

Alert | Government Contracts



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VA and SBA Adopt Changes to Veteran-Owned Small Business Verification Guidelines

On Sept. 24, 2018, the Department of Veterans Affairs published new guidelines for verification of Veteran-Owned Small Businesses (VOSBs) and Service Disabled Veteran-Owned Small Businesses (SDVOSBs), with the Small Business Administration, filing companion rule changes on Sept. 28, 2018 ([83 Fed. Reg. 48,221](#) and [83 Fed. Reg. 48,908](#), respectively). Both sets of rule changes took effect on Oct. 1, 2018.

The rule changes are the result of the National Defense Authorization Act for Fiscal Year 2017 (NDAA), Public Law 114-840, which directs VA to use SBA's regulations to define ownership and control of VOSBs and SDVOSBs. Under the new rules, VA continues to determine whether individuals are veterans or service-disabled veterans, and is responsible for verification of applicant firms for listing in the Vendor Information Pages (VIP database).

Responsibility for adjudicating challenges of the status based upon issues of ownership and control is now to be determined by administrative judges at SBA's Office of Hearings and Appeals (OHA). The new VA rules generally refer to SBA's regulations and remove VA requirements for joint ventures. This change has the effect of immediately updating VA regulations when SBA updates its regulations, and ensuring consistency between the agencies for ownership and control regulations.

The standard for reviewing a VOSB or SDVOSB's eligibility is "totality of the circumstances," with the burden of proving eligibility falling on the applicant. Decisions based on an applicant's failure to meet any veteran eligibility criteria are not subject to appeal; however, an applicant can re-apply and submit a new

application six months after denial. A denial based on criteria other than failure to meet veteran eligibility criteria (i.e., ownership and control by a veteran) can be appealed to SBA's OHA.

Additionally, the rule changes clarify the process for removal from the VIP database. The revisions include reordering the regulation to provide more clarity, addressing the impact of criminal activity on eligibility, and further defining "good character" to provide clarity to circumstances under which a company is subject to removal as opposed to cancellation. The changes expand the reasons for removal to include having tax liens and unresolved debts. Other removal criteria include being found guilty of or involved in criminally related matters as well as debarment of any individual owning or controlling the business concern, as well as submitting false information to VA.

VA is not required to prove anything further under the above circumstances, as the parties to be removed have already received due process through administrative or criminal proceedings. VA is not providing an additional level of review but merely acting on determinations issued by courts or other administrative bodies. Further, bankruptcy has been added as a changed circumstance that can lead to a contractor's removal from the VIP database. If determined that removal of a certified business is warranted prior to the expiration of its eligibility term, VA will notify the participant in writing, and the entity will have 30 days to submit a written response. Any final determination can be appealed to OHA.

There are complementary SBA rules for determining when a veteran controls a business enterprise. The additions are in the form of rebuttable presumptions that a non-service-disabled veteran controls a company where: (1) a non-service-disabled veteran is involved in the management or ownership of the firm and is a current or former employer or a principal of a current or former employer of the service-disabled veteran; (2) the non-service-disabled veteran receives compensation that exceeds that received by the highest-ranking officer; (3) the veteran-owned enterprise is co-located or shares equipment, employees, or resources with another firm in the same or similar line of business, and an owner, officer, or director (or any of their direct relatives) has an equity interest in the veteran-owned enterprise; (4) the non-service-disabled veteran provides critical financing, bonding support, or a critical license to the veteran-owned enterprise; and (5) a business relationship exists that causes such dependence that the veteran-owned enterprise cannot exercise independent judgment without great economic risk. There is also a rebuttable presumption that a service-disabled veteran does not control the enterprise if that individual is not located within a "reasonable commute" to the firm's headquarters and/or job-site locations.

These newly implemented rules should hopefully resolve longstanding inconsistencies between SBA and VA regulations that historically led to conflicting decisions about a company's qualification for set-asides for VOSBs and SDVOSBs. The new rules clearly define VA's role in determining whether individuals are veterans or service-disabled veterans, and responsibility to determine the ownership interests of those individuals now ultimately falls on SBA, subject to appeal to OHA.

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