

# SBA Certification of VOSBS and SDVOSBS

Navigating the certification process for veteran-owned small businesses (VOSBS) and service-disabled veteran-owned small businesses (SDVOSBS) can be complicated. **This guide will help.**



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**O**n Nov. 29, 2022, the U.S. Small Business Administration (SBA) published the final rule establishing the certification program for veteran-owned small businesses (VOSBs) and service-disabled veteran-owned small businesses (SDVOSBs). (SBA published the initial proposed rule in the Federal Register on July 6, 2022 (87 FR 40141).)

Effective January 1, 2023, Section 862 of the 862 of the National Defense Authorization Act for Fiscal Year 2021, Public Law 116-283, 128 Stat. 3292 (January 1, 2021) (NDAA 2021), amended the VOSB/SDVOSB requirements and transferred responsibility for certification of VOSBs and SDVOSBs to the SBA, and required certification for SDVOSBs seeking set-aside contracts government wide.

Prior to the final rule, there was no government-wide SDVOSB certification program, and concerns seeking to be awarded SDVOSB sole-source or set-aside contracts with Federal agencies, other than the VA, only needed to self-certify their status as set required under section 36 of the Small

Business Act, 15 U.S.C. 657f. Section 862 created a certification requirement for SDVOSBs seeking sole-source and set-aside contracts across the Federal Government. Along with these new certification requirements, Section 862 created a one (1) year grace period for a business to file an application for SDVOSB certification and to continue to self-certify.

Under 38 U.S.C. 8127, the Veteran-Owned Small Business and Service-Disabled Veteran-Owned Small Business Programs, authorized Federal contracting officers to restrict competition for Department of Veterans Affairs (VA) contracts to eligible VOSBs and SDVOSBs. Previously, to be eligible for VA contracts, VOSBs and SDVOSBs had to be verified by the VA Center for Verification and Evaluation (CVE).

Self-certified SDVOSBs which apply within the one (1) year grace period will maintain eligibility until the SBA makes a final eligibility decision. VOSBs and SDVOSBs that are not certified by SBA's Veteran Small Business Certification Program will not be eligible to receive sole-source

or set-aside VOSB or SDVOSB awards across the Federal Government.

## VOSB AND SDVOSB CONTRACTS

VOSB contracts are exclusively VA procurements, including prime contracts and subcontracts for which the VA is the procuring agency. SDVOSB contracts are contracts available to an SDVOSB through any of the following procurement methods: (i) Sole source awards to an SDVOSB; (ii) Set-aside awards, including partial set-asides, based on competition restricted to SDVOSBs; (iii) Awards based on a reserve for SDVOSBs in a solicitation for a Multiple Award Contract; or (iv) Orders set aside for SDVOSBs against a Multiple Award Contract, which had been awarded in full and open competition or as a small business set-aside. Eligibility to submit an offer and be eligible for the award of a VOSB or SDVOSB set-aside or sole-source contract will require the concern to qualify as a small business concern under the size standard corresponding to the NAICS code assigned to the contract and be a certified VOSB or SDVOSB.

### Eligibility for the Veteran VOSB or SDVOSB Program Status

To qualify as a VOSB, a business entity must meet the following qualifications: size standard corresponding to any NAICS code listed in its SAM profile; and not less than fifty-one (51%) percent owned and controlled by one or more veterans.

To qualify as an SDVOSB, a business entity must be: a small business concern under the size standard corresponding to any NAICS code listed in its SAM profile; not less than 51% owned and controlled by one or more service-disabled veterans or, the spouse or permanent caregiver case of a veteran with a disability that is rated by the Secretary of Veterans Affairs as a permanent and total disability and who is unable to manage the daily business operations of such concern.

### Qualification

To be eligible for a specific VOSB/SDVOSB contract, a concern must qualify as small under the NAICS code size standard corresponding to the contract. The certification process will also ensure that an applicant is owned and controlled by one or more veterans or service-disabled veterans and could qualify as a small business for a VOSB/SDVOSB set-aside contract. This is a change from when only concerns that were small in their primary North American Industry Classification System (NAICS) code were considered eligible for certification as VOSBs or SDVOSBs. Concerns that do not apply for certification in the Veteran Small Business Certification Program may continue to self-certify their status, receive contract awards outside the Veteran Small Business Certification Program through open competition

or other types of set-asides, and count toward an agency's goals.

### Certification Application

A concern must electronically apply to the SBA for certification as a VOSB or SDVOSB. Along with its application, the concern must submit evidence that it is a small business owned and controlled by one or more qualifying veterans. Upon receipt, the SBA may approve or deny the application for certification and request additional documentation and/or clarification of information relating to eligibility. A concern's eligibility will be based on the totality of circumstances, including information contained in the application, supporting documentation, information received in response to a request for clarification, independent SBA research, and any changed circumstances.

Any small business concern that submits a complete certification application with to SBA on or before December 31, 2023, shall be eligible to self-certify for SDVOSB sole-source or set-aside contracts (other than VA contracts) until SBA declines or approves the concern's application. Any small business concern that does not submit a complete SDVOSB certification application to SBA on or before December 31, 2023, will no longer be eligible to self-certify for SDVOSB sole-source or set-aside contracts effective January 1, 2024.

### Certification Requirements

To be eligible for VOSB or SDVOSB certification and to remain certified, the concern and any of its owners must not have an active exclusion in SAM. If, during the application process, the SBA determines that an applicant has know-

ingly submitted false information the application will be denied. Similarly, if after certifying an applicant the SBA discovers that it knowingly submitted false information, SBA will initiate proceedings to decertify them and remove them from the certification database.

A concern will not be eligible for certification as a VOSB or SDVOSB if it or any of its principals owes a significant financial obligation (unresolved tax lien, Federal loan default, or other government-assisted financing owed. Only after demonstration that the financial obligations owed have been settled, discharged, or forgiven by the Federal Government, may they become eligible to apply.

### Ownership Requirements of a VOSB or SDVOSB

To qualify as a VOSB, one or more veterans must unconditionally and directly own at least 51% of the concern. To qualify as a SDVOSB, one or more service-disabled veterans must unconditionally and directly own at least 51% of the concern. Direct ownership requires the qualifying veteran to own the percentage directly, and not through another business entity or trust.

To be considered unconditional ownership, ownership must not be subject to any conditions, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity). A right of first refusal granting the non-qualifying-veteran the contractual right to purchase the ownership interests of the qualifying veteran, does not affect the unconditional nature of ownership if the terms

follow normal commercial practices.

In the case of a partnership, at least 51% of aggregate voting interest must be unconditionally owned by one or more qualifying veterans and reflected in the concern's partnership agreement. In the case of a limited liability company, at least 51% of each class of member interest must be unconditionally owned by one or more qualifying veterans. Similarly, in the case of a corporation, at least 51% of the aggregate of all stock outstanding and at least 51% of each class of voting stock outstanding must be unconditionally owned by one or more qualifying veterans.

In the event of the death of a service-disabled veteran, their surviving spouse, a small business concern owned and controlled by one or more service-disabled veterans immediately prior to the death of a service-disabled veteran who was the owner of the concern, the death of whom causes the concern to be less than 51% owned by one or more service-disabled veterans, will continue to qualify as a small business concern owned and controlled by service-disabled veterans during the time period if: the deceased veteran's surviving spouse acquires such veteran's ownership interest in such concern.

**Control**

To be an eligible VOSB, the management and daily business operations of the concern must be controlled by one or more veterans. To be an eligible SDVOSB, the management and daily business operations of the concern must be controlled by one or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or perma-

nent caregiver of such veteran). Control by one or more qualifying veterans means that one or more qualifying veteran's controls both the long-term decision-making and the day-to-day operations of the entity. A qualifying veteran cannot engage in outside activities that prevent them from devoting sufficient time and attention to the business concern to control its management and daily operations. Where a qualifying veteran claiming to control a business, concern devotes fewer hours to the business than its normal hours of operation, SBA would assume that the individual does not control the business concern, unless the concern provides evidence that the qualifying veteran has ultimate managerial and supervisory control over both the long-term decision making and day-to-day management of the business.

Where a qualifying veteran is a reserve component member in the United States military who has been called to active duty, the concern may elect to designate in writing one or more individuals to control the concern on behalf of the qualifying veteran during the period of active duty. The concern must keep records evidencing the qualifying veteran's active-duty status and the written designation of control and provide those documents to SBA.

**CERTIFICATION OF VOSB OR SDVOSB STATUS**

If SBA determines that a concern meets the eligibility requirements of a VOSB or SDVOSB, it will notify the concern and designate the concern as a certified VOSB or SDVOSB in the certification database. To remain in the program, the VA will require the concern to notify

the agency of a change in circumstances (change in ownership or control, business structure, filing of bankruptcy, or change in active-duty status), and undergo a program examination to verify the accuracy of any statement or information provided.

Participants must retain documentation demonstrating satisfaction of all qualifying requirements during the entire period of participation. At the end of the three-year eligibility term, the concern must reapply using the same procedures as the initial application.

Concerns verified by VA prior to the Transfer Date will be deemed eligible by SBA for the time that remains in the concern's three-year term of eligibility. To remain certified by SBA after the Transfer Date, those verified concerns will be required to meet all conditions of eligibility as described in the regulations such as program examinations and recertification at the end of the concern's term of eligibility.

A concern's failure to notify SBA of a material change may result in decertification, pursuant to §128.310. SBA may also seek the imposition of penalties under §128.600.

**Maintaining Certification and Recertification**

VA requires participants to notify the agency of a change in circumstances such as a change in ownership or control of the concern. VA also requires participants to undergo a program examination to verify the accuracy of any statement or information provided as part of the verification application process.

A concern must recertify its eligibility every three years using

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the same procedures as the initial application. There is no limitation on the number of times a business may recertify. The recertification must occur within 120 calendar days prior to the termination of their eligibility period. If the concern fails to recertify, SBA may decertify the concern at the end of their eligibility period.

### **Decertification**

A decertified or a concern previously denied certification, within the past three years, from the Veteran Small Business Certification Program must include a full explanation of why it was decertified or denied certification, and what, if any, changes have been made with its application. Ultimately, every applicant bears the burden of proof to demonstrate its eligibility as a VOSB or SDVOSB.

### **PROTESTS CONCERNING VOSBS AND SDVOSBS**

All challenges to the inclusion of a VOSB or SDVOSB in the certification database based on the status of the concern as a small business concern or the ownership or control of the concern, shall be heard by the Office of Hearings and Appeals of the Small Business Administration. The decision of the Office of Hearings and Appeals shall be considered final agency action. The protest procedures are separate from those governing size protests and appeals.

### **Removal from the Veteran Small Business Certification Program**

The SBA has established four (4) methods under which a concern may be removed from the Veteran Small Business Certification Program. A concern may (i) voluntarily withdraw at any time.

The SBA may decertify a concern and remove its designation as a VOSB or SDVOSB in the certification database. A VOSB or SDVOSB concern may be found ineligible through a VOSB or SDVOSB status protest decision. Additionally, the SBA may decertify a concern upon notice that it or any of its owners has an active exclusion in SAM. In each decertification scenario, the concern may reapply for SDVOSB or VOSB certification 90 calendar days after the date of decertification. At reapplication, the concern must demonstrate that it meets all eligibility requirements.

If the SBA becomes aware that a concern may not or no longer meet the eligibility requirements it may propose decertification. Upon notification of a proposed decertification, the recipient will have 30 calendar days from the date of receipt of the decertification notification to submit a written response to the SBA. The response must rebut each of the basis set forth in the decertification notice and must include supporting documentation, as applicable.

During this process, the SBA may review any information related to the concern's eligibility including, documentation related to the concern's legal structure, ownership, and control, information previously provided to SBA, and any additional information requested by SBA at the time of program examination. SBA may draw an adverse inference from a concern's failure to cooperate with a program examination or provide requested information and assume that the information that the concern failed to provide would demonstrate ineligibility and decertify on this basis.

### **Denial Or Decertification Appeals**

A concern whose application for VOSB or SDVOSB certification that has been denied or whose status has been decertified must file its appeal within 10 business days of receipt of its notification of denial or decertification. The standard of review is whether there was a clear error of fact or law. The judge shall decide a VOSB or SDVOSB Appeal within 60 calendar days after close of the record. If the appellant is successful, they will be immediately included in the SBA certification database.

A concern that has been denied certification as a VOSB or SDVOSB or has had its VOSB or SDVOSB status decertified may appeal the decision to the Office of Hearings and Appeals (OHA). However, a denial or decertification based on the failure to provide sufficient evidence of the qualifying individual's status as a veteran, or a service-disabled veteran are final VA decisions and not subject to appeal to OHA. A concern may apply for certification no sooner than 90 calendar days from the date of final agency decision (i.e., the SBA decision if no appeal is filed or the decision of SBA's OHA where an appeal is filed) if it believes that it has overcome all the reasons for denial or decertification and is currently eligible.

### **PROTESTS OF ELIGIBILITY**

For sole-source procurements, SBA, VA, or the contracting officer may protest the proposed awardee's VOSB or SDVOSB status. For all other procurements, any interested party (contracting officer, SBA, VA, any concern that submits an offer for a specific set-aside VOSB or SDVOSB contract (including Multiple Award Contracts) or order, or

any concern that submitted an offer in full and open competition) may protest the apparent successful offeror's VOSB or SDVOSB status.

### **Grounds for filing a VOSB or SDVOSB status protest**

*Veteran Status.* If the protest is based on service-connected disability, permanent and severe disability, or veteran status, the Judge will only consider a protest that presents specific allegations supporting the contention that the owner(s) cannot provide documentation to evidence that they meet the definition of veteran, service-disabled veteran, or service-disabled veteran with a permanent and severe disability.

*Ownership and Control.* If the protest is based on ownership and/or control, the Judge will consider a protest only if the protester presents credible evidence that the concern is not 51% owned and controlled by one or more veterans or service-disabled veterans.

*Joint Ventures.* A VOSB or SDVOSB joint venture may be protested regarding the status of the managing VOSB or SDVOSB joint venture partner or for failure to meet the necessary requirements.

### **Timeliness**

The VA or SBA may file a VOSB or SDVOSB status protest at any time. In contrast, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the intended awardee of the order or Agreement.

### **QUALIFICATION AT TIME OF CONTRACT OFFER/AWARD**

A concern that qualifies as a VOSB or

SDVOSB at the time of the initial offer response, including a Multiple Award Contract, will be considered a VOSB or SDVOSB throughout the life of that contract. This includes for each order issued against the contract unless a contracting officer requests a new VOSB or SDVOSB eligibility review in connection with a specific order.

Regarding VOSB or SDVOSB contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its VOSB or SDVOSB status no more than 120 calendar days prior to the end of the fifth year of the contract, and no more than 120 calendar days prior to exercising any option. If the business is unable to recertify its status as a certified VOSB or SDVOSB, the procuring agency may no longer be able to count the options or orders issued pursuant to the contract towards its VOSB or SDVOSB goals. A concern that did not certify itself as a VOSB or SDVOSB, either initially or prior to an option being exercised, may recertify itself as a VOSB or SDVOSB for a subsequent option period if it meets the eligibility requirements in this part at that time.

### **VOSB OR SDVOSB CONTRACT JOINT VENTURE**

A certified VOSB or SDVOSB may enter into a joint venture agreement with a small business concern, or an approved mentor for the purpose of submitting an offer for a VOSB or SDVOSB contract. However, a VOSB or SDVOSB cannot be a joint venture partner on more than one joint venture that submits an offer for a specific contract set-

aside or reserved for VOSBs or SDVOSBs.

A certified VOSB or SDVOSB must perform at least 40% of the work performed by the joint venture. However, in the context of a joint venture between a protegee VOSB or SDVOSB and its SBA-approved mentor the protégé must individually perform at least 40% of the work performed by the joint venture. The work performed by the certified VOSB or SDVOSB partner(s) to a joint venture must be more than administrative or ministerial functions so that they gain substantive experience.

### **Certification of Joint Venture**

Prior to being a successful offeror for a VOSB or SDVOSB contract, the certified VOSB or SDVOSB partner to the joint venture must submit a certification to the contracting officer and SBA attesting that: (i) the parties have entered into a joint venture agreement; and (ii) the parties will perform the contract in compliance with the joint venture agreement and with the limitations on subcontracting requirements. The SBA will then evaluate the capabilities, past performance, experience, business systems, and certifications and qualifications of the submitting entity, and may inspect and copy all records and documents relating to the joint venture.

Further, a certified VOSB or SDVOSB partner to a joint venture must describe how it is meeting or has met the applicable performance of work requirements for each VOSB or SDVOSB contract it performs as a joint venture and annually submit a report to the relevant contracting officer and to SBA, explaining how and certifying that the performance of work requirements is being met.

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Additionally, at the completion of every VOSB or SDVOSB contract, the certified VOSB or SDVOSB partner to the joint venture must submit a report to the relevant contracting officer and to SBA, explaining how and certifying that the performance of work requirements was met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement.

### SET ASIDE PROCUREMENTS FOR VOSBS OR SDVOSBS

For VA procurements, a contracting officer may set aside a contract for a VOSB or SDVOSB when that award is at or below the simplified acquisition threshold. When the award amount is above the simplified acquisition threshold, the award may be set aside as set forth in the VA Acquisition Regulation (VAAR).

For non-VA procurements, the contracting officer shall set aside any acquisition with an anticipated dollar value between the micro-purchase and the simplified acquisition threshold for small business concerns, when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices.

If a contracting officer elects to set aside the requirement for competition restricted to SDVOSBs, the contracting officer must: (1) have a reasonable expectation that at least two responsible SDVOSBs will submit offers; and (2) determine that the award can be made at fair market price.

### Recommendation and Appeal

An SBA Procurement Center Representative may recommend that a sole-source or set-aside contract, at or above the simplified acquisition threshold requirement, be available for award as an SDVOSB contract. If rejected by the contracting officer, an SBA Administrator may appeal the decision and must notify the contracting officer no later than five business days after receiving notice of the contracting officer's decision.

Upon receipt of the notice of intent to appeal, the contracting officer must suspend further action regarding the procurement until the Secretary of the department or head of the agency issues a written decision on the appeal, unless a written determination is made that urgent and compelling circumstances which significantly affect the interests of the United States compel award of the contract. The appeal must be filed within 15 business days of SBA's notification to the contracting officer, or the appeal will be deemed withdrawn.

### SURPLUS PERSONAL PROPERTY

Veteran controlled and eligible small business concerns may receive surplus Federal Government property from State Agencies for Surplus Property (SASPs). Eligibility includes being an SBA certified small business concern owned and controlled by veterans; not debarred, suspended, or declared ineligible; and engaged or expected to be engaged in business activities making the item useful to it.

The recipient must represent and agree in writing: to the intended

use of the surplus personal property; acquired in the normal conduct of its business activities; that it will not sell or transfer the surplus personal property to be acquired to any party other than the Federal Government as required by General Services Administration (GSA) and SASP requirements and guidelines; it will return the surplus personal property to a SASP, at its own expense, if directed to do so by SBA; that, should it breach its agreement not to sell or transfer the surplus personal property, it will be liable to the Federal Government for the established fair market value or the sale price, whichever is greater, of the property sold or transferred; and GSA and the SASP will be provided liberal access to inspect the surplus personal property and all records pertaining to it.

Upon execution of the SASP distribution document, the recipient has only conditional title to the property during the applicable period of restriction. Full title to the property will vest in the recipient concern only after the recipient concern has met all the requirements of GSA and the SASP that it received the property from. **CM**

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