

Comment on Developments in Government Contracts—Fall 2023

Deadline Looms for Small Veteran Owned Government Contractors¹

Under regulations issued by the Small Business Administration (SBA) late last year, small veteran owned government contractors can no longer self-certify their eligibility for certain procurement preferences. Instead, to qualify, the contractors will have to obtain formal SBA certifications of their eligibility. All such contractors should be aware that they have until December 31, 2023 to submit applications for the certifications. If a contractor submits the application before the deadline, the contractor can continue to self-certify eligibility until such time as the SBA issues the certification. However, if the contractor misses the deadline, they will no longer be able to self-certify. As a result, they will not be able to qualify for the preferences pending SBA's certification decision.

Background

In the Small Business Act (the "Act"),² the Congress declared that small businesses are essential to the competitive marketplace that is the essence of the American economic system and thus the economic well-being and security of our nation. In essence, the Congress found that, without strong small business participation in the economy, monopolies and oligopolies would control the economy and ultimately pose a threat to our freedoms. To promote the development of the capacity of small businesses, the Act also declared that the government should award a "fair proportion of the Government's contracts for goods and services" to small businesses.³

To implement this policy, the Act established five government-wide small business contracting goals:⁴

¹ This article was jointly authored by Christopher C. Bouquet of the Law Office of Christopher C. Bouquet, PLLC and Mark Martins of the Mark Martins Law Office, PLLC.

² The Small Business Act of 1953, Pub. L. 83-163, Title II, 67 Stat. 232 (codified at 15 U.S.C. ch. 14A).

³ 15 U.S.C. § 631.

⁴ 15 U.S.C. §644(g)(1)(A).

Type of Firm	Goal	Measure of Contract Awards
Small Businesses	23%	Dollar value of prime contract awards
Small Disadvantaged Businesses	5%	Dollar value of prime and subcontract awards
Women-Owned Small Businesses	5%	Dollar value of prime and subcontract awards
Service-Disabled Veteran-Owned Small Businesses	3%	Dollar value of prime and subcontract awards
HUB (Historically Underutilized Business) Zone Small Businesses	3%	Dollar value of prime and subcontract awards

Regulations promulgated the Federal Acquisition Regulatory Council and the Small Business Administration give agencies the tools to achieve these statutory goals. Among other things, the regulations empower agencies to set-aside procurements for qualifying small business concerns and impose requirements on large businesses to take affirmative actions to achieve specified small business subcontracting goals.⁵

Concurrently, the Department of Veterans Affairs (“DVA”) has separate statutory authority to promote awards by the DVA to veteran owned small businesses.⁶ In particular, the DVA statute authorizes the Secretary to set goals for each fiscal year for participation in Department prime contracts and subcontracts by (i) service-disabled veteran owned small business concerns (“SDVOSB”) and (ii) small businesses owned and controlled by veterans who are not veterans with service-connected disabilities (referred to as “veteran owned small businesses” or “VOSBs”). The Secretary may not establish a goal for SDVOSBs that is less than the annual goal set by the President under the Small Business Act, which for 2023 was the minimum authorized goal of 3%.⁷ However, since that Act does not have a

⁵ See Federal Acquisition Regulation Part 19, Small Business Programs, and the Small Business Administration regulations at Chapter I of Title 13 of the Code of Federal Regulations.

⁶ This authority is the Veterans Benefits, Health Care and Information Technology Act of 2006, Pub. L. No. 109-461, §§ 502–503, 120 Stat. 3403, 3431 (Dec. 22, 2006) (codified at 38 U.S.C.A. §§ 8127–8128).

⁷ 38 U.S.C. § 8127(a)(3). Congress’s direction to the President in the Small Business Act to set a government-wide goal for procurement contracts to be awarded to SDVOSBs is codified at 15 U.S.C. § 644(g)((a)(A)(ii) (“The Governmentwide goal for participation by small business concerns owned and controlled by service-disabled veterans shall be established at not less than 3 percent of the total value of all prime contract and subcontract awards for each fiscal year.”).

goal for VOSBs, the Secretary has discretion to set the goals according to his priorities for the DVA.⁸ The DVA each year in its budget submission to Congress provides a table indicating the targets it has set for the coming fiscal year with regard to SDVOSB and VOSB awards and reflecting results vis-à-vis prior year targets. Pertinent data as to FY2023 targets reported by the DVA in its most recent budget submission are as follows:

Measure Name	Target⁹
New contract awards using SDVOSB or VOSB set-asides	10%
Percentage of total procurement awarded to Veteran-Owned Small Businesses	17%

This article concerns an important regulatory change affecting the eligibility of veteran owned small businesses for procurements set-aside by all federal agencies for SDVOSBs and by the DVA for VOSBs.

The Regulatory Changes

In a final rule effective on January 1, 2023 (the “Rule”), the Small Business Administration (“SBA”) changed the process by which veteran owned small businesses can qualify for procurement set-asides.¹⁰ Prior to the change, to qualify for DVA set-asides for VOSB and SDVOSBs, offerors had to obtain certification of their eligibility from the DVA’s Center for Verification and Evaluation (“CVE”). To qualify for SDVOSB set-aside procurements by all other federal agencies, SDVOSBs could simply self-certify their eligibility. Under the Rule,

The 3% goal for FY2023 is published at Small Business Administration, “Small Business Procurement – FY2023 Small Business Goals – as of 12/15/2022,” available at https://www.sba.gov/sites/sbagov/files/2023-01/FY23_Final_Goals_508_0.pdf (accessed October 13, 2023).

⁸ 38 U.S.C. § 8127(a)(1)(A).

⁹ DVA, FY 2023 Budget Submission: Supplemental Information and Appendices, Vol. 1 of 4, Mar. 2023, at 125, available at <https://www.va.gov/budget/docs/summary/archive/fy-2023-va-budget-submission.zip> (accessed Oct. 13, 2023). Since 2021, the DVA has not set a separate goal (i.e., other than the not-less-than-3% government-wide goal published by the SBA) for percentage of total procurement to be awarded to SDVOSBs. See DVA, FY 2022 Budget Submission: Supplemental Information and Appendices, Vol. 1 of 4, May 2021, at 25, available at <https://www.va.gov/budget/docs/summary/archive/FY-2022-VA-BudgetSubmission.zip> (accessed Oct. 13, 2023).

¹⁰ 87 Fed. 73400 (November 29, 2022).

the CVE's eligibility certification responsibilities for DVA procurements were transferred to a new Veteran Small Business Certification Program ("VetCert") office in the SBA. In addition, all agencies must require offerors to submit proof of certification of their SDVOSB status by the SBA to qualify for a set aside.

The Rule has three important transition provisions. First, any SDVOSB or VOSB verified by the CVE prior to January 1, 2023 will be deemed SBA-certified for the remainder of the business' three-year eligibility term provided the business continues to qualify under the criteria set forth in the regulations. Second, SBA intends to grant a one-time, one-year extension to the eligibility term of current CVE certified VOSBs and SDVOSBs. However, any new VOSBs or SDVOSBs applying for SBA certification will receive only a three-year eligibility term. Third, the Rule gives all VOSBs and SDVOSBs that do not have CVE certifications until December 31, 2023 to submit applications for the SBA certifications. If a contractor submits the application to VetCert before the deadline, the contractor can continue to self-certify eligibility until such time as SBA issues the certification. However, if the contractor misses the deadline, they will no longer be able to self-certify. As a result, they will not be able to qualify for the preferences pending SBA's certification decision.¹¹ Nonetheless, any such contractor could continue to self-certify its eligibility as a SDVOSB to prime contractors for purposes of inclusion in their small business subcontracting plans.

The Rule did not make any major changes to eligibility requirements for set-asides, although it did relax a few requirements.¹² In short, to qualify as a VOSB for DVA set-asides, the concern must be (i) a small business concern as defined in 13 CFR Part 121 under the size standard corresponding to any North American Industrial Classification ("NAICS") code listed in its profile on the System for Award Management ("SAM"); and (ii) not less than 51 percent owned and controlled by one or more veterans. To qualify as a SDVOSB for set-asides by all federal agencies the concern must be (i) a small business concern as defined in 13 CFR Part 121 under the size standard corresponding to any NAICS code listed in its SAM profile and (ii) not less than 51 percent owned and controlled by one or more service disabled veterans or, in the case of a veteran with a disability that is rated by the DVA as permanent and total and is unable to manage the daily business operations of the concern, the spouse or permanent caregiver of such veteran. In addition, applicants must not be suspended or debarred from

¹¹ *Id.*

¹² A detailed review of these changes is beyond the scope of this article.

government contracting, decertified by the SBA due to false statements in a prior application or be in default of any significant financial obligation owed to the federal government, including unresolved tax liens and defaults in federal loans, or other government assisted financing.¹³

The Rule codifies all eligibility and certification requirements in a new Part 128 to the SBA regulations at Title 13 of the Code of Federal Regulations. To prevent “gaming” of the procurement system and fraud, the rules are elaborate and cover a variety of criteria for qualifying as a small business and demonstrating the required ownership and control of the concern. Applicants for certification would be well advised to review all of these rules and associated guidance issued by SBA¹⁴ prior to beginning work on their applications, and to seek legal counsel if and as questions arise.

Certification Process¹⁵

Before applying for certification, a company must be registered in the SAM and have a Unique Entity Identifier (UEI). During the process, the company’s bank account number will also be needed.

The SBA, in administering the certification process, will rely upon determinations the VA has made as to an individual’s veteran and service-disability status. The rules and processes by which the VA makes such determinations are beyond the scope of this article.

Applicants for certification establish an account and login by navigating in a web browser to the Veterans Small Business Certification portal.¹⁶ If the preparer is a contractor or consultant, the contract with the business owner will be needed. A preparer who is the surviving spouse of the veteran having not remarried will need a marriage certificate. If the preparer is a permanent caregiver for a veteran

¹³ 87 Fed. 73400

¹⁴ Guidance and further links are available at <https://www.sba.gov/brand/assets/sba/resource-partners/Preparing-for-certification-VetCertFactSheet-508c.pdf>. Frequently asked questions, with answers, are posted at <https://veteranscertify.zendesk.com/hc/en-us/sections/10278762063895-FAQ> (accessed Oct. 13, 2023).

¹⁵ This section summarizes the regulatory provisions regarding “Certification of VOSB or SDVOSB Status” at 13 C.F.R. Part 128, Subpart C.

¹⁶ The portal website is <https://www.sba.gov/federal-contracting/contracting-assistance-programs/veteran-contracting-assistance-programs> (accessed Oct. 13, 2023).

with a permanent, total, service-connected disability, that person will need proof of formal appointment as caregiver, as well as the written determination from the Veterans Administration that the veteran has a permanent and total disability.

The application requires the furnishing of certain business information. If the veteran is not the highest compensated person in the business, required documentation will consist of a written explanation of the situation that details who is highest compensated and the business reasons for such compensation. If the business has a franchise agreement, this will need to be provided. If the business is currently past due on any taxes, liens, federally backed loans, or outstanding tax returns, the preparer must submit a letter of explanation regarding any delinquencies, including amounts and to whom owed. If the owner or any family household member of an owner is a federal employee in a GS-13 (or equivalent) position or above, a letter of non-objection from the federal employee's ethics official is required. And if the business is owned by a trust, the trust agreement must be provided, and it must demonstrate that the trust is revocable, and that veterans are the grantors, trustees, and current beneficiaries of the trust—other types of trusts are not eligible for the program.

Different documents are required based upon the entity type of the applicant business:

- A ***Sole Proprietorship*** must furnish one of three documents to demonstrate that the business legally exists and is in operation, namely (1) an IRS SS4 TIN issuance letter with correct name and EIN, (2) fictitious name certificate or certificate of trade name, or (3) copy of most recent schedule C.
- A ***Limited Liability Company (LLC)*** must furnish (1) copy of articles of organization, or equivalent, including all amendments as filed with the state of formation, (2) certificate, or equivalent, issued by state of formation showing creation of LLC, as available, (3) operating agreement, including all amendments, and (4) minutes demonstrating or establishing the current operating practices and providing evidence of election or appointments of officers, adoption/implementation of operating agreements or voting agreements, business decisions, and voting (should be signed and dated).
- A ***General Partnership*** must furnish (1) the partnership agreement, including all amendments, and (2) one of four documents to demonstrate the business legally exists and is in operation, namely (a) copy of most recent Schedule K-1s, (b) copy of most recent Schedule C for proprietorship, (c)

IRS SS4 TIN issuance letter with correct name and EIN, or (d) fictitious name certificate or certificate of trade name.

- A **Limited Partnership (LP)** or **Limited Liability Partnership (LLP)** must furnish (1) the partnership agreement, including all amendments, (2) certificate, or equivalent, issued by state of formation showing creation of partnership, as available, and (3) minutes demonstrating or establishing the current operating practices and serving as evidence of important partnership actions (should be signed and dated).
- A **Corporation** must furnish (1) copy of articles of incorporation, or equivalent, including all amendments as filed with the state of formation, (2) all corporate by-laws and all amendments, signed and dated as of their effective date, (3) certificate, or equivalent, issued by state of formation showing creation of corporation, as available, (4) shareholders agreements, including all amendments, (5) minutes demonstrating or establishing the current operating practices and serving as evidence of important partnership actions (should be signed and dated), and (6) copy of the most recent stock ledger adopted in the minutes or by resolution and providing important information about the stockholders of the company, such as stockholder name, stockholder certificate number, date the person became a stockholder, number of shares registered to each stockholder, and class of shares held by the stockholders, e.g., voting shares.

The foregoing items are among the questions and document requirements in the application. The SBA reviewer may ask for additional information based on individual circumstances.

When an application is deemed by the SBA to be complete, the SBA will review these documents to determine whether the concern meets size, ownership, and control requirements of the regulations. It generally takes 90 days for an approval or denial of certification to be issued.

Appeals from Denials¹⁷

Denial of certification of VOSB or SDVOSB status may be appealed to the SBA's Office of Hearings and Appeals (OHA). However, the general provisions

¹⁷ This section summarizes the new "Rules of Practice for Appeals of Denials of Certification and Decertification in the SBA Veteran Small Business Certification Program (VOSB or SDVOSB Appeals)," at 13 C.F.R. Part 134 (Rules of Procedure Governing Cases Before the Office of Hearings and Appeals), Subpart K, as well as pertinent sections of 13 C.F.R. Part 128 (Veteran Small Business Certification Program).

governing the SBA's Veteran Small Business Certification Program prominently state that "a denial . . . based on the failure to provide sufficient evidence of the qualifying individual's status as a veteran or a service-disabled veteran is a final decision, and not subject to appeal to OHA."¹⁸ While the full meaning of this provision with regard to a particular application will only become clear if and as the matter is litigated, this rule cautions that while an SBA OHA judge can rule on disputes as to eligibility on a given set of facts in an application, the agency itself (that is, the DVA) determines whether an applicant business has furnished sufficient information to establish status as a veteran or service-disabled veteran. Businesses are thus on notice that they must diligently answer all questions presented to them, by DVA officials involved in an individual's veteran and service-disability status determinations, and then either in the online application or separately by official reviewers of the application. A business whose application for VOSB or SDVOSB certification has been denied must file its appeal within 10 business days of receipt of the denial.

VOSB or SDVOSB appeals must be in writing. There is no required format for an appeal petition, but it must include (1) a copy of the denial and the date the appellant received it, (2) a statement of why the denial is in error, (3) any other pertinent information the judge should consider, and (4) the name, address, telephone number, and email address, if available, and signature of the appellant or its attorney. The business appealing the denial must serve copies of the entire appeal petition upon the Director, Office of Government Contracting (D/GC) and SBA Counsel at OPLservice@sba.gov. The appellant must attach to the appeal petition a signed certificate of service meeting the requirements of 13 C.F.R. § 134.204(d).

The appeals process for certification denials does not permit discovery, and oral hearings will not be held. Also, except for good cause shown, evidence beyond the case file will not be admitted. Thus, appellants must submit all of the pertinent evidence and their best arguments with their appeal. The standard of review is whether the denial was based on clear error of fact or law. The appellant has the burden of proof, by a preponderance of the evidence.

The OHA judge will decide the appeal within 60 calendar days after close of the record, insofar as practicable. The judge will issue a decision containing

¹⁸ 13 C.F.R. § 128.304; *see also* 13 C.F.R. § 134.1103 ("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.).

findings of fact and conclusions of law, reasons for such findings and conclusions, and any relief ordered. The judge's decision will be based primarily on the evidence in the SBA case file, arguments made on appeal, and any responses, but the judge has discretion to issues beyond those raised in the pleadings and the denial letter. The decision is the final agency decision and becomes effective upon issuance. If the OHA judge dismisses an appeal of a certification denial, the determination remains in effect. If the judge grants the appeal and finds the appellant eligible for inclusion in the SBA certification database, the D/GC must immediately include the prevailing appellant in the SBA certification database. An appellant who receives an adverse decision from the judge may request reconsideration by filing with OHA and serving a petition for reconsideration on all parties to the VOSB or SDVOSB Appeal within twenty (20) calendar days after service of the written decision. The petition must be based upon a clear showing of an error of fact or law material to the decision.¹⁹

Whether a final SBA OHA decision upholding denial of a SDVOSB or VOSB certification can be further appealed can raise complex questions regarding the jurisdiction of the court and the extent to which it must defer to matters of agency discretion. Detailed review of these questions is beyond the scope of this article. In short, there are two principal statutes that could provide for judicial review of these decisions. The first is the Administrative Procedure Act ("APA").²⁰ In general, to obtain review under the APA, the individual, business, or other organization seeking review must have suffered a legal wrong or been otherwise harmed by an agency action. The second is the Tucker Act.²¹ Under the Tucker Act, a suit may be brought in the Court of Federal Claims ("COFC") for a monetary claim against the U.S. government based on a constitutional provision, a statute, or a regulation, and the COFC will find it has jurisdiction if such provision, statute, or regulation is "money-mandating," meaning that it can fairly be interpreted as mandating compensation for damages as a result of the breach of the duties it imposes and as providing a right of recovery in damages.²² This means that the business whose certification has been denied, as a Tucker Act claimant, will need to identify a money-mandating source of law, such as a regulation provision governing a specific contract.

¹⁹ 13 C.F.R. § 134.1112(g).

²⁰ 5 U.S.C. Chap 7.

²¹ 28 U.S.C. §1491(a)(1).

²² *Albino v. United States*, 104 Fed. Cl. 801, 812-13 (2012).

Finally, the SBA rules permit an unsuccessful offeror on a set-aside procurement to file a protest of the SDVOSB or VOSB status of the awardee.²³ Protests are filed with the Contracting Officer who then must forward the protest to the OHA. If the OHA sustains the protest and the awardee loses the contract, the concern may have standing under the Tucker Act’s “bid protest” jurisdiction²⁴ to file an action at the COFC to challenge the OHA decision.²⁵ Meanwhile, SBA OHA decisions are given deference by the COFC unless an agency regulation, such as that setting forth the SBA’s Veteran Small Business Certification Program, is hopelessly ambiguous, or the COFC finds that it would not be disrupting expert SBA interpretations of its own rules.²⁶ In light of these and other complexities, businesses considering whether to pursue further appeal of a VOSB or SDVOSB certification denial should seek legal counsel.

* * * * *

The foregoing reflections were prepared for the general information of clients and other friends of the Law Office of Christopher C. Bouquet, PLLC and the Mark Martins Law Office, PLLC. They are not meant as legal advice with respect to any specific matter and should not be acted upon without counsel from an attorney. If you have any questions or require any further information regarding these or other related matters, please contact us. This material is considered Attorney Advertising.

²³ 13 C.F.R. Part 134, Subpart J.

²⁴ 28 U.S.C. §1491(b)(1)

²⁵ *Swift & Staley, Inc. v. United States*, 159 Fed. Cl. 494, 500–01 (2022), *aff’d*, No. 2022-1601, 2022 WL 17576348 (Fed. Cir. Dec. 12, 2022).

²⁶ *Defense Integrated Solutions, LLC v. United States*, 165 Fed. Cl. 352, 371 (2023).