

New Verification Requirements For VFCP

Law360, New York (January 10, 2011) -- Thousands of veteran-owned small business concerns (VOSBCs) received letters from the U.S. Department of Veterans Affairs in December 2010 informing the businesses that they must submit numerous documents within 90 days of receipt of the letter — including detailed résumés of all key personnel, two years of tax filings, payroll accounting records, management and operating agreements, and detailed information on the entities' legal and corporate structures — if the companies want to remain eligible for VA contract awards under the Veterans First Contracting Program (VFCP).

Since the VA awarded nearly \$6.6 billion in contract awards to VOSBCs in fiscal year 2010 — approximately \$3.1 billion to small businesses owned by service disabled veterans and another \$3.5 billion to small businesses owned by veterans — remaining eligible for such awards is critical to the financial well being of many VOSBCs.

Undoubtedly, a large number of contractors will be impacted and contract awards delayed by the letter's myriad documentation requirements, and many VOSBCs that have successfully participated in the VFCP for years are wondering why they are being required to submit so many documents on such short notice. To answer this question, it is important to understand the history of the VFCP and recent legal and regulatory changes that have been made to the program.

Federal Procurement Programs for Veteran-Owned Small Businesses

First, VOSBCs should be aware that the VFCP is separate and distinct from the Small Business Administration (SBA) governmentwide contracting program established to benefit service-disabled, veteran-owned small business concerns (SDVOSBCs) — the SDVOSBC Program (I know, it's a mouthful).

The SBA's SDVOSBC Program is an outgrowth of The Veterans Entrepreneurship and Small Business Development Act of 1999, which established a governmentwide goal of 3 percent of all federal contract dollars being awarded to SDVOSBCs, and The Veterans Benefits Act of 2003, which authorized agencies to award certain contracts to SDVOSBCs on a sole-source (without competition) or set-aside (competition limited to qualifying SDVOSBCs) basis.

Regulations for the SBA's government procurement programs are found at Code of Federal Regulations (CFR), Title 13, Parts 121-127, with the SDVOSBC Program defined at 13 CFR § 125.8 et. seq.

These sections describe almost everything one needs to know about qualifying and participating in the SBA's SDVOSBC Program. For example, they permit an SDVOSBC to self-certify that it meets program requirements when bidding on a contract. These sections are inapplicable to VFCP transactions, however, and this causes a great deal of confusion among VOSBCs, which must comply with two different regulatory schemes if they want to be awarded both VA and non-VA contract awards on a preferential basis.

The Veterans First Contracting Program

The VA's VFCP began in December 2006 after enactment of the Veterans Benefits, Health Care and Information Technology Act of 2006. Unlike any SBA program, the 2006 act requires the VA to give first priority to SDVOSBCs and second priority to

VOSBCs when making small business contract awards, thus providing preferential treatment to these two categories over all other small business categories, such as HUBZone or small disadvantaged (8(a)) businesses.

The 2006 act also permits the VA to use sole-source or set-aside procurement actions when making contract awards to such entities. In fact, the act allows the VA to award sole-source contracts to both VOSBCs and SDVOSBCs much more freely than the SBA's SDVOSBC Program by authorizing the use of sole-source contract awards of up to \$5 million if the selected contractor is a "responsible source" that offers "a fair and reasonable price" and "best value" to the government.

While the provisions described above have benefitted VOSBCs greatly, another provision in the 2006 act has caused the VA a great deal of consternation over the last four years — a requirement that the VA: 1) create and maintain a database of qualifying VOSBs and SDVOSBs that provides data on the ownership, control and veteran or service-disabled status of businesses; and 2) verify the eligibility status of these database companies.

In order to carry out this requirement, the VA established the Center for Veterans Enterprise (CVE), which then implemented the required database — the Vendor Information Pages (VIP) database — at VetBiz.gov. As initially employed, the VIP database allowed a VOSB or SDVOSB to self-certify that it met all VFCP requirements. Once the online certification was completed and approved by the CVE, the business was eligible for VFCP awards for one year, at which time the process repeated.

What Happened to the Required Verification?

As you can tell, a verification step was not part of the initial process. It wasn't until May 2008 that the CVE began its verification functions, and even then the verification actions that were taken were minimal and superficial. According to a May 2010 U.S. Government Accountability Office report, this was because an undermanned and undertrained CVE staff received over 10,000 VFCP applications from May 2008 to April 2010, more than doubling the total number of VOSBs and SDVOSBs in its VIP database. There are now well over 20,000 registered businesses in the database, most of which have not been properly verified.

Even after verification began in May 2008, the CVE had little guidance on how to perform its verification function. In fact, it operated under interim VA guidance for nearly two years. Finally, in February 2010, the VA published its final verification rule (see 75 FR 6098 (Feb. 8, 2010); see also Veterans Affairs Acquisition Regulation (VAAR) Subpart 819.70, Veteran-Owned and Operated Small Businesses).

In the interim, the vast majority of VFCP participants, many of whom had enrolled in the program years earlier, were not verified as required by the 2006 Act. The GAO report found that only about 14 percent of the businesses in the VIP database had been verified as of April 8, 2010. To correct this problem, the final rule required the CVE to verify all VFCP participants by Jan. 1, 2012.

Businesses not verified by that date would not be eligible for future VFCP contract awards unless and until verification occurred. This February 2010 verification process — which has timeliness requirements that have since been significantly shortened — required a review of submitted data for accuracy and completeness, an analysis of ownership and control of the applicant using outside sources such as Dun & Bradstreet reports, and the assignment of a risk factor of between one and four, with the higher numbers reserved for companies that were awarded higher dollar value contracts and/or that provided minimal documentation. The CVE also was required to select certain companies, mostly those with a high risk-factor rating, to receive a verification site visit by the VA.

The Veterans Benefit Act of 2010

On Oct. 13, 2010, the verification process was revised again with enactment of the Veterans Benefit Act of 2010. This 2010 act expressly prohibits a company from being listed in the VIP database prior to verification, and it gives the VA a very small window of time to get all verification actions accomplished. Specifically, the law requires the VA to notify each nonverified VFCP participant in the VIP database by Dec. 11, 2010, that it will be given 90 days from receipt of notification to submit all required verification documentation.

As a result, the VA sent thousands of VOSBCs and SDVOSBCs letters dated Dec. 10 or 11, 2010, requiring the businesses to submit a laundry list of items within 90 days. How the VA will handle the inundation of VOSBC documentation that it will receive in early 2011 remains to be seen. At risk are billions of dollars in contracts that cannot be awarded to any entity that has not submitted all required documentation and been affirmatively verified for listing on the VIP database. Currently the level of such nonverified entities numbers in the thousands.

VIP Database Verification Program Regulations

What should a business do if it has received one of these letters? First, as described above, it needs to understand that the letter has nothing to do with the SBA, its regulations or its programs. Second, the company should ensure it has a firm grasp of the VA's VIP database verification program regulations, which are found at 74 CFR § 74.1 et. seq., before responding to the letter. Among the more important regulatory requirements are the following:

- A VFCP participant must be at least 51 percent unconditionally and directly owned and controlled by one or more veterans or service-disabled veterans.
- "Control" by such veterans means day-to-day management, long-term decision-making authority and strategic policy setting as exercised by boards of directors; in addition, such veterans "must have managerial experience of the extent and complexity needed to run the concern."
- Such veterans "must devote full time to the business during the normal working hours of firms in the same or similar line of business."
- Such veterans must receive at least 51 percent of the annual distribution of profits.
- If the CVE believes an applicant has submitted false information, it will refer the matter to the Office of Inspector General and request that debarment proceedings be initiated; debarment proceedings could result in a company being rendered ineligible to be awarded any federal (as well as many state and local) prime or subcontracts.

With over \$6 billion in contract awards at stake, it is essential that VOSBCs act quickly and in an informed manner in the coming weeks to establish or maintain their VFCP eligibility status. With new stringent verification procedures in place, an inevitable shakeout of qualifying VFCP concerns will occur in 2011. Those that are prepared for this event and act proactively stand to gain, as the ratio of contract dollars per qualifying VFCP contractor undoubtedly will increase in the years to come.

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