



Aldevra GAO Decision -- Moot but Not Mute

By Rodney Marshall, Aldevra President & CEO

My name is Rodney Marshall, owner of Aldevra. Many people have followed our case over the last several months. It started by protesting the Department of Veterans Affairs' (VA) solicitations to use the federal supply schedule (FSS) without first considering service disabled veteran owned small businesses (SDVOSBs). The Government Accountability Office (GAO) sustained our protest (meaning they agreed the VA should consider SDVOSBs before FSS) and recommended that the VA cancel the solicitations and re-solicit as SDVOSB set aside if there were two or more qualified SDVOSBs. The VA initially refused to comply with GAO's recommendation and, most recently, cancelled the solicitations so it becomes a moot issue.

The argument for these solicitations may be moot, but the Veterans First cause is far from mute! This is not the first time the VA has cancelled solicitations which would require them to consider SDVOSBs first. It's just the one that happened to get a lot of folks' attention. VA acquisition leadership continues to insist SDVOSBs should be placed in the last category for purchasing priority, but already we are seeing progress.

- Congress now knows that there are some issues with the VA Purchasing Priority List and hopefully they'll continue to articulate to the VA how they would like the law they passed to be interpreted – Vets First!
- The courts continue to find that SDVOSBs should be considered first.
- There are more SDVOSB opportunities than ever on the VA Business Opportunities website.
- More contracting officers are conducting market research to determine whether or not SDVOSBs can meet their needs. **(Marshall, continued page 4)**



Randy Marshall

On the Hill, page 3

Editorial, Tim Foreman, page 4

Vets First "Movement," page 5

SBA Veterans Task Force Final Report, page 12

GAO issues another Aldevra-type Decision, details pages 9, 14

“Adversity is the first path to truth”

Lord Byron, British Poet

**THE WHITE HOUSE
Office of the Press Secretary
November 21, 2011**

Fact Sheet: Returning Heroes and Wounded Warrior Tax Credits

In August, President Obama called on Congress to enact tax credits that will help get veterans back to work. “The "Returning Heroes Tax Credit" provides businesses that hire unemployed veterans with a maximum credit of \$5,600 per veteran, and the "Wounded Warriors Tax Credit" offers businesses that hire veterans with service-connected disabilities with a maximum credit of \$9,600 per veteran. These tax credits were included in the American Jobs Act and were signed into law by President Obama on November 21, 2011.

Returning Heroes and Wounded Warrior Tax Credits

Under the Recovery Act, employers who hired certain unemployed veterans were eligible for a tax credit of up to 40 percent of the first \$6,000 of wages, for a maximum credit of \$2,400. This credit expired at the end of 2010.

On November 21, 2011, the President signed into law two new tax credits:

The "Returning Heroes Tax Credit" is a new hiring tax credit that will provide an incentive for businesses to hire unemployed veterans.

Short-term unemployed: A new credit of 40 percent of the first \$6,000 of wages (up to \$2,400) for employers who hire veterans who have been unemployed at least 4 weeks.

Long-term unemployed: A new credit of 40 percent of the first \$14,000 of wages (up to \$5,600) for employers who hire veterans who have been unemployed longer than 6 months.

The “Wounded Warrior Tax Credit” will double the existing tax credit for long-term unemployed veterans with service-connected disabilities.

Maintain the existing Work Opportunity Tax Credit for veterans with service-connected disabilities (currently the maximum is \$4,800).

A new credit of 40 percent of the first \$24,000 of wages (up to \$9,600) for firms that hire veterans with service-connected disabilities who have been unemployed longer than 6 months.

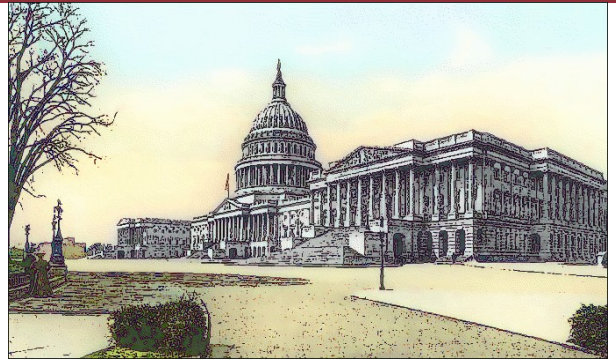
The President directed the Department of Labor to launch this initiative in his August 5, 2011 speech at the Navy Yard.

My Next Move for Veterans

The Department of Labor has launched "My Next Move for Veterans", a new online resource that allows veterans to enter their military occupation code and discover civilian occupations for which they are well qualified. The site also includes information about salaries, apprenticeships, and other related education and training programs.

(White House. Cont. page 7)

ON THE HILL



Legislative Update

S. 1154: Honoring Promises to Service-Disabled Veterans Act of 2011

Requires transparency for Executive departments in meeting the Government-wide goals for contracting with small business concerns owned and controlled by SDVOSB.

Introduced: June 7, 2011 by Senator Max Baucus (D-MT)

Co-sponsors: Senator David Vitter (R-LA)

Referred: Senate Committee on Small Business and Entrepreneurship

S. 1184: To amend title 38, United States Code

To revise the enforcement penalties for SDVOSB misrepresentation

Introduced: June 13, 2011 by Senator Maria Cantwell (D-WA)

Co-sponsors: None

Referred: Senate Committee on Veterans Affairs

Introduced in House of Representatives: April 15, 2011 by Mr. Marlin Stutzman (R-IN)

Co-sponsors: None

Activity: May 23, 2011: passed in the House by roll call vote

Referred: House Veterans Affairs Committee

HR 240: To amend title 38, United States Code

Requires (current law authorizes) a Department of Veterans Affairs (VA) contracting officer to award contracts to small businesses **owned and controlled by veterans using other than competitive procedures** for contracts above the simplified acquisition threshold.

Introduced: Jan 7, 2011 by Mr. Robert Filner (D-CA)

Co-sponsors: André Carson [D-IN7], Jim Gerlach [R-PA6]

Referred: House Veterans Affairs Committee, hearings held by Subcommittee on Economic Opportunity

Amends the Small Business Act to permit agencies to count certain contracts toward contracting goals.

Introduced: May 25, 2011 by Senator Mike Enzi, (R-WY)

Co-sponsors: Senator Robert Casey (D-PA)

Referred: Senate Committee on Small Business and Entrepreneurship

S. 633: Small Business Contracting and Fraud Prevention Act of 2011

Requires that SDVOSB/VOSB are verified by all federal agencies...ends self-certification...

Introduced: March 17, 2011 by Senator Olympia Snowe (R-ME)

Co-sponsors: Ayotte (R-NH), Brown (R-MA) Cantwell (D-WA), Hagan (R-NC), Hoeven (R-ND), Landrieu (D-LA), Manchin (D-WA), McCaskill (D-MO), Toomey (R-PA).

Stalled in House Small Business Committee.~~



Misinterpretation or Subterfuge?

By Tim Foreman

This article primarily deals with my impressions of the Department of Veterans Affairs's (VA) implementation contracting policy regarding SEC. 502 and SEC. 503 of Public Law 109-461. I continue to hold in high esteem the vast majority (99 percent plus) of VA employees, who are working hard and honorably for the good of this Country's veteran community.

How could the VA misinterpret the plain language of Public Law 109-461, SEC. 502 & 503, which I will refer to as "Vets First" contracting provisions? This statute clearly establishes service-disabled veteran-owned small business as having the first priority then followed by non-service-disabled veteran-owned small business as the second priority. More importantly SEC. 503(a) adds, in part, the following new section:

"§8128. Small business concerns owned and controlled by veterans: contracting priority

(a) CONTRACTING PRIORITY.—“In procuring goods and services pursuant to a contracting preference *under this title or any other provision of law*, the Secretary *shall* give priority to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference.”

(Foreman, continued page 11)



(Marshall, from page 1)

- Tom Leney, VA executive director for small and veteran business programs, now realizes he may have a problem just as big as verification. Many SDVOSBs are working hard to get verified only to discover there are no opportunities.
- The veteran service organizations (VSOs) have come together, with one exception, to advocate and insist that Vets should come first!
- SDVOSBs around the country are inundating VA and GAO with protests that insist Vets should be considered first.
- SDVOSB Network in CA is taking the VA to court over the issue.
- The American public is on our side, especially as we demonstrate how Vets First can actually save taxpayer dollars.
- SDVOSB and mainstream media are helping to educate our communities about the issue.
- Many SDVOSBs have been empowered to contact their members of Congress, set up veteran business round tables, and even rally in support of Vets First.

We are very proud and excited for these accomplishments! This is not about one company. This is about everyone coming together collectively to insist SDVOSBs be considered FIRST at the VA. Our veteran families' livelihood depends on it and our brothers and sisters coming back from Iraq and Afghanistan need to know there are opportunities for them to work, to contribute, to start their own business or to work for a fellow veteran. The momentum must continue – don't let Vets First become moot. It's time for the VA to do what's right.~~

The “Veterans First” Movement

(SDVOSB News Services, November 16, 2011— Washington, DC) – Veteran Small Business Owners saw an unprecedented amount of bureaucratic, legislative, judicial and advocacy activity in the past eight months. Though most of the dust was stirred by SDVOSB, the events have huge implications for the entire Veteran Owned Small Business Community in ways that are difficult to measure.

“The Veterans First Movement” (V-1), entered the SDVOSB/VOSB scene in late October, when the Government Accountability Office (GAO) issued unfavorable recommendations to the VA in response to a protest filed by an SDVOSB to a VA solicitation that violated PL 109-461. “Veterans First” came together when VA issued an agency-wide memorandum to ignore the GAO ruling.

Aldevra, an SDVOSB out of Portage, MI, appealed a VA solicitation that conflicted with VA’s *Vets First* policy. *Vets First* mandates that the VA **shall** give preference to SDVOSBs for contract opportunities **regardless of any subsequent legislative statute**.

Aldevra protested the VA solicitation on the basis that no market research had been done to determine if there were qualified SDVOSBs capable of doing the work. No research had been done by the VA to determine if the contract should be set-aside for SDVOSB. Two or more SDVOSB were capable of completing the contract, which was the procurement of a kitchen griddle, a meat slicer and other appliances.

GAO ruled in favor of Aldevra and recommended that the contract but re-solicited as an SDVOSB set-aside award. Three days later, the VA’s Deputy Assistant Secretary of Acquisition and Logistics issued a memo to all VA procurement staff that the GAO decision was not to be followed.

Supported by the American Legion’s Small Business Task Force, V-1 began to take shape. Chet McLendon, a member of the Task Force, explains: “The VA guidance issued by Deputy Assistant Secretary Jan Frye contradicts the VA’s ‘pro-veteran’

policy. The VA blatantly disregards PL 109-461 and has since the beginning [of PL 109-461]. SDVOSBs are not getting the contracting preference they’ve earned. The old excuse that veteran small business will cost the VA more money is unfounded and a direct result of lazy acquisition. V-1 is a pushback by veterans, VSOs, and politicians. We are thrilled to see the movement grow.”

The V-1 Movement has drawn national attention. The VOSB community, veteran service organizations, small business associations and national media are engaged. “We’re finally getting some attention,” Ralph Baxter, an SDVOSB from Frederick, MD said. “We’re building partnerships with VSOs, politicians and national media about *Vets First*.”

Priorities of Use of Government Supply Sources

The United States Court of Federal Claims has long held that the Specific Federal Statute 38 USC § 8127 & 8128 supercedes all General Federal Statutes. Public Law 109-461 places SDVOSBs and VOSBs

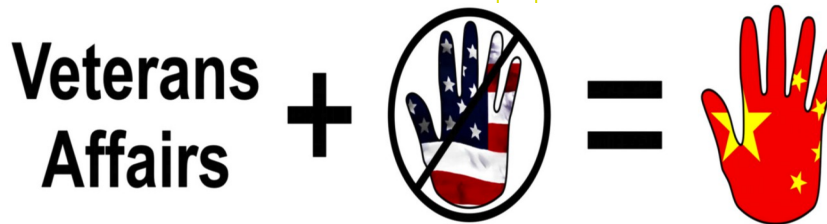
first and second respectively, for federal contract opportunities... This places SDVOSBs and VOSBs above Federal Prison Industries, Ability One, NISH, Federal Supply Schedules, 8(a), HUBZone, WOSB, Blanket Purchase Agreement (BPA), and Basic Ordering Agreement (BOA).

V-1 made its inaugural statement in Washington, DC on Veterans Day, 2011. SDVOSBs traveled from Los Angeles, Michigan, Pennsylvania and joined SDVOSBs in Washington, DC for a White House Rally, a show of force at VA Headquarters and the U.S. Capitol. The “Veterans First Movement” appears to have staying power and momentum to make positive change for veterans within the federal procurement arena.

The Aldevra vs. Department of Veterans Affairs case will, according to VA spokesman Josh Taylor, “ultimately be decided by the courts.”~~



Veterans Affairs Snubs American Made Gloves and Veteran Small Business for Chinese Made Gloves



The Veterans Administration openly refuses to abide by law and give veteran small businesses first consideration when procuring medical supplies. In addition, the Veteran's Administration pays more for exam gloves made in China than high quality US manufactured nitrile exam gloves. These "Made in America" gloves are also compliant with the 'Buy American Act'(41 U.S.C. §§ 10a – 10d).

VA senior acquisition executives, many who are veterans themselves, deny veteran small business owners their earned contracting privilege and violate Congressional intent supported by a U.S. Court of Federal Claims ruling, Federal Statute, and a recent General Accountability Office (GAO) decision. Some of these senior acquisition professionals comment without proof that if they were to give Veterans their earned privileges it would cost the government more money. Eric Shinseki, Secretary of the VA, stated, "*VA will begin putting Veterans first—**fully first**—in our contracting efforts because we recognize the **on-time, on-budget, quality solutions** that meet our contracting needs.*"

The nitrile exam gloves were created by an American WWI veteran small business owner, are currently manufactured by the same company with veteran employees in the United States, and distributed by a Service Disabled Veteran Owned Small Business (SDVOSB).

Why does the VA buy foreign manufactured gloves when the federal government is investigating ways to expand American manufacturing and keep existing manufacturing jobs in America? Why would the VA buy foreign manufactured gloves when there is a product sold by American veterans and disabled veterans that are equal to or better in quality?

Buying American made nitrile exam gloves from veterans and disabled veterans makes sense, it directly converges with the VA's mission, supports the US economy, and it is the *LAW* (Public Law 109-461; 38 USC sec. 8127 & 8128).

Our Pain, China's Gain

(White House, from page 2)

Creating a Veterans Job Bank

The Administration launched the "Veterans Job Bank", at National Resource Directory, a tool to help veterans find job postings from companies looking to hire them. It searches over one million job postings and is growing. In a few easy steps, companies can make sure the job postings on their own websites are part of this "Veterans Job Bank". These resources can be accessed at www.whitehouse.gov/vets

Joining Forces

In August, the President challenged the private sector to hire or train 100,000 veterans or military spouses by the end of 2013. The President also asked First Lady Michelle Obama and Dr. Jill Biden to lead these efforts with the private sector as part of their Joining Forces initiative. In just over 100 days, more than 1,500 private sector companies have stepped up and employed more than 18,000 veterans and spouses. In addition, these private sector companies have committed to hiring 135,000 veterans and spouses by the end of 2013, exceeding the President's challenge. Also included in these private sector employment efforts is a dedicated commitment to hire 5,000 wounded warriors.

Challenging Community Health Centers to Hire 8,000 Veterans in Three Years

The Obama Administration challenged Community Health Centers to hire 8,000 veterans – approximately one veteran per health center site – over the next three years. The health reform law provides funding for community health centers to serve more Americans and hire more workers. The National Association of Community Health Centers will also contribute to this effort and joined the Administration in announcing this Community Health Center Veterans Hiring Challenge.

Helping Veterans Become Physician Assistants

To fast-track military medics into jobs in community health centers and other parts of the health care system, the Health Resources and Services Administration (HRSA) pledged to open up career-paths beyond nursing and expand opportunities for veterans to become physician assistants. Through this initiative, HRSA will



begin to give priority in physician assistant grant awards to universities and colleges that help train veterans for careers as physician assistants. Together, these initiatives and the tax credits will lower veteran unemployment through increased hiring, improve resources for veterans to translate their military skills for the civilian workforce, and provide veterans with new tools to aid their search for jobs.~~

In an about face, VA cancels protested solicitations

Washington Business Journal

by Jill R. Aitoro, Senior Staff Reporter

In a bit of an about face, the Department of Veterans Affairs has decided to comply with recommendations made by the Government Accountability Office and cancel two solicitations that the watchdog agency decided should be set aside for veteran-owned small businesses.

In a Dec. 8 letter to the GAO obtained by *Washington Business Journal*, the VA's deputy assistant general counsel, Dennis Foley, said the two solicitations in question were canceled but the agency had yet to decide whether a new request for proposals would be issued. ... (read more)

(<http://tinyurl.com/cdjagtd>)

Editor's Note

When *VetLikeMe* launched in December 2009, GAO investigations of SDVOSB fraud, the VA and government incompetence began to cook up. Congress started noticing, especially the self-certification sham and widespread fraud across the federal procurement arena. SDVOSB starting getting traction toward increased opportunities.

SDVOSB lacked a common voice to collectively form a 'pressure group.' With the help of social media and the ability for grassroots organizations to collectively 'rage against the machine,' we are raging now—literally and politically.

The first issue of *VLM* was a four-pager. Key events within our community have grown this publication by four in two years. The mailing list to date is well over six thousand.

I apologize for the 'busy' appearance of *VLM*. I'm pleased with our progress and hope you are too. Let our inertia keep us going until there's no need to make demands of our government to do the right thing...honor promises made for our sacrifice.

Hardy R. Stone, Jr.



Hank Wilfong—

Are We Impotent or What?

Some of the comments we got recently cause us to ask that question. We lay out the "teeth" we have to cause things to happen. But, then, we get back a bunch of responses asking about "how long has this been going on", and things about "what the failure to comply might mean", "can we really do anything about it", "we can't afford to fight it, and trifling stuff like that.

So, we begin to wonder—are we impotent or what...

We give you the solutions to what your problems have been—you cop out with stuff that will make our struggle that much longer, if not undoable. We know it can be done. We are beginning to wonder if it will be achieved by the 'WE' as currently constituted, though.

The governmental entities promise us all kinds of things to get our support. But, then, once they get elected, they seem oblivious to what we say we need, and that they promised. It seems to matter little, though, because they ask us for our support, again—and we give it again. Are they to blame, or are we. That's a slam-dunk. WE are guilty as charged.

So, what's the problem? Why are we so easily led to repeat our failures to discern?

Are We Impotent or What?

(Wilfong, continued page 13)



Frauds

Results from an independent audit results found the VA has awarded numerous sole-source and set-aside contracts to business that do not meet program and contract requirements. “Pass-through” schemes where a SDVOSB is awarded a contract and passed it to an ineligible company for a fee or a percentage of the award were also found. The VA OIG is currently pursuing 91 investigations for similar actions.

Fraud-related links:

Self-certification rewards bogus company that claimed SDVOSB status as three-tour disabled Vietnam veteran:

<http://tinyurl.com/ckchxro>

Another blatant case of falsification without penalty:

<http://tinyurl.com/cvza5hb>

Pass-through contract:

<http://tinyurl.com/co3wvxa>

Subsequent to the CVE cracking down and developing greater proof of SDVOSB status, many legitimate SDVOSB are accused of falsification. The initial CVE program to weed out fraud has been costly to SDVOSB that are legitimate.

<http://tinyurl.com/buhdmqp>

SBA Defrauded, Investigates, Gets Conviction:

<http://tinyurl.com/ckp7x6a>

YouTube video on dwindling federal contracts:

<http://tinyurl.com/cgr2zm7>

Short Takes

VA Sued Again Over Vets First

<http://tinyurl.com/7cy3r2s>

US Court of Federal Claims hears VA appeal of Angelica decision:

<http://tinyurl.com/brbd334>

Kindomware Technologies’ GAO victory marks two major VA Procurement policy losses in 49 days:

<http://tinyurl.com/6nogd6g>

VA Changes Stance on Key Issue on Veterans’ Set-Aside Contracts:

<http://tinyurl.com/7tpd4py>

VA Inspector General finds that VA structured \$133 million security contract to favor incumbent.

<http://tinyurl.com/74erpd>

Op-Ed for *OhMyGov!*

Raul Espinosa writes in detail about how “Small Business Faces Uphill Fight in Winning Federal Business.” Espinosa, founder of the *Fairness in Procurement Alliance* shows how and why the federal government is eliminating SDVOSB (and all small business) exemptions in favor of a “reverse auction” contracting vehicle. He details why we lose the fight to agencies, how to file a GAO protest and what to do when GAO protests are ignored.

<http://tinyurl.com/77jmumt>

(Foreman, from page 5)

This in my mind, waives all other provision of law and regulation regarding the VA contracting priorities and clearly establishes Vets First for VA contracting within the language of Public Law 109-461. I believe my memorandum of request to the General Counsel for a legal interpretation and my refusal to agree to expand "Ability One" lists of products or services that would trump "Vets First" led to my early departure from the Department of Veterans Affairs.

My personal belief is that the plain language (spirit and intent) of Congress shall be fully implemented and not just what an "executive department employee" wants to implement. I hope that all Executive Branch employees responsible for implementing the law into regulations have the moral strength to faithfully implement the spirit and intent of that law. The case in point unfortunately undermines the credibility of the Department and the Secretary.

It is interesting to note that the Oath for Federal employees and Military personnel is generally given as follows:

I, [name], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

The following selected Articles and Sections of the Constitution are offered as supporting my argument for the appropriate implementation of this Country's laws.

Article I. Section 1. **All legislative Powers** herein granted shall **be vested in Congress of the United States**, which shall consist of a Senate and House of Representatives.

Article II. Section 4. He (the President) **shall take Care that the Laws be faithfully executed**,

Article III. Section 2. The judicial Power shall extend to **all Cases, in law and Equity**, arising under this Constitution, the Law of the United States,...

Thank you Thomas Jefferson!

The **bold** and *italicized* characters are used for emphasis only.

Even though I have limited legal training, I think the key Section of the Constitution states that the Executive Branch of Government shall faithfully execute and implement regulations that carry out the language and spirit of the law. Moreover, the courts have jurisdiction for interpreting if the Executive Branch of the Government appropriately and faithfully executed (implemented) the law into regulation.

In my mind the VA's implementation of Title 38 U.S.C. §§8127 and 8128 does not follow the Constitution and will be reversed at some later date.

The VA's rigid use of the VA and General Services Agency (GSA) Federal Supply Schedules (FSS) does provide for a significant amount of income referred to as the "Supply Fund" monies. The Supply Fund income may be part of the reason VA has "misinterpreted" Public Law 109-461. Ease of contracting through "Strategic Sourcing" through the FSS may provide some contracting efficiencies. The VA's supply fund has and continues to provide funds that assist the many functions of the VA that support all veterans. This includes the Office of Small and Disadvantaged Business, The Center for Veterans Enterprise, as well as medical equipment and other supplies and service to include business education activities for Veterans. The latter happened only after I asked for a General Counsel Opinion which turned out favorable.

(Foreman, cont. page 13)

CVE Certification Update:

Courtesy, Center for Veterans Enterprise

Verification Data Over the Life of the Program

Denials (renewals and new applications): 3,043

Approvals: 8,571

Total new applications and renewal applications processed: 22,813*

Purged SDVOSBs: Unknown. All companies removed from VIP are due to either denial or failure to respond/submit required documentation.

Total SDVOSBs in database: 5,959 SDVOSB; total VOSB (includes SDVOSB): 8,571

Estimated backlog: 0 (Backlog is defined as businesses in VIP that are not verified.)

Est. elimination of backlog time period: N/A. Backlog eliminated September 4, 2011.

*Note: not every application submitted receives an approval or denial decision. Some are duplicates, some do not proceed due to inability to determine the Veteran or service-connected status, many do not submit complete documentation to allow the application to move forward.

Vets First Media Coverage

The furor over PL 109-461 (Vets First) received wide-spread national media attention. Most newsworthy was the VA's refusal to abide by the GAO's recommendations in the Aldevra case. Aldevra, an SDVOSB, protested the solicitation and VA denied the protest. Aldevra appealed to GAO, who found in favor of the SDVOSB. Though the Aldevra issue may be an early sign of the future of the Vets First mandate, several other cases in the media include:

<http://tinyurl.com/7jsfbfy>

<http://www.gao.gov/new.items/d12205t.pdf>

<https://dap.dau.mil/aap/pages/qdetails.aspx?cgiSubjectAreaID=22&cgiQuestionID=26921>

<http://www.bellinghamherald.com/2011/10/21/2238169/vets-say-the-va-fails-to-give.html#ixzz1bVbp2mCM>

http://www.washingtonpost.com/business/economy/veteran-owned-suppliers-may-gain-3-billion-from-va-griddle-fight/2011/11/09/gIQAyfG9IN_story_1.html

<http://vetlawyers.com/vetblog/index.php/2011/11/disabled-vet-owned-business-squares-off-with-va/>

SBA Veteran Owned Business Task Force Report to the President

The recently released Task Force Report on Veteran Owned Business is an ultra-bureaucratic disappointment. Many feared that's what would become of the ballyhooed project...After eighteen months of deliberations and discussion by powerful civil servants, only two, count 'em, two recommendations apply to SDVOSB:

Recommendation #9: Find and reduce barriers that impede service-disabled veteran-owned small businesses from contracting with the U S Government.

Recommendation #11: Coordinate and centralize information on veteran and service-disabled veteran-owned small business contracting opportunities across the Federal Government.

This is the best they could do? Our tax dollars at work? DoD, GSA, OMB, DOL, VA and the token veteran-service organizations came up with nothing more than this? Sheesh...it's my fault for being led down the primrose path to unadulterated bureaucratic failure.~~



VA's 'VetsFirst' Policy Under Attack

Violations of Law Questioned

(Washington, DC -- SDVOSB News Services, November 30, 2011) — The U.S. House Veterans Affairs Committee Subcommittee on Oversight and Investigations (Bill Johnson, (R-OH) Chair), heard testimony from several government officials regarding Service Disabled Veteran Owned Small Business (SDVOSB) and procurement priority at a joint hearing today. Lawmakers were troubled by the VA's implementation of Public Law 109-461 and its adherence to the 2006 federal statute.

The Hearing was streaming live on the internet (<http://tinyurl.com/7nzzhaj>) as Mr. Tom Leney and VA counsel Mr. John Thompson responded to questions about the VetsFirst policy. Thompson appeared flustered as he attempted to defend the VA's interpretation of PL 109-461 and SDVOSB priority in procurements (<http://tinyurl.com/7nzzhaj> at 56:25).

“Could you please tell me, tell this Committee how the VA considers itself exempt from the mandates set out in Public Law 109-461?...The government cannot be sued for not meeting goals. The federal government can be sued for not adhering to the law. Why is there such reluctance by the VA to follow the law as interpreted by the GAO?,” Chairman Johnson asked the VA counsel. “I disagree, GAO disagrees...is there going to be a review? Because you've been told by the GAO that your interpretation is wrong.” GAO issued recommendations to the VA on its VetsFirst procurement policies in late October of this year after Aldevra, an SDVOSB, appealed a VA decision to ignore their protest on a solicitation. Aldevra appealed to GAO, which sustained the protest, citing PL 109-461. Jan Frye, VA Deputy Associate Director for Logistics and Procurement Policy, issued instructions to VA Contracting Officers to ignore the GAO's recommendations and continue agency procurement as it has in the past.

Also testifying at the hearing: Ralph O. White, Managing Associate General Counsel for Procurement Law, Office of General Counsel, U.S. Government Accountability Office, who laid out PL 106-50 in plain terms and indicated that it is rare that GAO's recommendations are not followed. Referring to the debate over 109-461 and its directive that VA „shall" put SDVOSB first for Department procurements, Chairman Johnson asked Mr. White a critical question about GAO's recommendations to VA: (@ 1:33) “What is your interpretation of the word ‘shall?’” Mr. White drew laughter from the galleries when he responded: “It certainly isn't may.”

The VA must respond to GAO's recommendations and its rationale for rejecting their recommendations by December 15.

Testifying witnesses included: Thomas J. Leney, Executive Director, Small and Veteran Business Programs, Office of Small and Disadvantaged Business Utilization, U.S. Department of Veterans Affairs; John H. "Jack" Thompson, Deputy General Counsel, Office of General Counsel, U.S. Department of Veterans Affairs; 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.



For two years, *VLM* has featured unvarnished national news and editorial opinion concerning the SDVOSB community. This publication will always be free.

We've heard from Congress and federal agencies. We hope *VLM* keeps the SDVOSB community informed so that decision makers are pressured to provide increased federal contracting opportunities for those of us injured while serving our country.

We've been promised these opportunities.

Advocacy begins with agitation



(Foreman, from page 10)

The concern that VA contracting has is that full implementation of SEC. 502 and SEC. 503 of Public Law 109-461 will slow VA contracting and result in higher costs of supplies and services necessary to support of the VA mission. Additionally, complete implementation of the law may result in the loss of critical "Supply Fund" monies. The veteran business community would improve and expand in both capacity and capabilities.

Moreover, VA contracting professionals can rise to the challenge and continue to support VA in an effective and efficient manner with additional Congressional budget support if necessary.

The bottom line is "*the law is the law.*"~~

Tim Foreman was the former Executive Director of the Office of Small and Disadvantaged Business for the US Department of Veterans Affairs.

A true advocate for Veteran owned small business, Foreman openly questioned the VA's 'Vets First' policy, noting that the agency was breaking the law (109-461).

As the agency OSDBU, his responsibility compelled him to take more vigorous measures to advocate for veterans. He wrote a formal letter to William Gunn, VA Counsel, questioning the agency's actions. Several days later he was summarily placed on administrative leave and removed as the veterans small business first-line advocate at the VA. ~~

Wilfong, from page 8

Why do we support these renegers again and again? OK, maybe we just have that "weakness". But, then, why do we complain about them not doing what we know they are not gonna do, in the first place?

So, we begin to wonder-are we impotent or what...

We've laid out the issue at the federal level. Compliance is the issue. They fail to enforce the laws Congress has enacted over the years. We let them do it. The Congress lets them do it. We have a National Election coming up next year. We wonder if this will be "the time", that we hold them accountable.

On the local level, we've got some serious issues as in our November elections. We've got much the same situation here. We get the "failed promises". We get the "We need you" plea. And, the "Just a little bit longer" line. Is our power to hold them accountable really that bad?

So, we begin to wonder-

Are we Impotent or What?

Aldevra, The Case That Keeps on Giving

By Devon Hewitt

'Tis the season and *Aldevra* is the case that keeps on giving. Last we heard (October 11), GAO decided that the VA should have set aside one solicitation and done market research to determine whether there was a reasonable expectation that two or more SDVOSBs/VOSBs would submit a bid on the VA's kitchen equipment requirement set forth in another solicitation before issuing soliciting task orders for same off of a non-mandatory FSS Schedule. In a surprising move, the VA thereafter informed GAO that it would not follow its "recommendations." (Because of separation of powers issues, the GAO only issues recommendations and not rulings that must be followed like court rulings). The VA did not provide any reason why it would not follow GAO's decision. The VA didn't do much better in a hearing conducted by two House subcommittees on November 30. During the hearing, VA representatives were repeatedly questioned regarding the reasoning behind its decision to ignore GAO's recommendation. The only real response was given by Tom Leney and he explained that following the law would make acquisitions far more expensive for the VA. The VA apparently has reconsidered the wisdom of this approach. Last week, the Service Disabled Veteran Owned Small Business Network, Inc, a nonprofit based in northern California, filed a lawsuit in the United States District Court for the Northern District of California challenging the VA's decision to procure supplies from FSS contracts rather than conduct the market research demanded by the Veterans First Contracting Program. In what appears to be a response to the interrogation it received before Congress and this case, on December 8, the VA sent a letter to the GAO informing it that the VA had decided to cancel the solicitations challenged successfully in the *Aldevra* protest decision. Period. Nothing else.

So what now? While the VA canceled the solicitations issued to FSS contract holders, the requirement is not back on the street. A victory can be declared if and when the VA does the required market research under the Vets First Contracting Program and, hopefully, reissues the solicitations as a SDVOSB/VOSB set-asides. Until then, one presumes that the VA stands by the position it took before GAO and Congress.

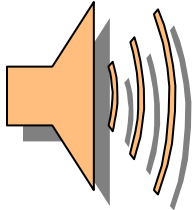
I think this is the argument that Tim Power, the attorney for the SDVOSB Network Inc. case, will take in the case. While the VA may argue that the lawsuit is "moot" because the VA has canceled the solicitations, but there is an exception to this doctrine. (Courts can only rule on cases or controversies in fact and won't issue advisory opinion based on what could happen; so a case is moot if, in the case before the judge, the issue in question no longer exists). If an issue is moot in a particular case but will likely recur again, a court may go ahead and render a decision. But its not a black and white doctrine, so nothing is guaranteed.

One of my clients has a mandatory FSS contract and is a VOSB. The VA is not ordering off the FSS contract and, instead, is going to the open market for the same items, buying the items from large businesses, at a higher cost than that for which the items are offered on the VOSB FSS contract. There isn't any position asserted by anyone or any entity that would justify this result. And consider this: on November 2, 2011 an interim rule was issued modifying FAR Part 8, which contains the regulations governing GSA Schedule/FSS/MAS buys. As you all may know, FAR Part 19 did not apply to FAR Part 8 (but the Vets First rules do according to *Aldevra*). The November rule modified FAR Part 8 to remove the FAR Part 19 exemption. Under this rule, which was effective on November 2, an agency can now (1) set aside part or parts of a multiple-award contract for small business concerns or subcategories thereof; (2) set aside orders or BPAs placed against multiple-award contracts for small business concerns or sub category thereof; and (3) reserve one or more contract awards for small businesses or sub category thereof under full and open multiple-award procurements. However, the new regulation says the agency "may, at their discretion" set aside a requirement; an agency is not required to set aside a requirement for small business if the "rule of two" is satisfied as required by FAR Part 19. If you combine *Aldevra* with the new rule, doesn't that mean that under the Veterans First Program that VA purchases off the schedule should be set aside for SDVOSBs/VOSBs? What if you have a mandatory FSS schedule? As the rabbit said in Alice in Wonderland, the case just gets "curiouser and curiouser."~~



Other Voices

VLM receives emails and comments from members of the national SDVOSB community that provide perspective and a sense of political urgency for our community. Comments, criticism and suggestions are encouraged. **Identifying information is redacted.**



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"**The VIP Program** is not for the initial startups. Companies have to have been a federal contractor for a couple of years. I am a graduate of that program and thus have first-hand experience with it. I chose to attend because we were in a rapid growth phase and I wanted to make sure we were not missing anything as we re-postured to accommodate that - think about this - three days of FREE advice from experts (the legal advice alone was invaluable). I recommend anyone who meets the qualifications to contact the Chamber if you have any questions - Barbara Ashe at the Chamber can answer your questions and help you decide if this is a program that you will gain from. And the contacts you'll get while attending are worth the time. The briefings and subjects are presented by experts in their fields and all of the briefers provide support to federal contractors. The program is all about making sure you've postured your business properly in the market, ensuring you've covered all your bases (for example my company has employees in warzones and there's a whole lot of legalities we have to deal with for that), and also you make connections with large federal contractors (see who the sponsors of the VIP Program are - check the link), as well as some of the top people from the government side."

<http://www.montgomerycountychamber.com/foundation/veteran-institute-procurement>"

"Things started changing when Aldevra moved forward and made first contact. Now it's time for reinforcements to step out and pile on. We've all got a dog in this fight."

"It's best to pick your battles carefully, but we can't leave a gutsy company like Aldevra twisting in the wind. It will take some time for this issue to grind through the legal system."

"If one upheld protest started this process, why not file more to keep it going? To bend steel, apply heat and pressure. It works the same in our world, too."

If one upheld protest started this process, why not file more to keep it going? To bend steel, apply heat and pressure.

"Have not gone to the GAO level myself, but on the regional level I have been told "the VA selection committee and I did not want to consider veteran work," or "Veterans are too dark". Maybe this is not a GAO matter, but an Americans with Disabilities Act issue. There is a clear prejudice in some VISIN's against SDV's both in purchasing and hiring. I was also told that they would never buy from me because they prefer to use federal prison industries. So if you earn yourself a orange jump suite or stripes they may look past the fact you are a veteran and be more willing to work with you. The situation is so bad it makes me ill to walk in the building at the local VA." _____

"The VA's position on FSS set asides is logical and predictable. No government agency will allow its autonomy to be challenged or its administrative burden to be increased without a fight. FSS purchases are fast and simple; finding qualified VOSBs takes extra time and effort. GSA didn't take a position on this issue, perhaps concerned it might trigger a concerted effort to kill the FAR FSS small business set aside exemption altogether. That would result in small business gaining \$4 billion or more in FSS sales annually, but only after winning a knock-down, drag-out brawl with big business interests. What's the Latin phrase for "Always Hopeful"?" _____

"Just got a rejection letter telling me that VA had decided I am not in charge of my own company. Is there no appeal process? I appreciate the advice, sympathy, and assistance. Now that I have had time to reflect on this experience I realize that it was MY job to read over the regulations, read between the lines, assume nothing, and spoon feed everything back to the VA contractors who were doing the analysis. I should have never trusted that the process would be direct and understandable. The OSDDBU - Tom Leney - was helpful once I got through to him. The volume of work on this process was more than any government agency could handle well. It is also clear that since I started under the first of the five or six undocumented processes for Verification under the "new" program that I was at a disadvantage. I have decided to back up; add a bunch of information for the sake of the auditors to explain step-by-step what an LLC is, how consulting works, and how a preponderance of the evidence will demonstrate that I have absolute unfettered control of my company."



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