEY. Yes, sir. And the rules within 38 CFR 74 that came out of 109-461 are rigorous. And we believe—

Mr. WALZ. Are they too rigorous because you are telling me these are real veterans really applying, but they are getting thrown out?

Now, some of them you want to be thrown out if they are a firm that does not have the capacity to fill the contract. I certainly do not expect you to award them the contract. But if they have the capability, what is throwing them out?

Mr. LENEY. Well, let me address I think the core of your question. I believe that the current policy is designed to ensure only legitimate businesses, veteran-owned businesses are verified as eligible for Vet First.

And I really welcome and I have reached out to veterans service organizations and a large number of veteran-owned businesspeople to engage in policy discussions on where should we and how should we and is it appropriate to change the policy.

And I was surprised at the lack of consensus over what policy changes should be made. And while I have initiated these conversations, given the diversity of viewpoints that I have run into, it is going to require considerable discussion and consideration by the VA and by this body.

And I will confess my focus over the last 6 months has been to improve the process because I am painfully aware having come out of that community of what it means to a small business and its ability to do business with the VA.

So I have been focused on making sure that we communicate and that we implement the policy that exists rather than focusing on how to change that policy. But there are those who would argue for changes and I confront those who would argue that it should not be changed.

Mr. WALZ. No. I thank you. That is helpful to me. This is one of those things, if the Chairman would indulge me for just a minute, I always like myself to know the exact process that goes through this.

I would be curious, and I certainly do not want to take up your time on a hypothetical or whatever, but I would be curious to see what it would be like for myself.

Do you know if there are any Members of Congress who are veterans that have used this program who would have firsthand experience of what these small business owners are frustrated about?

Mr. LENEY. I am not aware that there has been any Member of Congress. I will check and respond.

Mr. WALZ. I am just curious because I think it would probably be for me to go back again and look at every single one of those forms, look at every single verification, look at the potential because this is—I was hopeful that it would not be a whole bunch of people fraudulently claiming to be veterans. And you are telling me that is the absolute anomaly.

But I am curious now and maybe even a little more concerned of these veterans that are saying I am a veteran, I still got thrown out. It made no difference. That is the part that I am a little more concerned about.

Mr. LENEY. If I could respond to that, Mr. Chairman.

Mr. WALZ. Sorry.

Mr. LENEY. The major issue is about control of the firm. And as I say, I believe the current policy is designed to ensure that veterans are, in fact, in control of the firm, that veterans are not used as passers, veterans are not used as fronts.

We have had instances where that has happened. And I do not think it is the intent of this body to allow that to go forward. The nature of the rules is such that it does make it difficult sometimes for a veteran to do business like he would like to or he or she would like to do business and still meet the requirements of 109–461.

I will give you one clear example that has an adverse effect on small businesses. And I am not making a statement about whether I support the policy or do not support the policy. I support the VA policy on this. I support 38 CFR 74.

But 109–461 makes it very difficult for a veteran-owned small business owner to get equity financing. Why? Because, sir, if you were providing me with a million dollars to my business and I am the veteran and you are not a veteran, are you going to give me 100 percent control of that organization? Are you going to allow me to sell that business out from under you and you receive 49 percent of the million dollars I get for the business and I receive 51 percent of that million dollars when I put in not a nickel and you put in a million dollars? I do not think—

Mr. WALZ. Does it have to be a hundred percent then? We were just asking that question. This hypothetical could be real, though, this—

Mr. LENEY. It is very real to a lot of firms. That is how it works.

Mr. WALZ. Well, that is very helpful. I do not want to—

Mr. LENEY. The current requirement is for 100 percent control. Right now the regulation says I could sell the business in which you have invested a million dollars tomorrow for \$500,000 and walk away with 51 percent of the sale price and give you 49 percent of that sale price.

Mr. WALZ. Thank you, Mr. Chairman, for indulging me.

Mr. JOHNSON. I thank you for your line of questioning.

We are going to have to wrap this up because we have a second panel that we want to hear from today.

But did I understand you correctly that the law currently says in your interpretation that the veteran has to own 100 percent of the company?

Mr. LENEY. Absolutely not. The veteran has to own 51 percent of the company.

Mr. JOHNSON. Okay.

Mr. LENEY. But the veteran must be in control of the company.

Mr. JOHNSON. Okay.

Mr. LENEY. One hundred percent in control.

Mr. JOHNSON. Isn't 51 percent in control of the company?

Mr. LENEY. No, sir, it is not.

Mr. JOHNSON. On the outside, if you have two partners and one partner is at 51 percent and one partner is at 49 percent, the 51 percent makes the decision. That is who is in control of the company, right?

Mr. LENEY. Unless your operating agreement authorizes the board that may and is often comprised of or includes nonveterans.

Mr. JOHNSON. Okay. All right. Well, obviously there are some details that we do not have time to get into here today. That is helpful. And, you know, I do not want to come across as berating.

I know that what the intent of your department is, but I think you can see from the questions and the concerns from this Subcommittee and our other Subcommittee on Economic Opportunity, we have some real concerns whether veterans and disadvantaged veterans, disabled veterans' businesses are getting the fair shake that was intended in the law.

The GAO has validated our concerns. We have expressed those concerns to you folks. We are going to continue to address this issue until we feel that we have an adequate answer and a response and a process that is going to ensure that our veterans are getting the shake that they are supposed to.

With that, I want to thank you for your testimony.

Mr. LENEY. Thank you, sir.

Mr. JOHNSON. And you are now excused.

I will call the second panel. On our second panel today, we will hear from Mr. Greg Kutz and Mr. Ralph White from the U.S. Government Accountability Office.

Mr. Kutz and Mr. White, your complete written statements will be made a part of the hearing record.

Mr. Kutz, you are now recognized for five minutes.

STATEMENTS OF GREGORY D. KUTZ, FORENSIC AUDITS AND INVESTIGATIVE SERVICE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE; RALPH O. WHITE, MANAGING ASSOCIATE GENERAL COUNSEL FOR PROCUREMENT LAW, OFFICE OF GENERAL COUNSEL, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

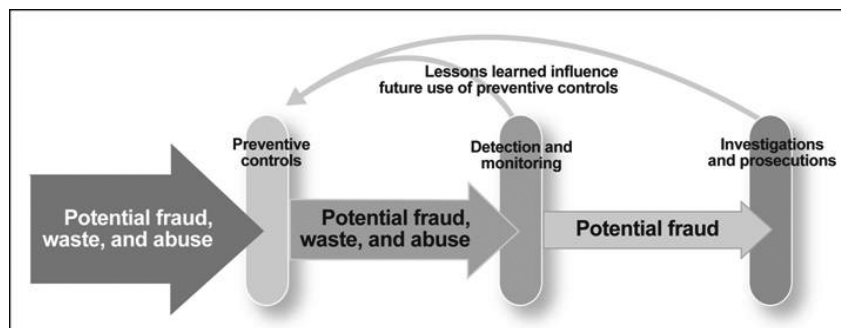
STATEMENT OF MR. KUTZ

Mr. KUTZ. Chairman and Members of the Subcommittees, thank you for the opportunity to discuss the Service-Disabled Veteran-Owned Small Business Program.

Today's testimony highlights the results of our assessment of the Department of Veterans Affairs' fraud prevention controls.

My testimony has two parts. First, I will discuss progress made in the Verification Program and, second, I will discuss our recommendations.

[Chart]



Source: GAO.

Mr. KUTZ. As you can see on the monitor, this shows GAO's fraud prevention framework which we use to assess VA's controls. On the left is prevention which includes steps to keep ineligible firms from entering the program.

In the middle is monitoring which is making sure that verified firms remain eligible. And on the right is investigation and consequences for fraud and abuse.

Let me start by saying that VA has made the most progress in the area of prevention. This is evident with progress and enhanced staffing, as Mr. Leney mentioned, and stronger verification of firms and individuals.

According to VA, these steps have helped the agency deny the applications of 1,800 ineligible firms. They also led to the rejection of our applications for two bogus firms that used fictitious individuals that were not service-disabled veterans.

Overall, there has been less progress in the areas of monitoring and consequences. However, with respect to monitoring, VA is doing random announced site visits for verified firms to ensure that they remain eligible.

They have also with respect to consequences established a Debarment Committee and, as Mr. Leney said, taken several debarment actions. They have also, as was mentioned, referred 70 is what we understand firms to the VA Inspector General for further investigation.

Moving on to my second point, we are making 13 recommendations to address a number of remaining vulnerabilities. VA generally has concurred with these recommendations and is taking action on most of them.

We will work with Mr. Leney and his staff to determine which of these 13 recommendations has been fully implemented and report our results back to you.

There are three areas in particular that VA should focus on starting with human capital. For this program to succeed, VA needs expert staff dedicated to maintaining program integrity.

Mr. Leney has shown strong leadership and very good progress in a short period of time. However, VA needs to develop a deep bench of expert staff to sustain progress made and to perhaps build on it in the near future.

Second, unannounced site visits are an important tool that we use in our own investigations. For example, the monitor shows what we found during an unannounced site visit to Fort Irwin in California as part of a past investigation.

The portable toilet and hand wash stations that you see belong to an ineligible pass-through firm that was actually performing the work. We recommended VA use unannounced site visits like this as part of their application process and as part of re-verification with a particular focus, as Mr. Leney said, on high-risk firms.

Third, historically the vast majority of fraud and abuse in this program was not identified and the bad actors face absolutely no consequence.

For example, the front firm for the portable toilet case again that you see on the monitor was highlighted not only in our investigation but was found to be ineligible by the SBA during a protest. This firm was not debarred by SBA and got to keep the contracts that they won through fraud and abuse.

We recommend that VA strengthen its Debarment Committee established in September of 2010 to prevent known bad actors like this from entering the program.

In conclusion, stealing money from legitimate service-disabled veterans should not be tolerated. That is why we are here today and that is why this is so important.

I look forward to continuing to work with both Subcommittees and VA to help protect the rights of legitimate service-disabled veteran entrepreneurs.

Mr. Chairman, that ends my statement and I look forward to your questions.

[The prepared statement of Gregory D. Kutz appears on p. 42.]

Mr. JOHNSON. Thank you for your testimony.

Mr. White, you are now recognized for five minutes.

STATEMENT OF RALPH O. WHITE

Mr. WHITE. Thank you, Mr. Chairman.

Chairman Johnson, Chairman Stutzman, Ranking Members, and Members of the Subcommittees, my name is Ralph White and I am the head of the Bid Protest Unit at GAO.

Thank you for asking for us to come today and talk about GAO's recent bid protest decision, sustaining a protest filed by a service-disabled veteran-owned small business named Aldevra.

Mr. Chairman, for more than 80 years, GAO has provided disappointed bidders with an objective, independent, and impartial forum for the resolution of disputes concerning the award of Federal Government contracts.

In 1984, Congress provided a statutory basis for these protests with the passage of the Competition in Contracting Act.

Under this statute, any business participating in a Federal procurement can challenge the award or the solicitation for a government contract provided it acts within a very short time.

When a protest is filed within this short time, executive branch agencies are required by the law in most instances to wait for GAO's decision. In return, GAO is required to produce its decision within 100 days.

The standard of review set by Congress is simply whether the award or planned award violates procurement law regulation. Unlike GAO's audit function, we do not consider issues of whether the agency is properly managing a program or buying the right mix of goods or services.

In the case called Aldevra, which has been discussed a fair amount here, we were given a protest that involved two VA solicitations seeking to buy industrial kitchen equipment using the Federal supply schedule.

As you know, the Federal supply schedule is administered by the GSA available for us by all executive branch agencies and open to businesses of all sizes.

Aldevra appearing before us without the benefit of a lawyer argued that the VA's use of the Federal supply schedule violated a statute passed by this committee, the Veterans Benefits Health Care and Information Technology Act of 2006.

Aldevra argued that under the 2006 act, the VA first had to consider whether this equipment could be purchased using a competition between two or more service-disabled veteran-owned small businesses. In our October 11 decision, we agree with Aldevra.

In short, our decision applied the plain meaning of the 2006 act. The act sets up a two-step priority first for service-disabled veteran-owned small businesses, then followed by veteran-owned small businesses, and it then states that the VA shall set aside contracts for these businesses whenever, one, there are two or more of them capable of performing the work and, two, they can do the work at a fair and reasonable price. If these conditions are not met, the VA is free to procure in any manner appropriate.

In conclusion, just a few observations. First, the 2006 act applies only to the VA. It is different from the 2003 act which applies to the entire executive branch.

Second, the 2006 act does not always require set-asides. It only operates when there are two or more veteran-owned small businesses capable of doing the work at a fair market price.

Thus, Congress directed the VA to rely upon the power of competition and the power of the free market, but if the competition and the marketplace permit, give first priority to veteran-owned small businesses.

Third, because GAO is a legislative branch agency, we cannot compel the VA to follow our recommendations. GAO's statute gives the VA 60 days to decide whether to follow the recommendation and five more days to advise us of their decision.

If the VA elects not to follow the recommendation, GAO is required to notify the Congress of the agency's decision. The due date for the VA to respond to GAO is December 15th.

Finally, I just would like to also mention that the owner of Aldevra and his family are in the audience here today.

Mr. Chairman, with that, that is the end of my prepared statement and I would be happy to answer any questions that you might have.

[The prepared statement of Ralph O. White appears on p. 46.]

Mr. JOHNSON. Well, thank you, gentlemen. Thank you both.

We will start with the questioning. Mr. White, how many bid protests are filed with the GAO each year? Do you have an idea of what that number would be?

Mr. WHITE. I do. We have been seeing an increase in protests in recent years and we had just over 2,300 in fiscal year 2011.

Mr. JOHNSON. Okay. How many get sustained?

Mr. WHITE. Actually, a good number of our decisions do not go all the way to a decision. Agencies voluntarily pull back a number of procurements. But of the cases that go to a decision, that was 417 of them, we sustained 67.

Mr. JOHNSON. Okay. Is it safe to say then that the remainder get denied?

Mr. WHITE. Yes, the 417 minus 67. The percentages, Mr. Chairman, just to put it in perspective, we deny about 84 percent of protests. We sustain 16 percent of the ones we decided on the merits.

Mr. JOHNSON. Okay. How many protests are there of VA procurements?

Mr. WHITE. Actually, we have not quite topped 200 in VA procurements. I have the numbers for the last few years. I think it was about 180 in fiscal year 2011. If I could, I would like to provide you for the record both the total number of VA protests and denials and sustains for the record.

Mr. JOHNSON. Okay. All right. I would appreciate that.

You have heard in previous testimony this morning that the VA does not interpret the law the same way that GAO does.

Would you care to comment on that, either of you?

Mr. WHITE. Well, first, I just would not mind mentioning that we view our obligation is to in thinking about legislative history to look at the plain meaning of the statute. And if we can decide a question based on the plain meaning, that is really where we stop.

And the plain meaning of this statute led us to conclude that Congress used the word shall. It did not include any exceptions. And we could not see nor did the VA provide any explanation of how they could justify going elsewhere.

Mr. JOHNSON. Just a good distinction. The word shall has a very, very explicit meaning in government contracting, right? What does the word shall mean?

Mr. WHITE. It certainly does not mean may.

Mr. JOHNSON. That is right. It does not leave much to interpretation. Is that safe to say?

Mr. WHITE. Yes, sir.

Mr. JOHNSON. Okay. All right. In dealing with the certification process, of your 13 recommendations, several relate to the need for VA to enhance its staff capabilities. You have noted that there is enhanced staffing at VA, but that more needs to be done in this area.

How important is the staffing or the human capital element of the VA employees to the overall success of the Verification Program?

Mr. KUTZ. Well, it is very important. You have the human capital element, processes, uses of technology, but none of it works unless you have strong expert government employees running the operation. That is really very important.

As Mr. Leney and some of you mentioned, there are a lot of contractors involved in this process, so contract management and oversight is also important. But I really believe that the human capital is probably central to the success of this Verification Program, not only the quality of the people but the right number of people.

Mr. JOHNSON. Okay. Has the VA taken steps to evaluate the sufficiency of the number of staff and the training and qualifications of the staff that are overseeing this program?

Mr. KUTZ. Yeah. They have taken steps and there are two parts to it. Again, there is the government employee group which is between 10 and 20. I do not know what the current number is. And then there is the contracting group which is larger.

And so it is a combination of both. And I think at this point, they have good people, but I think that they may not always be trained in the right areas. Mr. Leney has talked about having them trained in the area of certified fraud examination, for example.

So I believe they are doing an assessment and looking to see ways to upgrade their own staff and perhaps the contract staff also.

Mr. JOHNSON. Okay. In regards to debarments, how do you explain the gap between 1,800 ineligible firms, 70 firms referred by VA to the IG, and only a few debarment actions?

Mr. KUTZ. Well, I think it is difficult. I mean, the way the law was written, it said misrepresentation, but I think we all could agree that the interpretation would be willful misrepresentation.

I do not think we want to debar people who are making mistakes necessarily. But there is a large gap between what has been done so far and perhaps the people that should have been debarred. And I think what it creates is a situation where people are going to be able to get into the system that perhaps should not and stay in the system.

They may even be kicked out here or denied, but then they go do work with DoD or NASA or someone else because keep in mind you are looking at \$3.2 billion or so out of \$10 or \$11 billion government-wide in service-disabled contracting. So I think that it is a matter of—right now all the staff as we understand are part time on the Debarment Committee, so it is a matter of perhaps resources and how many can you actually do. A debarment is a very difficult, time-consuming process.

Mr. JOHNSON. Okay. All right. Thank you.

I will yield to Mr. Walz for his questions.

Mr. WALZ. Well, thank you both for being here. It is good that we are having both these panels. Obviously we want to hear the whole thing. It seems like there is a bit of a disconnect.

How often does it happen, if you can help me with this, where a GAO's recommendation, and we heard from the last panel that they are just interpreting it differently, do you have an idea how often that happens in your experience?

Mr. WHITE. That happens very rarely, Mr. Walz. In fact, I think I can think of fewer than five times in the last decade.

Mr. WALZ. Okay.

Mr. WHITE. We had about 2,000 cases.

Mr. WALZ. And I am also curious and I am a stickler for getting the details right. I mentioned the one disbarment. We got that from the GAO, from you guys, was the number that we were using.

I want to be very clear. The VA says it is seven now. Is that just the lag time in reporting it is happening there?

Mr. KUTZ. Well, you are talking about the ten cases that we identified in our first report. None of those have been debarred by VA. The ones that they have debarred have come through their own processes.

In fact, one of those ten in—

Mr. WALZ. My scenario of 20, 22 is actually optimistic on those ten cases.

Mr. KUTZ. Yeah. I do not think it is going to happen at VA probably, but one of the ten recently this month was indicted on 15 counts of wire fraud and other fraud. So as you may be aware of that, that was one of our original cases, and—

Mr. WALZ. And they are still not disbarred? Now, I want to give due process. They were indicted. They were convicted.

Mr. KUTZ. They were indicted and I believe the individual and not the firm right now is debarred which that is questionable. And we are going to look at that.

Part of our follow-up work for both Subcommittees here is to report back to you the details of what happened to those ten firms. And I believe SBA did debar or suspended a couple of them. And now this is the first indictment out of the ten and there a couple of others that are still under investigation.

Mr. WALZ. I am curious about this. You know, I mentioned one. They said, no, it is seven. And we have a disconnect here.

Are those still small numbers? I know it is the statistics here type of thing. I finished seventh in my class which was great, but there were only 25 of us. So that is a little different.

So is this is a case of this—yeah, they know it is Congress. Do you know what I am saying? It seems like an inordinately small number, but maybe the problem is not as great in the ineligible.

I am trying to get at this of where—I just get a feeling and maybe I will take this one step further to you, Mr. White. This is a very unusual disconnect between GAO and an agency since I have been here. I am feeling that. And I have to say your initial statement mentioning Aldevra being here seemed highly unusual to me.

Do you feel that strongly that that is why you mentioned that? I am glad they are here and it is an open public hearing, but for the GAO to mention that they are here and their statement seems to me to show—maybe I am misinterpreting here—that you feel very strongly about this.

Mr. WHITE. I actually noticed they were here and I thought it was a nice gesture.

Mr. WALZ. Okay. Well, good. And I do not want to read anything into it. I want to be very clear on that. You know, and I think it is great for the citizens. I think what we are seeing is a great example of how the checks and balances can work.

What I am trying to figure out is, is how we use what you have given us, how we apply that to improve which is, as I said again, an incredibly good organization, the VA, an incredibly good program that is serving veterans. We just want to make it even better and get these out.

Do you get the feeling they are implementing your suggestions at a pace that can be done, Mr. Kutz? Do you think they are?

Mr. KUTZ. With respect to the 13 recommendations—

Mr. WALZ. Yes.

Mr. KUTZ [continuing]. They are taking action on most of those and, as I mentioned, I believe that the prevention area is where they are the strongest and perhaps the debarment is the area where they are the weakest.

And I wanted to mention that firm that I showed you on the monitors is one of our original firms and they were never debarred by SBA. They got to keep the contracts, millions of dollars of contracts they got through fraud and abuse, and now they are vet bus verified today.

Now, I am not going to blame VA on that necessarily because they may look good today, but the point is that protecting the government interest was not done in the first place through a firm in this case that misrepresented their status and our belief intentionally and committed fraud.

Mr. WALZ. So this is one of the egregious ones here probably.

Mr. KUTZ. Yes, this is an egregious case. And, again, it just shows the impact of not debarring someone, that they are able to continue to exist and move around the government and stay in programs and keep doing business. And if they are going to lie about this, what else are they going to lie about?

Mr. WALZ. I am always very careful and I think the group up here tends to be that way. Is this a case where we can clarify or tweak—I know this gets people nervous—the original law to make the intent very clear that our spirit and letter of the law converge very clearly as with shall and may and some of those? Is that your interpretation? Would that help you make the case?

Mr. KUTZ. Well, not on debarment. I mean, I think debarment—

Mr. WALZ. Just in general on the whole program.

Mr. KUTZ. On the whole program, no. I think the framework you have set up for the VIP—I mean, the bigger issue here, we are—I am just here to talk to you about VA.

Mr. WALZ. Right.

Mr. KUTZ. The bigger issue is you have not addressed, no one has addressed what happens outside of VA. So you still have the ability of firms—it is still a self-certification program for service-disabled vets outside of VA.

Now, granted, some of the agencies I think are using the VIP pages, but it is not necessarily happening across the government. And so you still have a little bit bigger problem. Even if VA gets it tight here for their \$3 or \$4 billion worth of service disabled, you have the other \$7 billion or so happening outside of that that is still self-certification basically.

Mr. WALZ. Very good. Well, I thank you for your time. That is very helpful.

Mr. JOHNSON. Mr. Stutzman.

Mr. STUTZMAN. Thank you, Mr. Chairman.

How often do executive branch agencies refuse to follow the recommendation—I think maybe, Mr. White, you kind of touched on that—in a GAO bid protest?

Mr. WHITE. Very rarely. This would be the first time this year. It happened last about 2 years ago. And it happened involving a very similar statute where the word shall in one statute versus may in some others. And it was a difficult situation because different Members of Congress felt that the different statutes should have had priority in that situation.

And could I say just one other thing about that? We do not get invested in which of the statutes sets a priority. We simply try to interpret the statutes that Congress passes.

Mr. STUTZMAN. Sure. What will happen if the VA refuses to follow the recommendation in the Aldevra decision?

Mr. WHITE. Under the statute that governs the bid protest process, the comptroller general is required to notify the Congress, the Committees involved, that would be this committee, and then it would be a matter between the executive branch and the legislative branch.

Mr. STUTZMAN. Has the VA in recent past refused any other? Has there been any other GAO reports to the VA?

Mr. WHITE. I am not aware that there has ever been an instance where the VA has not followed a GAO bid protest recommendation.

Mr. STUTZMAN. Why on this one?

Mr. WHITE. Why? I do not really understand why. Could I speak factually about a couple of things that I think they are mistaken about?

In the testimony earlier, they mentioned that they will get back to the Committee on where this is laid out in the Federal Acquisition Regulation Part 19 which governs small businesses and set-aside programs.

Well, I can tell you that there is only one subpart of Part 19 that addresses service-disabled veteran-owned small business contracting preferences. And it has a preamble and in its preamble, it expressly states that it is implementing the 2003 Veterans Benefits Act that applies government-wide and is codified in Title 15.

It was not written to implement the 2006 Veterans Benefits Act that is specific to the VA and codified in Title 38.

Mr. STUTZMAN. And I agree with Mr. Walz's statements earlier that if there is somebody out there that is taking advantage of this particular program, I mean that the hammer should come down. But at the same time, we do not want to overreact and make it so difficult for businesses that are legitimate.

And I guess would there be an appropriate way to have appeals reviewed by a third party like SBA's Office of Hearings and Appeals? Is there something we could add to the process that would make it more fair or make the appeal process legitimate for a business that would be denied?

Mr. WHITE. And do you mean other than the Federal courts?

Mr. STUTZMAN. Yes.

Mr. WHITE. I know that there have been exchanges between the VA and the SBA about whether or not SBA would review the VA's decisions in this area. And I think the SBA has taken the view that it will not. So I do not know why they took that position. I imagine they have reasons for their views.

Mr. STUTZMAN. But doesn't it seem inappropriate to have SVE reviewing their own decisions when it comes to verification?

Mr. WHITE. I can understand that they may view it that Congress did not anticipate anyone else doing that kind of review other than the courts, but—

Mr. STUTZMAN. Okay. Thank you, Mr. Chairman. I yield back.

Mr. JOHNSON. I thank the gentleman for yielding back.

I think that is all the questions that we have. You have certainly enlightened us here.

We talk about the word shall. We talk about Title 38 versus Title 15. I am very concerned with the VA's refusal to accept the GAO's response to this particular bid protest.

I am looking forward to see their response.

What did you say again the deadline is?

Mr. WHITE. The deadline works out to be December 15th.

Mr. JOHNSON. Okay. All right. Well, gentlemen, I appreciate your being here. Our thanks to you today and you are now excused.

In closing, improvements in the SDVOSB verification process are obviously a good thing, but I believe we all know and we have seen from today that the work is far from over.

I look forward to the VA's continued reporting to this committee on progress made in this effort, not only in approving those eligible companies, but also in taking prompt action against those that seek to defraud the government and take business away from our deserving veterans.

Our concerns regarding the Aldevra decision are fairly clear as well. Knowing that for the last 30 days that it would come up at this hearing, the testimony provided was disappointing at best.

There is a prime opportunity for the VA to solve this issue without the added time and expense of forcing it into the court system. Our veterans serve this country with pride and we should be proud to do business with them when they return to the workforce. The VA can maintain leadership in this arena, but instead it is choosing to only do so when it is convenient. That is not the treatment our veteran small business owners deserve.

With that, I ask unanimous consent that all Members have five legislative days to revise and extend their remarks and include extraneous material. Without objection, so ordered.

I want to thank all Members and witnesses for their participation today, especially to Chairman Stutzman in today's hearing and the Ranking Members from both the Subcommittees for being here today.

With that, this hearing is now adjourned.

[Whereupon, at 11:53 a.m., the Subcommittees were adjourned.]

A P P E N D I X

Prepared Statement of Hon. Bill Johnson, Chairman, Subcommittee on Oversight and Investigations

Good morning. This hearing will come to order.

I want to welcome everyone to today's follow-up hearing on the VA's Service-Disabled Veteran-Owned Small Business Certification Process. I thank the Members of the Subcommittee on Economic Opportunity for their participation today and their efforts in improving the process for veteran-owned and service-disabled veteran-owned small businesses to do business with the VA.

A first item I would like to mention is the several outstanding deliverables due to the Committee, some of which are now nearly 2 months overdue. If the VA is sincere about working with this Committee to better the lives of our Veterans, I would expect action that reflects that desire. Failing to identify the leadership structures of your own VISNs for over 2 months, or not being able to identify efficiency measures in patient visits for over a month is alarming, and makes me wonder whether the VA is fully aware of events happening under its watch.

In July, we held a hearing on this certification process. At that time, Mr. Tom Leney ("Linn-ee") was relatively new to his position as the Executive Director of Small and Veteran Business Programs at VA's Office of Small and Disadvantaged Business Utilization, commonly referred to as the "OSDBU" ("Ausd-booh"). At that hearing, we promised a follow-up discussion with Mr. Leney to see how his planned improvements for the process in certifying veteran-owned small businesses had been implemented after several months. Today is that follow-up. I look forward to hearing of the progress made toward achieving those goals and how much longer it will be until the goals are realized.

I also have concerns regarding recent actions taken by the VA's Senior Procurement Executive in response to the recent GAO *Aldevra* decision, which states that the VA should make efforts to contract with veteran-owned small businesses when feasible, and in accordance with the Veterans First contracting program. GAO recently upheld a bid protest filed by the *Aldevra* business on a VA contract, and recommended that the VA re-bid that contract. Despite clear legislative and committee report language outlining the intent of the Veterans First contracting program, the VA decided that GAO's decision would not apply to its contracting operations and that it would continue as it pleased, doing away with preference for VOSBs and SDVOSBs in much of its contracting.

The VA has made it clear in correspondence and meetings following the *Aldevra* decision that it has no intention of attempting to clear up its own questions about Veterans First. Despite acknowledging a problem, the VA is not trying to solve the problem, nor did it even ask Congress or this Committee those questions that needed to be answered years ago.

Even after the *Aldevra* decision and the VA's response, efforts by these two Subcommittees to help explain parts of the law that the VA had trouble understanding—several years after its passage—were met with a lack of cooperation on the VA's part.

Instead, the VA is determined to run this through the court system, eliminating key opportunities for VOSBs to contract with the Federal Government.

When the VA cannot, or chooses not to, implement clearly written legislation, we have a problem.

This is not rocket science. The Veterans First contracting program exists to help the VA set the standard in Federal Government contracting with VOSBs and SDVOSBs. With Congress and the Administration sharing a goal of increasing contracting with VOSBs and SDVOSBs, the Veterans First language facilitated the achievement of that goal. The law contains clear wording on how the VA can achieve that goal, while simultaneously helping our veterans do business and not hindering the VA in its contracting efforts. With straightforward language such as "the Secretary *shall* give priority to a small business concern owned and controlled

by veterans," it is difficult to understand the VA's failure to correctly interpret this law, which also provides reasonable accommodations when a VOSB or SDVOSB cannot fill the need.

We need to get this right. The certification process must ensure that VOSBs and SDVOSBs are efficiently processed and certified. We then must ensure that those same businesses are able to compete for the appropriate contracts. Otherwise, there is no point in having these businesses in the system if the VA is going to ignore them.

I look forward to today's testimony on improvements made in the certification process since our last hearing and the further improvements we can look forward to in the near future. I also look forward to discussion on how we can make the actual contracting system with VOSBs and SDVOSBs work as it is intended. I am, however, disappointed that VA's testimony barely touches on the *Aldevra* topic despite knowing for 30 days that it would be a part of this hearing. This is no surprise to anyone, and since VA's October meeting with Committee staff we see no great effort on VA's part to improve this situation.

Closing remarks

Improvements in the SDVOSB verification process are obviously a good thing, but I believe we all know the work is far from over. I look forward to VA's continued reporting to the Committee on progress made in this effort, not only in approving those eligible companies but also in taking prompt action against those that seek to defraud the government and take business away from our deserving Veterans.

Our concerns regarding the *Aldevra* decision are fairly clear as well. Knowing for the last 30 days that it would come up at this hearing, the testimony provided was disappointing at best. There is a prime opportunity for VA to solve this issue without the added time and expense of forcing it into the court system. Our Veterans served this country with pride, and we should be proud to do business with them when they return to the workforce. The VA can maintain leadership in this arena, but instead is choosing to only do so when convenient. That is not the treatment our veteran small business owners deserve.

**Prepared Statement of Hon. Marlin A. Stutzman,
Chairman, Subcommittee on Economic Opportunity**

Thank you Chairman Johnson. First, let me express my appreciation for offering to join forces on enabling service disabled veteran-owned small businesses to compete for contracts with the Department of Veterans Affairs.

Let me begin by adding some context to why we are here today. In 1999, the President signed legislation that became Public Law 106-50, which established a government-wide goal for all Federal agencies to award 3 percent of their contract dollars to small businesses owned and controlled by service-disabled veterans. Until that time, there was no goal for Service Disabled Veteran Owned Small Businesses or SDVOBs.

Since then, there have been several laws and an Executive Order that make it clear that Federal agencies are to make every effort to award at least 3 percent of their acquisition dollars to service disabled veteran-owned small businesses.

This legislative effort has continued with the passage of two laws that established and reinforced section 8127 of title 38 to provide VA with special tools and priorities to meet, and hopefully exceed, the 3 percent goal. By most indicators, the intent of section 8127 has been met. But meeting the 3 percent goal is not the sole intent of section 8127. Another goal is to establish a database of validated veteran and service disabled veteran-owned businesses that any government agency can access as part of their efforts to meet the 3 percent goal. And that is where there are still significant problems.

Today, VA data shows contract awards exceeding 20 percent and I congratulate them for that effort. However, the process in achieving those numbers has been painful at best. Until recently, implementation of the database of validated veteran and service disabled veteran-owned small businesses required by P.L. 109-461 has been less than professional, to put it kindly.

VA is still recovering from its initial reluctance to implement the law. Its policy of allowing self-certification of ownership and control status instead of actively performing the validation function prescribed in the law was, frankly, a disaster. As a result, as we will hear today, millions of contract dollars went to businesses that did not meet veteran or disabled veteran-owned and controlled status.

I also find VA's recent decision to ignore GAO's finding in favor of a protest by Aldevra, a service disabled veteran-owned small business, as evidence of a continuing reluctance to fully embrace the clear requirements of section 8127. The law does not require VA to set aside all contracts for SDVOSBs or award all contracts to SDVOSBs. More importantly, nowhere in section 8127 is there a provision exempting acquisitions using the Federal Supply Schedule. If nothing else, setting aside contracts using the FSS will provide VA contracting officers additional flexibility in meeting the SDVOSB goals.

Let's assume for the moment that those who believe the provisions of section 8127 go too far and that they give too much advantage to SDVOSBs are correct. To those I would point out the literally dozens of Federal agencies who continue to fail miserably to meet even the 3 percent goal. For example, DoD, the largest Department in the Federal Government, awarded only 1.82 percent to SDVOSBs in FY 2010. I suspect DoD could do better if they limited janitorial awards to those SDVOSBs in that business. So, if VA is picking up part of the slack for the rest of the Federal Government, so be it.

Finally, my staff and I have been hearing with increasing frequency that many legitimate SDVOSBs are having an extremely difficult time being validated and several have even had to close down as a result. While I understand that verification rules must be enforced to ensure non-SDVOSB are kept out there must be a balance. I am interested to hear from Mr. Leney about how he can better strike this balance and expedite re-consideration for many of these small businesses. I am also concerned about what appears to be very dubious arbitrary decisions to deny status to businesses by contractors hired to validate the ownership and control status and I suggest that may be as a result of a lack of clear regulations on things like survivorship and conflicts with state laws.

I yield back.

**Prepared Statement of Hon. Joe Donnelly, Ranking Democratic Member,
Subcommittee on Oversight and Investigations**

The tough economic times make it as important as ever to properly address oversight, programmatic, policy concerns, and thoroughly review the Service Disabled Veteran Owned Small Business or SDVOSB certification process.

Providing contracting opportunities to our deserving Veterans through the SDVOSB process is important, but when you have a successful program such as the VA's small business contracting program awarding millions of dollars, it attracts non-veteran business owners whose intentions are unfortunately to commit fraud. This is why it's important for the VA to implement and enforce fraud prevention measures.

During this joint hearing, I will look for the following: an overview of VA's preventive measures and monitoring control to minimize vulnerability to fraud, VA's debarment procedures, staff training to identify and monitor potential fraud, VA's verification process such as how they verify SDVOSBs and the purpose of conducting unannounced site visits. These are just some of the few items I have in today's agenda. I believe that unless we remedy these concerns, the same problems that have haunted the VA's verification program will remain.

**Prepared Statement of Hon. Bruce L. Braley, Ranking Democratic Member,
Subcommittee on Economic Opportunity**

The opportunity we have to hold this hearing with the Subcommittee on Oversight and Investigations is rare but shows how important today's topic is. By having this joint hearing, I believe it will bring to light the importance of preventing service-disabled veteran owned small business program fraud by non-veteran small business.

Providing contracting opportunities to veteran owned small businesses and service-disabled veteran owned small businesses was a preference that Congress agreed veterans and disabled veterans merited. The purpose of the 3 percent set-aside for SDVOSB was to increase contracting opportunities throughout the Federal Government; this was a right that our service-disabled veterans earned.

At this time, I would like to take the opportunity to thank the Department of Veterans Affairs for their support to VOSBs and SDVOSBs and for exceeding the government-wide goal as well as the VA's own internal goals. This program lacks rigorous controls to prevent fraud by contractors seeking to perform under the

SDVOSB program when they deliberately misrepresent themselves as such. VA has a long history of problems in its verification program but I'm pleased to hear that they are working through these hurdles. However, verification doesn't only happen once, businesses are required to be re-verified yearly which means the VA needs to be prepared to have enough staff, resources, and proper guidelines to re-verify SDVOSBs.

I would like to thank my colleagues from the Subcommittee on Oversight and Investigations for including us in this hearing today. I look forward to today's joint hearing and hearing from all of our panelists here today.

Prepared Statement of Thomas J. Leney, Small and Veteran Business Programs, Office of Small and Disadvantaged Business Utilization, U.S. Department of Veterans Affairs

Chairman Johnson, Chairman Stutzman, Ranking Member Donnelly, Ranking Member Braley, and Members of the Subcommittees, thank you for inviting me to testify on the VA's implementation of Veteran-owned small business (VOSB) provisions in the Veterans Benefits, Health Care and Information Technology Act of 2006 (Public Law 109-461, Sections 502 and 503), and the Veterans Benefits Act of 2010 (Public Law 111-275 Section 104).

The goal of VA's Office of Small and Disadvantaged Business Utilization (OSDBU) is to help small and Veteran-owned businesses contribute most effectively to the important mission of VA. The Center for Veterans Enterprise (CVE), which is part of OSDBU, is responsible for ensuring that all money and contracting preferences set-aside for Veterans and service-disabled Veterans go to legitimate Veteran-owned small businesses through a verification process that is intended to put contracts and job-creating opportunities into the hands of legitimate Veteran owned and controlled businesses.

Congress has provided VA with tools to aid Veteran entrepreneurs. The Vet First program under P.L. 109-461 enables VA to provide preference to Service Disabled Veteran Owned Small Businesses (SDVOSB) and Veteran Owned Small Businesses (VOSB). VA has used this program aggressively and leads the Federal Government in contracting with service-disabled Veteran-owned small businesses (SDVOSBs). VA is also the only agency with specific authority to contract with all VOSBs, regardless of service-disability. In Fiscal Year 2011, VA awarded more than \$3 billion in contracts to both categories, out of our contracting base of \$15.5 billion. P.L. 109-461 enabled VA to far exceed its procurement goals of 10 percent for SDVOSBs and 12 percent for VOSBs, by reaching nearly 20 percent and nearly 22 percent respectively.

That is real money in the hands of Veterans and their small businesses, and it establishes VA as a leader in this area. At the same time, VA has actively implemented statutory provisions to ensure the Public Law 109-461 procurement eligibility goes only to legitimate SDVOSBs and VOSBs. We are carrying out the direction of Congress to verify such firms, and to ensure that only those firms whose business models meet the criteria laid out in P.L. 109-461 gain the benefits of the preferences it provides. We have also moved aggressively against the relatively small number of firms who would misrepresent their status in order to obtain illegitimate benefit.

I would like to update you on the progress VA has made to improve the VA VOSB Verification Program and our plans to continue improving so that legitimate SDVOSBs and VOSBs have greater access to VA procurement opportunities. As we promised, we have completed the removal of all non-verified companies from the Vendor Information Pages (VIP). In April 2011, we had nearly 1,800 non-verified companies in VIP. As of September 4, 2011, only verified companies are listed in VIP, 3 months ahead of schedule. In June, 2011, it took an average of 127 days to process an initial verification application. Today it takes an average of 75 days. When the Veterans Small Business Verification Act (Public Law 111-275, Section 104) required business owners to send in documents, we did not have an easy way for them to do so. We received CDs, paper copies and even email attachments, and our first attempt at an online upload site did not produce the desired results. Veterans now have the ability to submit their entire application online, to include uploading all required documents directly to their VIP profile. In April, a Veteran may have waited months to receive word that there was an issue with their Veteran or service-connected status in the VA Beneficiary Identification Records Locator Subsystem (BIRLS) database. The BIRLS database is used to determine the Vet-

eran's status, character of service and whether or not the Veteran has a service-connected disability. Veterans now receive this status within 48 hours.

To further ensure the accuracy of our verification process, CVE conducts an additional Quality Check (QC) on 10 percent of its approval decisions. The QC check includes site visits for a randomly selected sample of approved applications. CVE officials have also increased our communications with applicants. Our policy is that applicants receive updates within 30 days, and at all key points in the process. The CVE help desk provides a response within one business day regarding at what stage the application is in and applicants can receive an update on demand in our new online system. Decision letters are also now delivered electronically to avoid the delay of conventional mail. VA's online application tool also posts the approval letters in the company's profile.

Along with more frequent correspondence, we have launched our Verification Education Program, which is a series of fact sheets that explain the most frequent reasons for denial. This program aims to educate applicants on common issues. Our goal is to eliminate common errors up-front to help legitimate SDVOSB/VOSBs quickly receive favorable decisions. We are also seeking partnerships with the Association of Procurement Technical Assistance Centers, the Association of Small Business Development Centers and Veterans Service Organizations so that applicants can receive assistance from local business counselors.

VA has recently launched a new online application and tracking system called VIP-6. The initial launch of VIP-6 created a number of challenges, but the platform is now fully operational. The project is a complete overhaul of the legacy system, built on a new platform. It seeks to provide VA with a robust application process that gives Veteran business owners the ability to complete applications online, immediately obtain the results of their Veteran status check by VA from BIRLS, and track the status of their application on demand.

The Government Accountability Office (GAO) did a follow-up on its May, 2010 evaluation of the CVE verification and identified some challenges and vulnerabilities that VA has since overcome. Among these were issues of training, unannounced site visits and debarment of ineligible firms. CVE staff are now evaluated and provided on-the-job-training for job functions. A fraud awareness program is in place for CVE staff that will provide Certified Fraud Examiner credentials for all CVE staff through training and evaluation. Qualified supervisors train staff on fraud awareness on a rotating basis. All firms identified by the risk mitigation program as high risk currently undergo an in-depth second examination that includes an announced site visit. Site visits are an important part of our risk mitigation program and a tool to ensure eligibility; we have increased them nearly ten-fold from calendar year 2010 and 2011. Verified firms that are identified as high risk undergo unannounced site visits. CVE also has initiated random unannounced site visits for verified firms.

In June and October 2011, OSDBU provided training to 500 contracting officers on the use of VIP. The Office of Acquisition and Logistics (OAL) clarified policy regarding contracting officer (CO) use of VIP for SDVOSB or VOSB set-aside and sole-source actions. The policy clarification states that the CO must check VIP at both the proposal receipt and again before making the award. Those businesses not in VIP are ineligible to submit a proposal and ineligible to receive an award. Checking the database a second time ensures that a company has not lost its eligibility between the proposal submission and award.

VA is serious about debaring companies who intentionally misrepresent their status as a VOSB or SDVOSB, and has formed the 8127 Debarment Committee, named after the portion of the U.S. Codes that implements the small business portions of P.L. 109-461. VA has developed and formalized specific processes and criteria related to the 8127 Debarment Committee which can be found on the Committee's Web site. As of October 2011, it had debarred seven separate contractors and related individuals. Two additional concerns which VA had worked to debar, filed suit and a resulting Court Order required VA remove the concerns and associated individuals from the Excluded Parties List System (EPLS) listing pending remand to VA for further action and final decision of the Court. However, it is important to note that most ineligible firms are not committing fraud. The vast majority of firms self-report issues that preclude their eligibility for verification. Those firms that provide false information or omit material information are referred to VA's Office of the Inspector General (OIG) for action.

Even with the substantial progress that VA has made, we realize that there are still challenges to face and improvements to be made. Our request for reconsideration option has faced a tremendous increase in use. Historically, about 20 percent of applicants who received an initial denial submitted a request for reconsideration. Over the last 2 months, this has increased to more than 60 percent. We have shifted

and increased resources to speed up the process. In order to be fair to all applicants, we continue to process all requests for reconsideration on a first-in, first-out basis.

Mr. Chairman, we were also asked to address an October 11, 2011, GAO decision upholding a bid protest by an SDVOSB on two VA solicitations for the purchase of food-preparation equipment. In the Matter of Aldevra decision, B-405271 & B-405524, GAO determined that before placing purchase orders against the Federal Supply Schedule (FSS), VA should have first determined whether the factual predicates for a set-aside for VOSBs using the restricted-competition standards of 38 U.S.C. § 8127(d) were satisfied.

GAO's decisions in these matters are advisory and its recommendations are not binding on executive agencies. This particular decision is still being discussed internally within the Executive Branch.

However, VA has consistently interpreted the authority Congress gave it in Public Law 109-461 as a small business set-aside program with VOSBs having priority over any other class of small businesses when VA is conducting full-and-open-competition procurements. Congress also gave the Department authority to do "restricted competitions" (set-asides) "for the purpose of meeting the goals" set by the Secretary for contracting with VOSBs. VA has not interpreted the latter as a requirement that VA always endeavor to do restricted competitions, nor have we interpreted it as abridging VA's authority to make FSS buys when it is appropriate to do so. VA has always been of this view, as it made clear in the Federal Register notice (74 Federal Register 64619 (December 8, 2009)).

Conclusion

VA has made significant progress in the last 6 months in its VOSB verification program. We have overcome many of the challenges and vulnerabilities that were raised by the GAO and OIG reports, and are working to resolve those that remain. We are being proactive in our approach to these issues and seek continuous improvement. Mr. Chairmen and Members of the Subcommittees, this concludes my statement. I am pleased to answer any questions you may have.

Prepared Statement of Gregory D. Kutz, Director, Forensic Audits and Investigative Service, U.S. Government Accountability Office

Service-Disabled Veteran-Owned Small Business Program: Additional Improvements to Fraud Prevention Controls Are Needed

Chairmen Stutzman and Johnson, Ranking Members Braley and Donnelly, and Members of the Subcommittees:

Thank you for the opportunity to discuss the fraud prevention controls within the Service-Disabled Veteran-Owned Small Business (SDVOSB) program at the Department of Veterans Affairs (VA). Today's testimony summarizes our report, released today, on the design of VA's fraud prevention controls within the SDVOSB verification program, including recent improvements in controls.¹ The SDVOSB program is intended to provide Federal set-aside and sole-source contracts to small businesses owned and controlled by one or more service-disabled veterans. About \$10.8 billion in contracts were awarded in fiscal year 2010 to firms that self-certified as SDVOSBs in the Central Contractor Registration (CCR), according to the Small Business Administration (SBA).² VA's SDVOSB contracts accounted for \$3.2 billion, or about 30 percent of the \$10.8 billion in governmentwide SDVOSB contracts during fiscal year 2010. As of October 2011, VA's VetBiz Vendor Information Pages database shows that the agency has verified the eligibility of more than 5,000 SDVOSB firms. In addition, more than 15,000 firms also self-certified their SDVOSB eligibility in CCR.

In audits of the SDVOSB program conducted in 2009 and 2010, we identified weaknesses in fraud prevention controls that allowed ineligible firms to receive about \$100 million in SDVOSB contracts.³ These weaknesses included a lack of governmentwide controls, which allowed ineligible firms to receive contracts by self-certifying that they were legitimate SDVOSB firms. In addition, we found the absence of continued monitoring of firm eligibility and an ineffective process for investigating and prosecuting firms abusing the program. We also found that VA had

¹ GAO, *Service-Disabled Veteran-Owned Small Business Program: Additional Improvements to Fraud Prevention Controls Are Needed*, GAO-12-152R (Washington D.C.: Oct. 26, 2011).

² CCR is the primary contractor registrant database for the U.S. Federal Government. CCR collects, validates, stores, and disseminates data in support of agency acquisition missions.

³ See the list of related GAO products at the end of this testimony.

made limited progress enacting an effective verification program as required by the Veterans Benefits, Health Care, and Information Technology Act of 2006.⁴ To improve governmentwide program controls, we recommended that SBA and VA explore the feasibility of expanding the use of VA's verified VetBiz database to the rest of the Federal Government. SBA and VA generally agreed with our recommendation.

After the Veterans Benefits, Health Care, and Information Technology Act of 2006 was passed, Congress passed laws further intended to strengthen the SDVOSB program within VA and governmentwide. The Veterans Small Business Verification Act requires VA to verify a firm's eligibility before including that firm in the database and permits VA to request additional documentation substantiating veteran ownership and control of a firm in order to establish eligibility.⁵ Furthermore, Congress also passed the Small Business Jobs Act of 2010, which facilitates prosecution of firms that willfully seek and receive small business awards through misrepresentation of their status, including SDVOSBs.⁶

Today's testimony summarizes our report on the design of VA's fraud prevention controls within the SDVOSB verification program, including recent VetBiz verification efforts, instituted in response to the Veterans Small Business Verification Act. The report is being released today as a separate product.⁷ To conduct this work, we reviewed prior findings from GAO audits and investigations of the SDVOSB program. We reviewed applicable guidance on internal control standards from GAO's Standards for Internal Control in the Federal Government,⁸ the fraud prevention framework,⁹ VA's Office of Inspector General (OIG) report,¹⁰ and VA's Verification Process Guidelines and internal control policies. We also interviewed VA officials and reviewed related documents. In addition, we conducted undercover tests to assess initial screening controls of an individual's service-disabled veteran status within VA's verification process. The undercover tests were limited in scope to providing a fictitious firm controlled by an individual whose Social Security number was not listed as a service-disabled veteran in VA's database of service-disabled veterans. Our assessment is part of an ongoing review of fraud prevention controls for the entire SDVOSB program. This testimony focuses on the design of VA's SDVOSB verification controls within its Center for Veterans Enterprise (CVE) office. With the exception of undercover tests to assess initial screening controls, we did not test the effectiveness of VA's fraud prevention controls or attempt to project the extent of fraud and abuse. Additional information on our scope and methodology is available in the issued report.

We conducted the work related to the report from July 2011 to October 2011 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. We performed our investigative work, limited to our undercover tests, in accordance with the standards prescribed by the Council of the Inspectors General on Integrity and Efficiency.

Summary

VA's fraud prevention controls for the SDVOSB program within VA have improved since the Veterans Small Business Verification Act was enacted. Specifically, VA has made progress in implementing an enhanced initial SDVOSB verification process that reduces the risk that ineligible firms will receive VA contracts. However, further enhancements could do more to reduce the program's vulnerability. Improvements in the areas of preventive controls, detection and monitoring, and inves-

⁴The act requires VA to institute controls over its SDVOSB contracts. The requirement to maintain a database of VA-verified SDVOSBs and Veteran-Owned Small Businesses (VOSB) became effective June 2007. The act also requires that VA only use its set-aside and sole-source award authority for SDVOSB firms listed in the database and to debar for a reasonable period of time, as determined by VA, firms that misrepresent SDVOSB and VOSB status. Pub. L. No. 109-461, § 502, 120 Stat. 3403, 3431-3435 (2006).

⁵Veterans Small Business Verification Act, Pub. L. No. 111-275, § 104, 124 Stat. 2864, 2867-2868 (2010).

⁶Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1341, 124 Stat. 2504, 2543-2544 (2010).

⁷GAO-12-152R.

⁸GAO, *Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: November 1999).

⁹GAO, *Service-Disabled Veteran-Owned Small Business Program: Fraud Prevention Controls Needed to Improve Program Integrity*, GAO-10-740T (Washington, D.C.: May 24, 2010).

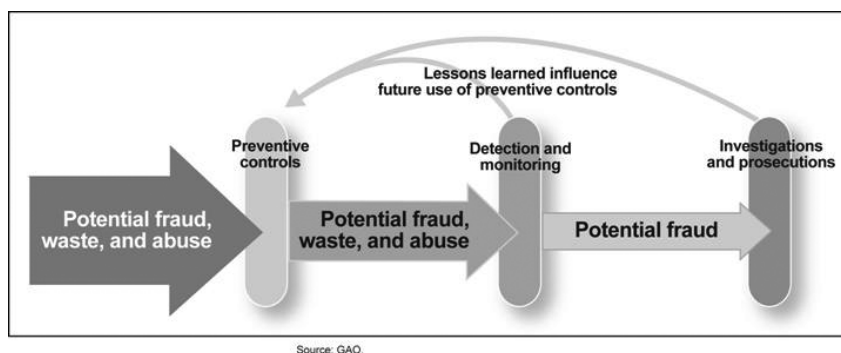
¹⁰VA OIG, Office of Audit and Evaluations, *Department of Veteran Affairs: Audit of Veteran-Owned and Service-Disabled Veteran-Owned Small Business Programs*, 10-02436-234 (July 25, 2011).

tigations and prosecutions could be made within VA's VetBiz verification process. With a comprehensive framework in place, VA can be more confident that the billions of dollars meant to provide VA contracting opportunities to our Nation's service-disabled veteran entrepreneurs make it to the intended beneficiaries. In an effort to improve controls, in our report, we made recommendations to improve fraud prevention controls in the areas of prevention, detection and monitoring, and investigations and prosecutions. VA generally agreed with the recommendations.

VA's SDVOSB Program Controls Have Improved, but Vulnerabilities Remain

VA's fraud prevention controls for the SDVOSB program have improved since the Veterans Small Business Verification Act was enacted, but additional enhancements would further reduce the vulnerabilities we identified in the areas of preventive controls, monitoring and detection, and investigations and prosecutions. These are also the components of GAO's fraud prevention framework (see fig. 1). First, preventive controls are an effective and efficient way of preventing ineligible firms from being verified. Second, active and continual monitoring of verified SDVOSB firms is necessary to detect any changes in their status that may affect eligibility. Third, investigations and prosecution is a strong deterrent for those considering misrepresenting their SDVOSB status.

Figure 1: GAO's Fraud Prevention Framework



Additional Improvements to Preventive Controls Are Needed

VA has enhanced deterrents to ineligible firms becoming verified through VetBiz. As of April 2011, VA had established verification guidelines, including a requirement to search the exact names of company principals in the Excluded Parties List System, and developed a risk assessment model to examine applications. VA also updated its data systems to limit manual data entries. Its process of verifying service-disabled veteran status allowed VA to prevent two fictitious ineligible SDVOSB applications submitted by GAO from being verified. Specifically, we submitted two fictitious companies for verification, listing the names and Social Security numbers of the majority owners who were not service-disabled veterans. VA's controls appropriately identified that our company owners were not service-disabled veterans and rejected our applications. VA also hired additional CVE staff to conduct initial file reviews and site visits. Additionally, VA has conducted announced site visits at high-risk firms before they receive VetBiz approval. Finally, VA created a quality review team to inspect a subset of initial file examination decisions. VA's enhanced deterrents under new guidelines have resulted in VA's denial of verification to over 1,800 firms under the new verification guidelines, according to VA.

Even with these enhanced deterrents, program weakness and vulnerabilities remain within VA's SDVOSB program. During our interviews with CVE officials, we found that CVE had not performed a systematic assessment of the qualifications of its staff. In addition, CVE staff and contracting officials had not received fraud awareness training. VA also did not have formal processes or procedures for considering all SBA status protest decisions related to an applicant, and was not validating applicants' self-reported information. VA also did not have a formal process for selecting high-risk companies for unannounced site visits or using information from previously denied SDVOSB applications to prevent individuals and fraudulent companies from repeated attempts at breaching VA controls. Additionally, we found that VA was not requesting that denied companies reassess their self-certified

SDVOSB status in CCR. By addressing the identified vulnerabilities, VA could further improve its fraud prevention controls.

Additional Improvements to Detection and Monitoring Controls Are Needed

VA has developed some controls that may help identify firms in the VetBiz-verified database that do not meet SDVOSB eligibility requirements, such as a reverification initiative designed to review previously verified SDVOSB firms under new controls. VA has also developed a process for interested parties to protest a firm's status, and instituted random announced site visits of verified SDVOSB firms. However, even with enhanced controls, certain weaknesses and vulnerabilities remain because of VA's focus on initial eligibility verification. For example, VA does not monitor firms' continued compliance with North American Industry Classification System size standards, nor does it have contact with contracting officials to determine whether the required percentage of work on SDVOSB contracts has been performed. VA also does not systematically data mine existing contract awards for review and further inspection. VA also does not have a formal process for selecting companies for unannounced site visits to contract performance locations and does not have a formal process for interviewing contracting officials. Finally, VA has not formalized its quality assurance process for selecting verified companies for unannounced site visits to determine if the verification process is effective. Further improvements in these areas would increase the design of detection and monitoring controls within the verification process.

Additional Improvements to Investigations and Prosecutions Are Needed

VA has taken some actions to debar firms violating SDVOSB program requirements. VA may debar an ineligible firm in accordance with the Veterans Benefits, Health Care, and Information Technology Act of 2006, which requires that any business determined to have misrepresented its status as an SDVOSB shall be debarred from contracting for a reasonable period of time, as determined by VA. VA instituted a debarment committee in September 2010 specifically to debar firms violating SDVOSB regulations. As of October 2011, the Committee had debarred one SDVOSB firm and related individuals that had misrepresented their status as an SDVOSB. Several other debarment actions are currently pending or are being litigated. Additionally, CVE officials have sent about 70 referrals to the VA OIG for potential fraudulent actions by firms receiving SDVOSB contracts. VA OIG is currently investigating these cases.

We identified certain weaknesses and vulnerabilities in the investigation and prosecution controls during our site visits. The debarment of only one firm and related individuals suggests that there is room for additional action given the 1,800 firms rejected by VA during its verification process and the 70 firms referred to VA OIG for potentially fraudulent actions. Additionally, VA does not have specific procedures for CVE staff to refer companies to the debarment committee or VA OIG, and has no specific guidelines documenting how VA is implementing debarments or outlining the debarment committee's decision process. Providing more emphasis on debarments and investigations could further help VA deter firms from attempting to fraudulently gain access to its SDVOSB program.

Conclusions

In conclusion, VA has made progress in implementing a valid verification program to deter ineligible firms from becoming verified and receiving SDVOSB contracts. However, additional improvements can be made, particularly in monitoring and detection and investigations and prosecutions. Specifically, developing a robust unannounced site visit process for verified firms and aggressively pursuing debarments and prosecutions of firms found to have violated program rules will further enhance fraud prevention controls. With a comprehensive framework in place, VA can be more confident that the billions of dollars meant to provide VA contracting opportunities to our Nation's service-disabled veteran entrepreneurs make it to the intended beneficiaries.

To minimize the risk of fraud and abuse within VA's SDVOSB program, in the report released today, we recommended that the Secretary of Veterans Affairs take 13 actions in the following three areas:

- Improve VA's preventive controls to provide reasonable assurance that only eligible firms gain access to the VetBiz database.
- Strengthen VA's detection and monitoring controls over verified firms.
- Strengthen VA's investigative and prosecutorial actions for firms violating SDVOSB program laws and regulations.

VA generally concurred with our recommendations and noted a number of significant actions planned or taken since the time of our site visits and development of our findings, which, according to VA, address many of the identified vulnerabilities.

According to VA officials, VA has recently made improvements of its preventive controls. For example, VA officials stated that CVE staff and most contractors assisting with the application evaluation are now required to receive Certified Fraud Examiner training, and additional VetBiz training has been provided to contracting officials. VA officials also stated VA has recently strengthened the agency's monitoring and detection of verified SDVOSB firms. Specifically, VA officials stated that VA conducts unannounced visits to verified companies either randomly or during the course of a high-risk SDVOSB reverification assessment. Finally, VA officials stated that VA recently strengthened the investigative and prosecutorial actions by creating guidelines for referring firms to VA OIG and the debarment committee. We plan to follow up on actions taken by VA as part of our ongoing work and will report back to the Subcommittees on our findings.

Chairmen Stutzman and Johnson, Ranking Members Braley and Donnelly, and Members of the Subcommittees, this completes my prepared statement. I would be pleased to answer any questions that you may have at this time.

GAO Contacts

If you or your staff have any questions about this testimony, please contact Gregory D. Kutz at (202) 512-6722 or kutzg@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement.

Related GAO Products

Service-Disabled Veteran-Owned Small Business Program: Additional Improvements to Fraud Prevention Controls Are Needed. GAO-12-152R. Washington, D.C.: October 26, 2011.

Service-Disabled Veteran-Owned Small Business Program: Preliminary Information on Actions Taken by Agencies to Address Fraud and Abuse and Remaining Vulnerabilities. GAO-11-589T. Washington, D.C.: July 28, 2011.

Department of Veterans Affairs: Agency Has Exceeded Contracting Goals for Veteran-Owned Small Businesses, but It Faces Challenges with Its Verification Program. GAO-10-458. Washington, D.C.: May 28, 2010.

Service-Disabled Veteran-Owned Small Business Program: Fraud Prevention Controls Needed to Improve Program Integrity. GAO-10-740T. Washington, D.C.: May 24, 2010.

Service-Disabled Veteran-Owned Small Business Program: Case Studies Show Fraud and Abuse Allowed Ineligible Firms to Obtain Millions of Dollars in Contracts. GAO-10-306T. Washington, D.C.: December 16, 2009.

Service-Disabled Veteran-Owned Small Business Program: Case Studies Show Fraud and Abuse Allowed Ineligible Firms to Obtain Millions of Dollars in Contracts. GAO-10-255T. Washington, D.C.: November 19, 2009.

Service-Disabled Veteran-Owned Small Business Program: Case Studies Show Fraud and Abuse Allowed Ineligible Firms to Obtain Millions of Dollars in Contracts. GAO-10-108. Washington, D.C.: October 23, 2009.

(192388)

Prepared Statement of Ralph O. White, Managing Associate General Counsel, Office of General Counsel, U.S. Government Accountability Office

Veterans Administration Procurement: Protests Concerning Service-Disabled Veteran-Owned Small Business Preferences Sustained

GAO Highlights

GAO's Role Under The Competition in Contracting Act

Under the Competition in Contracting Act of 1984, GAO is required to consider protests filed by interested parties concerning the terms of solicitations or contract awards. In deciding protests, GAO makes a determination of whether the agency's actions complied with procurement statutes and regulations. Aldevera, an SDVOSB concern, argued that two solicitations issued by the Veterans Administration should have been set aside for SDVOSB concerns.

GAO's Recommendations

GAO recommended, for the solicitation where the record showed that two or more SDVOSBs were capable of meeting the agency's requirements at a fair and reasonable price, that the VA cancel the solicitation and obtain its requirements using an SDVOSB set-aside. GAO also recommended, for the solicitation where the record did not indicate whether there were two or more SDVOSBs capable of meeting the agency's requirements at a fair and reasonable price, that the VA conduct reasonable market research regarding its requirements. If the VA determines that there is a reasonable expectation of receiving offers from two or more SDVOSB concerns capable of performing the requirements at a fair and reasonable price, we recommended that the VA cancel the solicitation and re-solicit its requirements using an SDVOSB set-aside.

GAO's Findings

The Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127–8128 (2006) (the 2006 Act) provides in relevant part that the Department of Veterans Affairs (VA) must set aside procurements for Service-Disabled Veteran-Owned Small Business (SDVOSB) concerns if the contracting officer has a reasonable expectation of receiving offers from two or more SDVOSB concerns and that award can be made at a fair and reasonable price that provides the best value to the government.

Aldevra, an SDVOSB concern, challenged the terms of two solicitations issued by the VA for kitchen equipment. In both protests, Aldevra argued that the VA should have restricted the competitions to SDVOSB concerns, instead of issuing the solicitations for competition under the General Services Administration's (GSA) Federal Supply Schedule (FSS). In its response to the protest, VA argued that the SDVOSB set-aside requirements of the 2006 Act did not apply to the FSS.

In a decision issued by our Office, GAO concluded that the 2006 Act applies to the FSS.

Accordingly, GAO sustained the protests. The decision is available at: <http://www.gao.gov/decisions/bidpro/405271.pdf>.

Chairman Johnson, Chairman Stutzman, Ranking Members, and Members of the Subcommittees:

Thank you for the opportunity to be here today to discuss the bid protest decision recently issued by the Government Accountability Office (GAO) in response to two protests challenging the issuance of solicitations by the Department of Veterans Affairs (VA). This decision addressed the statutory preference for setting aside VA procurements for Service-Disabled Veteran-Owned Small Business (SDVOSB) concerns.

GAO provides an objective, independent, and impartial forum for the resolution of disputes concerning the awards of Federal contracts. Since 1984, the Competition in Contracting Act (CICA) has established statutory authority for GAO's bid protest function. GAO has issued implementing regulations establishing the procedural framework for our bid protest forum in Title 4, Part 21, of the Code of Federal Regulations.

In Fiscal Year 2011, we received 2,353 bid protests challenging procurements across the Federal Government. The bid protest process is a legal one, and both the process and the resulting product differ from those associated with the reports that GAO issues in connection with its program audits and reviews. Protests are handled solely by GAO's Office of General Counsel (OGC), not by its audit teams. In developing the record, OGC provides all parties—the protester, the awardee, and the contracting agency—an opportunity to present their positions. In some cases, OGC conducts a hearing to further develop the record. Under CICA, as amended, we have 100 calendar days to decide a protest.

The product of a GAO protest—our legal decision—does not address broad programmatic issues such as whether or not a particular government program is being managed effectively or consistent with best practices. Instead, our bid protest decisions address specific allegations challenging particular procurement actions as contrary to procurement laws, regulations, and the evaluation scheme set forth in the solicitation. We sustain a protest when we find that the procuring agency has not complied with procurement laws, regulations, or the solicitation's evaluation scheme, and that the violation prejudiced the protester's chances of winning the contract.

With that background, my testimony today will summarize our recently issued decision concerning challenges to the VA's interpretation of the statutory requirement that VA set aside procurements for SDVOSB concerns.

Background

Our decision concerns two protests filed by Aldevra, an SDVOSB. The first protest, which was received on July 1, 2011, challenged the terms of solicitation No. VA-69D-11-RQ-1170 for a tilting skillet/braising pan and one countertop electric griddle for the Federal Health Care Center in Chicago, Illinois. The second protest, which was received on August 12, challenged the terms of solicitation No. 693-11-4-179-0306, for two griddles and one food slicer for the VA Medical Center in Wilkes-Barre, Pennsylvania. Our decision of October 11 addressed both protests by the 100-day deadline for the first protest.

The VA issued both solicitations under the Federal Supply Schedule (FSS), which is a program consisting of contracts administrated by the General Services Administration that is available for all Executive Branch agencies to use in their procurements. The solicitations here were not restricted to SDVOSB concerns, or concerns under any other socio-economic program.

The Legal Standard

The sole issue raised by Aldevra was whether the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (2006) (the 2006 VA Act), required the VA to conduct market research to determine whether the VA should set aside the procurements for SDVOSB concerns before using the FSS to satisfy its requirements.

In relevant part, the 2006 Act provides as follows:

. . . a contracting officer of [the VA] shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

The statute also sets out an order of priority for the contracting preferences it establishes, providing that the first priority for contracts shall be given to SDVOSB concerns, followed by veteran owned small businesses (VOSBs).

A regulation issued by the VA implementing the 2006 Act similarly stated that a contracting officer "shall" set aside a procurement for SDVOSBs (or VOSBs) if there is a "reasonable expectation" that offers will be received from two or more SDVOSB (or VOSB) concerns, and award will be made at a reasonable price. Veterans Administration Acquisition Regulation (VAAR), 48 CFR § 819.7005(a) (2011).

The VA argued that, notwithstanding the statutory language in the 2006 Act, the agency is not required to conduct market research to determine whether SDVOSBs (or VOSBs) are capable of performing the requirement if the VA instead chooses to procure its requirements through the FSS. In support of its position, the VA cited provisions of Federal Acquisition Regulation (FAR) part 19.14, which states that agencies "may" set aside procurements for SDVOSBs if they have an expectation of receiving two or more offers from SDVOSB concerns capable of performing the requirements at a fair and reasonable price. As relevant to the protests—and the VA's response to the protests—FAR part 8.4 states that the small business set-aside rules under FAR part 19—including SDVOSBs—do not apply to the FSS.

GAO's Review of the Record

Our Office reviewed the language of the 2006 Act, as well as the FAR provisions cited by the VA. We concluded that the 2006 Act plainly states that the VA "shall" set aside procurements for SDVOSB (or VOSB) concerns if it determines that there is a reasonable expectation of receiving offers from two or more SDVOSB (or VOSB) concerns capable of performing the requirements at a fair and reasonable price. This statutory language takes precedence over any regulatory language to the contrary.

Moreover, the FAR provisions cited by the VA, which state that agencies "may" consider using an SDVOSB set-aside, were implemented to meet the statutory requirements of the Veterans Benefit Act of 2003, 15 U.S.C. § 657f (2006) (the 2003 Act), which applies government-wide. The 2006 Act, however, is a separate statutory authority codified within the statutes that govern the VA (i.e., Title 38 of the U.S. Code) that applies only to the VA.

Thus, the FAR provisions, which state that agencies "may" set aside procurements for SDVOSBs, and which are also exempt under the FSS from the provisions of FAR part 19.14, do not apply to the VA, because the VA is governed by the later-enacted and VA-specific 2006 Act, and not the 2003 Act, which applies government-wide. Put

differently, the VA is subject to procurement rules concerning SDVOSBs that do not apply to any other Executive Branch agency.

For the record, our decision does not state that the VA must set aside every competition for SDVOSB (or VOSB) concerns. Instead, our decision states that the VA must first conduct market research to determine whether it will receive offers from two or more SDVOSB (or VOSB) concerns. If the VA concludes that there is a reasonable expectation of receiving offers from two or more SDVOSB (or VOSB) concerns capable of performing the requirements at a fair and reasonable price, the agency must set aside the procurement for SDVOSBs (or VOSBs). If the VA concludes that there is not a reasonable expectation of receiving offers from two or more SDVOSB (or VOSB) concerns capable of performing the requirements at a fair and reasonable price, it may use any other authorized procurement method.

Recommendation

Based on our review of the record, we sustained the protests. For the first solicitation, the VA conceded that there were two or more SDVOSB concerns capable of performing its requirements at a fair and reasonable price. GAO therefore recommended that the VA cancel the first solicitation and re-solicit its requirements using an SDVOSB set-aside. For the second solicitation, the record did not address whether there were two or more SDVOSB concerns capable of performing the requirements at a fair and reasonable price. GAO therefore recommended that the VA conduct market research regarding its requirements for that solicitation.

If the VA determines that there is a reasonable expectation of receiving offers from two or more SDVOSB concerns capable of performing the requirements at a fair and reasonable price, we recommended that the VA cancel the solicitation and re-solicit its requirements using a SDVOSB set-aside. We also recommended that the agency reimburse the protester the costs of filing and pursuing the protests.

Under CICA, a GAO decision sustaining a protest results in a recommendation. The statute gives agencies 60 days to implement a GAO recommendation. In the event an agency does not implement a GAO recommendation, the agency must advise GAO within 5 days after the conclusion of the 60-day period. In the event an agency advises it will not follow a GAO recommendation, CICA requires GAO to advise the Congress of the agency's decision.

Here, the VA has until December 15, 2011, to respond to our recommendation. As of today, the VA has not yet responded.

Chairman Johnson, Chairman Stutzman, this concludes our prepared statement. I would be happy to respond to any questions regarding our bid protest decisions that you or other Members of the Subcommittees may have.

SUBMISSIONS FOR THE RECORD

Statement of Steve L. Gonzalez, Assistant Director, National Economic Commission, American Legion

Chairman Bill Johnson, Ranking Member Donnelly and Members of the Subcommittee:

Thank you for the opportunity in allowing The American Legion to submit for the record its views on the Department of Veterans Affairs' (VA) Center for Veterans Enterprise and Veterans First Contracting Program.

For more than half a century, it has been the policy of the Federal Government to provide "maximum practicable opportunity" for small businesses to participate in Federal contracts. To achieve this objective, Congress established an aspirational goal in 1978 for the percentage of annual prime contract spending awarded to small businesses each year. Congress later set the government-wide goal at 23 percent and created a set of sub-goals to support the participation of special segments of the small business community: small disadvantaged businesses (5 percent), women-owned small businesses (5 percent), service-disabled-veteran-owned small businesses (3 percent), and small businesses in Historically Underutilized Business Zones (HUB Zones) (3 percent). These goals help ensure that a diverse set of small businesses share in the jobs and opportunities created by Federal contracting.¹

America has benefited immeasurably from the service of its 23.4 million² living veterans, who have made great sacrifices in the defense of freedom, preservation of democracy, and the protection of the free enterprise system. Due to the experience veteran's gain in the military, the success rate of veteran-owned businesses is higher than non-veteran-owned businesses. The current Global War on Terror has had a devastating impact on the Armed Forces and has exacerbated this country's veterans' unemployment problem, especially within the National Guard and Reserve components. According to the most current Federal data available, veterans owned 2.4 million businesses. Another 1.2 million firms were at least 50 percent veteran owned³ within the fifty states and District of Columbia. According to this survey, veteran-owned and co-owned firms accounted for 13.5 percent of all non-farm businesses in the United States, employed 11 million people (4.9 percent of total U.S. employment) and generated \$1.655 trillion in receipts.⁴

According to the Department of Labor, the present unemployment rate for recently discharged veterans is as high as 12.1 percent. One way of combating unemployment or underemployment is through the creation of new jobs. Increasingly, the growth and stability of this Nation's economy is dependent on the long-term success of the small business networks across the country. However, during a time of war there is much to be accomplished. Ironically, for too many years, the very men and women who served in uniform, stood ready to fight, and if necessary die in order to protect and preserve the free enterprise system, are summarily ignored by the Federal agencies responsible for meeting their small business needs.

The barriers to entry for small businesses are numerous: weak policies and rules that limit the effectiveness of tools that are supposed to facilitate contracting opportunities; inadequate workforce training to help contracting officers, small business advocates, and program offices to successfully use contracting tools; and a lack of coordination among and accessibility to agency training and outreach events designed to help small businesses navigate the contracting system. Action must be taken to remove these barriers and ensure small businesses get access to Federal contracts.

THE CENTER FOR VETERANS ENTERPRISE

According to its Web site, the VA's Center for Veterans Enterprise (CVE) "is designed to improve the business climate for veterans, to minimize access barriers and to inform the public about the benefits of working with veteran-owned small businesses." In addition, CVE provides opportunities for veteran-owned small businesses by collaborating with like-minded individuals and organizations who believe that veterans in business are still serving the American public. They work and link with partner organizations to provide local support to veteran-owned small businesses, because they are the face of a local economy. They also support acquisition teams

¹ <http://www.sba.gov/content/interagency-task-force-federal-contracting-opportunities-small-businesses>.

² http://www.va.gov/opa/publications/factsheets/fsdepartment_of_veterans_affairs.pdf.

³ <http://web.sba.gov/faqs/faqIndexAll.cfm?areaid=24>.

⁴ *Survey of Business Owners—Veteran-Owned Firms: 2007*. U.S. Census Bureau. <http://www.census.gov/econ/sbo/get07sof.html#17>.

through procurement coaching, free market research, awareness briefings and provide awards for noteworthy achievements. Their goal is to provide smart business information for those veteran-owned small businesses in search of starting their business or continuing to grow their business.

PUBLIC LAW 109-461

On December 22, 2006, President Bush signed Public Law (P.L.) 109-461, The Veterans Health Care, Benefits and Information Technology Act of 2006. This law directs the Secretary of Veterans Affairs to “give priority to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference.” 38 U.S.C. § 8128(a). To implement the Veterans Benefits Act, VA established the “Veterans First Contracting Program” on June 20, 2007. See AR 38-540 to 541 (New Guidelines for Placing Items and Services on the AbilityOne Procurement List (Apr. 28, 2010) (“New Guidelines”). The program directed VA to consider service-disabled veteran-owned small businesses (“SDVOSB”) and veteran-owned small businesses (“VOSB”) as a first and second priority when satisfying its acquisition requirements. *Id.* at 38-541. A final implementing rule establishing changes to the Department’s acquisition regulations was made effective January 7, 2010. See 74 Fed. Reg. 64619-01 (Dec. 8, 2009) (codified in scattered sections of 48 CFR Subparts 802, 804, 808, 809, 810, 813, 815, 817, 819, 828, and 852).

VA’S IMPLEMENTATION OF PUBLIC LAW 109-461

In 2006, Congress created the Veteran First contracting program to help provide preference to small businesses owned by veterans and service-disabled veterans over other companies. VA was charged with putting procedures in place to verify the ownership and status of the companies that wanted to participate in Veterans First. The VA has failed time and time again to follow the “Veterans First” law, which establishes set aside guidelines for service-disabled veteran-owned small businesses. While the GAO has investigated and agreed with the protest’s claims, an internal memo from the VA dated October 17th makes the assertion that since the GAO is part of the legislative branch, the VA is not bound by their findings and that the courts would decide the issue. The memo goes on further to state that “GAO recommendation does not change how VA will acquire goods and services in support of its mission.”

On October 26, 2010, the United States Court of Federal Claims (USCFC) set precedence on behalf of all SDVOSB/VOSB, when it ruled in favor of Angelica Textile Services, Inc., in the case of *Angelica Textile Services, Inc., v. United States* (10-496C).⁵ The Federal Court decision confirmed that veterans have a contract preference and priority. Here are some excerpts from the court ruling:⁶

- “The Veterans Benefits Act is a specific mandate to the Department, and only to the Department, to grant first priority to SDVOSBs and VOSBs in the awarding of contracts.”
- Above “any other provision of law” such as *FAR Part 8 Required Sources of Supply*
- Above “any other provision of law” such as *FAR Part 19.14*;
- Above general Federal statutes and initiatives
- In all market types such Federal supply schedules and open market;
- Exclusively within the VA under 8127 (b), (c), or (d) and 8128

In March 2007, Scott Dennison, Director of the VA’s Office of Service-Disabled Veteran-Owned Small Business Utilization (OSDBU) wrote in his department’s local newsletter the **Small Business Advocate** “a major challenge to implementing P.L. 109-461 will be educating and training VA’s workforce of the significant changes brought by the law. To that end, OSDBU is available to provide training to acquisition professionals, program officials engineering officers and personnel, purchase cardholders and anyone else involved in the acquisition process that could use this training.”

Challenges:

- Over the past 10 years, VA has built CVE through non-appropriated funds. CVE markets itself as a technical training and assistance center that maintains a database of veteran-owned small businesses. With regard to CVE’s technical

⁵ <http://www.uscfc.uscourts.gov/sites/default/files/LETTOW.ANGELICA102610.pdf>.

⁶ *Ibid.*

assistance capabilities, this effort represents a negligible impact locally and virtually no impact nationally. CVE maintains one small assistance center in Washington, DC, where they see a small amount of clients and field phone calls.

- It takes anywhere from 1 month to 1 year to have a company registered with VA. One veteran complained after registering, he was deleted from the data system a few months later.
- Veterans cannot register multiple businesses at one time, and owners must work full time in their registered business.
- CVE staff qualifications have been questioned by many.
- A 10-case Government Accountability Office study proved approximately \$100 million in SDVOSB sole-source and set-aside contracts through fraud and abuse of the program.
- The Web site is not user-friendly and needs to be improved.
- An inability to foster communication between veteran-owned small businesses on the Web site.

On July 21, 2009, Secretary of Veteran Affairs Eric Shinseki addressed SDVOSB/VOSB at the 5th Annual National Veteran Small Business Conference in Las Vegas and stated, “VA will begin putting Veterans first—fully first—in our contracting efforts because we recognize the on-time, on-budget, quality solutions that you offer to meet our contracting needs.”⁷ This statement seems to be contradictory to VA Department official’s actions when issuing VA contracts to businesses.

RECOMMENDATIONS

The American Legion fully understands and support Title 38 section 8127 and 8128 does not automatically award VA government contracts to SDVOSB/VOSB; however, when qualified SDVOSB/VOSB are being overlooked or ignored by the VA this is cause for great concern.

CVE’s marquee program is their VIP database. As the only Federal database focusing strictly on veteran-owned small businesses, the VIP database has established itself as the premiere database for veterans in the country. CVE has successfully promoted this database commercially, as well as cross agency and has established a strong foundation and infrastructure that can easily be interwoven into other Federal databases such as the Central Contractors Registry (CCR).

VA and the Small Business Administration (SBA) should develop a comprehensive partnership to assist veterans who are interested in participating in Federal procurement. CVE should maintain the database (VIP) and verify accurate veteran/service-connected disabled veterans’ status. SBA should retain the responsibility for validating the business ownership, size standards, and structural integrity of the business. SBA should have direct reporting and input authority to the VIP database through the Office of Veterans Business Development once this information is collected. VA should maintain the eligibility status regarding veteran status. SBA is responsible for verifying all other socioeconomic categories for the purpose of Federal procurement. SBA already maintains the infrastructure, expertise and established regulatory guidance to include the veterans’ population within their authority. VA should develop clearer and more comprehensive small business contracting policies.⁸

Recommendation 1: Update acquisition policies and regulations to provide clear guidance on small business set-asides and related tools.

Recommendation 2: Issue guidance clarifying practices and strategies to prevent unjustified contract bundling and mitigate any negative effects of justified contract bundling on small businesses.

Recommendation 3: Identify where focused efforts will likely have the most positive effect on increasing small business utilization in prime contracting.

Recommendation 4: Strengthen the skills of the acquisition workforce by revising existing core certification, requiring training on small business contracting, procurement policies and regulations, and creating focused refresher materials for continuous learning.

Recommendation 5: Use meaningful “carrots and sticks” to create a greater sense of agency accountability for reaching small business Federal contracting goals.

Recommendation 6: Facilitate the identification and rapid adoption of best practices across the agencies to maximize successful strategies.

These observations come from The American Legion’s National Small Business Task Force. This Task Force is made up of veterans who are successful business

⁷ http://www.va.gov/opa/speeches/2009/09_0721.asp.

⁸ http://www.sba.gov/sites/default/files/contracting_task_force_report_0.pdf.

owners, Federal agency officials and The American Legion leaders. Their mission is to gather information, data and research regarding the current and future economic status of veteran businesses. These individuals are the very individuals who are using the CVE and are a part of the database that CVE is maintaining.

CONCLUSION

While The American Legion applauds the Federal Government in setting up and implementing a program that is designed to assist Veteran-Owned and Service-Disabled Veteran Owned Small Business to start up and receive government contracts, it is our belief that this program could be improved. VA and SBA should develop a comprehensive partnership to assist veterans who are interested in participating in Federal procurement, with each Department utilizing their resources to ensure proper implementation. As interpreted by Federal Court, the VA is mandated by law to purchase all products and services from SDVOSB/VOSB as mandated by the Veteran First law, as long as those SDVOSB/VOSB meet both the legal and contract requirements. Any regulations, policies, and procedures disseminated by the VA that deny SDVOSB/VOSB their contracting preference and priority as defined by the United States Court of Federal Claims is a violation of law.

Unfortunately, SDVOSB and VOSB businesses have been relegated to last in the VA's procurement hierarchy even when Congress and United States Court of Federal Claims said they should be first. The irony and greatest insult is that this agency which was created to help veterans appears to be actively and knowingly shutting them out when it's time to award government contracts.

The American Legion appreciates the opportunity to present this statement for the record. Again, thank you Mr. Chairman, Ranking Member Donnelly, and Members of the Subcommittee for allowing The American Legion to present its views on these very important issues.

Statement of Robert G. Hesser, Vetpreneur, LLC, SDVOSB Owner, Herndon, VA, Retired Master Chief, USN

This document is a compilation of comments from members of the veteran business community and includes suggestions, ideas and concerns. Most of the comments were unsolicited and frequently passionate. Our commenters represent almost every ethnic, cultural, age, gender and possible demographic. We are united in our concern for how veterans, their families and employees are treated.

We are also united in our belief that the VA's mission of helping veterans should be integral to acquisition planning and implementation . . . as we understand that the greatest value to the taxpayers is to have a robust and competitive small business industrial base. To us, that means that the objectives of Vets First include the impact on veteran unemployment and homelessness as well as opportunities through the marketplace to improve access to medical care through employer funded plans.

Vets helping vets, it's that simple. We ask the Committee to reinforce the importance of including the Department of Veterans Affairs mission in the planning and execution of their acquisitions. In today's economic environment, it will be good to get a win-win where we are helping our Nation's veterans while reducing the total cost of implementing the VA's mission.

Vets First = Vets Last

The Department of Veterans Affairs (VA) has stated that it "conducts its contracting with small businesses in **good faith** and in the **spirit** of the "Veterans First" legislation that gives preference to eligible veteran-owned small businesses (VOSBs) and service-disabled veteran-owned small businesses (SDVOSBs)." Despite the value that veteran small business owners bring to VA procurement, they continue to face barriers and obstacles. One of the lateral benefits of the Veterans First law is its ability to decrease veteran unemployment, which is currently 11.5¹ percent with estimates as high as 25 percent when the troops return from Iraq and

¹Bureau of Labor Statistics "Employment Situation of Veterans News Release" October 20, 2011 <http://stats.bls.gov/news.release/vet.htm>.

Afghanistan. Veterans hire veterans! From battle to business, veteran small businesses care for fellow comrades.

Background on Vets First Law

On December 22, 2006, Former President Bush signed P.L. 109-461, The Veterans Health Care, Benefits and Information Technology Act of 2006, which directs the Secretary for Veterans Affairs to “give priority to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference.” 38 U.S.C. § 8128(a). Note that there is no mention of Federal supply schedules, open market, or other qualifiers. The law clearly and profoundly declares that veteran owned small businesses shall be given priority when the VA procures goods and services.

VA Understood Vets Come First

It’s clear that the VA initially understood the intent of the law. In the June 19, 2007 Information Letter (IL 049-07-08), VA stated that “this approach changes the priorities for contracting preferences within VA, placing SDVOSBs and VOSBs first and second, respectively, in satisfying VA’s acquisition requirements.”

A year later, the VA still clearly understood the intent of the law to consider veteran owned businesses first because they declared in the August 20, 2008 Federal Register that “*We interpret section 8128 and the legislative history to mean that SDVOSBs and VOSBs must receive priority in VA contracting opportunities without regard to other provisions of law concerning contracting preferences . . . VA finds that section 8128 requires VA contracting officers to have the authority to **override** other statutory contracting preferences to provide priority to SDVOSBs and VOSBs . . .*”²

VA Puts Vets Last

Then, in testimony before the U.S. House of Representatives Committee on Veterans’ Affairs Subcommittee on Economic Opportunity on April 23, 2009, everything changed. Jan Frye, VA Deputy Assistant Secretary, Office of Acquisition and Logistics, testified, “*It is important to note that the unprecedented and extraordinary contracting authorities granted to VA under Public Law 109-461 are **preferences in open market** contracting for veteran entrepreneurs.*”³

In one fell swoop; veteran owned small businesses were moved from FIRST to LAST in the VA Purchasing Priority List. The VA’s unilateral interpretation that the law only applies to “open market” purchases means that veteran businesses are now first in the LAST category on the purchasing priority hierarchy.

VA Uses Convolutd Purchasing Priority List

Eight months later, a commenter in the Federal Register (December 8, 2009) asked that the VA Purchasing Priority Hierarchy be specifically defined for contracting personnel to avoid confusion. The VA disagreed by stating “this rule clearly implements the priority purchasing preference for SDVOSB and VOSB in accordance with the statute. Under section 8128(a), VA must give priority to small business concerns owned and controlled by veterans, if the business concern meets the requirements of that contracting preference. In this rule, VA will provide discretion to its contracting officers to override certain statutory priority preferences, such as Federal Prison Industries and Government Printing Office. Under section 8128, VA is implementing priority for SDVOSBs and VOSBs to the extent authorized by the law . . .”

Yet, there is confusion for VA contracting personnel. The VA purchasing priority list basically goes like this. First and Second in the purchasing hierarchy includes—Number 1—Agency inventories and Number 2—Excess from other agencies. Veterans understand that the Vets First law does not apply here as the VA is not buying goods and services because they were previously purchased or are from an existing agency on-hand inventory. Number 3—Federal Prison Industries. VA regulation (808.6) states that veteran businesses come before Federal Prison Industries. Number 4—Supplies which are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (Ability One). The United States Court of Federal Claims found in the “Angelica” decision on October 26, 2010 that veteran businesses take priority over Ability One (otherwise known as “Javits-Wagner-O’Day Act” (JWOD)). The court found that “the New Guidelines . . . provide mandatory procedures for Departmental contracting officers and procurement officials to explore whether SDVOSB and VOSB entities are potential sup-

²VAAR 808.603 Purchase Priorities, VA Proposed Rule in Federal Register August 20, 2008.

³Testimony before the U.S. House of Representatives Committee on Veterans’ Affairs Subcommittee on Economic Opportunity, April 23, 2009.

pliers, in which instances they are to be accorded first priority over that provided by the Javits-Wagner-O'Day Act." The court further found that the "Veterans Benefits Act is a specific mandate to the Department [VA], and only to the Department, to grant first priority to SDVOSBs and VOSBs in the awarding of contracts."

Let's continue down the VA purchasing priority list. Number 5—Wholesale supply sources. Number 6—Mandatory Federal Supply Schedules. There are no mandatory Federal supply schedules. This will be further clarified once the proposed rule FAR Case 2009-024 takes effect. Number 7—Optional use Federal Supply Schedules ("FSS"). The October 11, 2011 Government Accountability Office (GAO) *Aldevera* decision states, "We see nothing in the VA Act or the VAAR that provides the agency with discretion to conduct a procurement under FSS procedures without first determining whether the acquisition should be set aside for SDVOSBs. The provisions of both the VA Act and the VAAR are unequivocal; the VA "shall" award contracts on the basis of competition restricted to SDVOSBs where there is a reasonable expectation that two or more SDVOSBs will submit offers and award can be made at a fair and reasonable price. Thus, contrary to the agency's position, the VA Act requires, without limitation, that the agency conduct its acquisitions using SDVOSB set asides where the necessary conditions are present. 38 U.S.C. sect. 8127-8128."

Finally, we arrive to the bottom, last category on the VA purchasing priority list—Number 8—Commercial sources and open market. This "open market" area is where Jan Frye testified that the Vets First law applies.

Based on these findings, it's no wonder why VA contracting personnel and the veteran business community are confused. The purchasing priority list is convoluted—how are veteran businesses ahead of some areas, yet below others? It makes no sense. The VA allows this confusion to continue as a means to NOT consider doing business with veterans first.

VA Refuses to Comply with Law

Even after the U.S. Federal Court of Claims and GAO declared that VA should be considering veteran small businesses first, VA stands by its faulty interpretation. VA says in an October 17, 2011 internal memo from Jan Frye that the agency will continue to violate the law, "VA is of the opinion GAO's interpretation is flawed and legally incorrect. . . . Because GAO is part of the Legislative Branch, Executive Branch agencies are not bound by GAO's legal advice. Therefore, VA determined this GAO recommendation . . . shall not be followed . . . The GAO recommendation does not change how VA will acquire goods and services in support of its mission."

VA Refuses to Consider Vets with a Federal Supply Schedule First

Even when veteran business owners have a Federal Supply Schedule contract, they are still not considered first! The VA has stated the "Vets First" program does not apply to awards made using Federal Supply Schedules, although the recent interim FAR rule FAR Case 2011-024 implementing the Small Business Jobs Act of 2010 would allow this evaluation factor.

Service disabled veteran owned small business owners have done their best to comply with all the VA terms to do business with them—the arduous task of verification, in business for 2 years, obtain past performance, apply and be awarded a Federal Supply Schedule contract, etc. Yet, after obtaining all these requirements, their opportunity to do business with the VA is given to others.

VA Transformation Twenty-One Total Technology (T4) Contract—\$12,000,000,000 IT Contract Awarded to Six Veteran Small Businesses and Eight Non-Veteran Businesses with the existence of P.L. 109-461

Prior to solicitation release, during briefings and discussions with VET-Force the TAC (VA Technology Acquisition Center) provided an organizational and mission overview. A key point emphasized during this briefing was that T4 would capture funds, such as the GSA/VA Schedule Industrial Funding Fee (IFF) for the supply fund.

T4 Solicitation Q&A's openly flaunted P.L. 109-461, "Vets First" in at least six of the Q&A responses to industry where TAC emphasized that the SDVOSB and VOSB awards were not set-aside and therefore were not subject to "Limitations of Subcontracting."

T4, as procured, may actually serve to reduce the SDVOSB and VOSB industrial base. In an SDVOSB set-aside, more than 50 percent of the direct labor must be performed by the prime and any combination of SDVOSBs. By not having an SDVOSB set-aside "limitations of Subcontracting" several SDVOSB companies will do quite well, but the key objective of 109-461—to build SDVOSB capabilities and industrial base—will not be met.

With recent GAO and CoFC decisions re-affirming “Vets First” as the VA acquisition priority, it would appear that only six of the awardees (the SDVOSBs) will be eligible for Task Order Awards.

VA Buys Chinese Gloves Instead of Gloves Made in U.S. from a Veteran with FSS

In one egregious example, a veteran invented a medical glove. The VA buys tens of millions of gloves annually. These gloves are manufactured in the United States in a historically underutilized business zone (HUBZone) in Alabama by a company that employs veterans. The gloves are distributed by a verified service disabled veteran with a Federal Supply Schedule. About 32 U.S. jobs are created for every \$1 million in gloves sold. So where do you think the VA spends millions buying gloves to care for veterans? The VA spends our hard earned tax dollars to buy these gloves from a company that makes them in China and sells them to the VA for more money than the American manufactured, veteran distributed gloves.⁴

The VA states that it “continues to strongly support eligible Veteran-owned small businesses who seek to do business with the Federal Government.” Yet this example and many others demonstrate otherwise.

VA Touts Inaccurate Numbers

The VA touts their achievements in awarding 23 percent of contracts to VOSBs and 20 percent to SDVOSBs. This is commendable; however, it is not accurate. The VA is double dipping. They’re counting service disabled veteran owned small businesses as part of the veteran owned small business contracting percentages. The true numbers are that 3 percent of contracts go to VOSBs and 20 percent to SDVOSBs. This includes \$500 million awarded to 1,400 ineligible businesses highlighted in the July 25, 2011 VA Office of Inspector General audit. In addition, considering that there is a law to consider veteran small businesses first 100 percent of the time, the VA’s performance is disappointing and signifies a loss of approximately \$11.8 billion a year to veteran owned small businesses.

VA Gives Small Contracts to Large Businesses

VA fails to first consider qualified veteran small businesses in Simplified Acquisitions. These are purchases valued between \$3,000 and \$150,000. The Small Business Act exclusively reserves these contracts for small businesses. For FY 2011, the VA had more than 213,000 simplified acquisition purchases equating to more than \$3.8 billion.⁵ More than 55 percent of these purchases went to large businesses, most of which hold a Federal Supply Schedule contract. The VA awarded 7.74 percent to SDVOSBs and 4.25 percent to VOSBs of a combined total of \$606 million of the \$3.8 billion of VA simplified acquisition transactions. This equates to \$3.2 billion in simplified acquisition contract awards to non-veteran businesses.

VA Leadership Contradicts Itself

On July 21, 2009, Secretary of Veteran Affairs Eric Shinseki addressed veteran entrepreneurs at the 5th Annual National Veteran Small Business Conference in Las Vegas and stated, “VA will begin putting Veterans first—fully first—in our contracting efforts because we recognize the on-time, on-budget, quality solutions that you offer to meet our contracting needs.”⁶ This statement seems to contradict VA practices. The hypocrisy continues in the VA’s strategic plan for 2010–2014, which states that “As the economy begins to recover, small firms will be the most likely source of new jobs for Veterans. Small firms employ about half of all private sector employees, create 60 to 80 percent of net new jobs annually, and tend to lead the way in new employment when the economy improves. In this vein, VA has a long-standing commitment to contracting with Veteran-Owned Small Businesses (VOSBs).” The VA is not doing what they say they will do! Vets hire vets! The only thing veteran small businesses ask is for first consideration at the VA. Right now, they don’t have it. If they’re not being considered, veterans can’t create jobs for themselves or for another veteran.

Recommendations:

VA and the Small Business Administration (SBA) should develop a comprehensive partnership to assist veterans who are interested in participating in Federal procurement. VA should develop clearer and more comprehensive small business contracting policies⁷:

⁴ VA Basic Ordering Agreement (BOA) V797P2071.

⁵ Simplified acquisition transaction numbers extracted from USASpending.gov on 11/18/2011.

⁶ http://www.va.gov/opa/speeches/2009/09_0721.asp.

⁷ http://www.sba.gov/sites/default/files/contracting_task_force_report_0.pdf.

Recommendation 1: Update or revise existing VA acquisition policies and regulations to comply with P.L. 109–461 and provide clear guidance to VA contracting personnel to increase veteran small business set-asides. The revision must clearly state that veteran small businesses have a contracting preference and priority:

- a. above statutory preference entities from General Federal Statutes under ***FAR Part 8 Required Sources of Supply*** that lists Federal Prison Industries, AbilityOne, and Federal supply schedules;
- b. above statutory preference entities from General Federal Statutes under ***FAR Part 19 Small Business Programs*** that lists 8(a), HUBZone, & WOSB;
- c. above General Federal Procurement Statutes and Acquisition Initiatives such as Strategic Sourcing Initiative;
- d. in all acquisition thresholds;
- e. in all NAICS Codes;
- f. in all market categories such as Federal Supply Schedules and Open Market; or all goods or services procured by the VA;
- g. exclusively within the VA.

Recommendation 2: Issue guidance clarifying practices and strategies to prevent unjustified contract bundling and mitigate any negative effects of justified contract bundling on veteran small businesses.

Recommendation 3: Identify industries where focused efforts on existing qualified veteran small businesses would likely have the most positive effect on increasing small business utilization in prime contracting. Then develop a plan to increase veteran small business participation in those industries where veteran small businesses are non-existent to increase contract awards.

Recommendation 4: Strengthen the skills of the acquisition workforce by revising existing core certification, requiring training on veteran small business contracting, procurement policies and regulations, and creating focused refresher materials for continuous learning to increase the number of contract awards to veteran small businesses in all industries.

Recommendation 5: Increase the number of simplified acquisition procedure (SAP) transactions awarded to SDVOSBs at 16,000 (7.74 percent) and VOSBs at 9,000 (4.25 percent) of VA total awards of 213,000 to 60 percent of SAP transactions within 1 year. This can be accomplished due to the fact that more than 100,000 transactions (more than 50 percent) were awarded to non-veteran businesses for commodities. An increase in simplified acquisition transactions to the veteran small business community has a direct effect on increasing veteran employment.

Recommendation 6: Create a separate budget line item designating that the funds are to be used for only the Center for Veterans Enterprise. The Center for Veterans Enterprise will assist veterans in obtaining verification of their small business in accordance with 38 U.S.C. 74.

Summary

The veteran small business community has the best overall understanding and is in the best position to fully support VA's mission with an in-depth procurement knowledge, experience, and understanding for mission success. The veteran small business community has a vested interest in VA's mission success and the health care, job creation, and homelessness of their fellow veterans that goes beyond profits. There is no finer group of small business owners and their families who have invested through their individual sacrifices to ensure the American Nation persevered with each new and challenging millennium.

