

# BRUCKNER & WALKER, LLP

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March 9, 2010

Director  
Regulations Management (02REG)  
Department of Veterans Affairs  
810 Vermont Avenue. NW, Room 1068  
Washington, DC2042

VIA FACSIMILE 202-273-9026

**Re: VA Veteran-Owned Small Business Guidelines  
Response to Request for Public Comment Re:  
38 §§ C.F.R. 74.1 et seq**

Dear Ms. Wegner:

This law firm represents numerous SDVOSBC firms in their corporate and contractual matters, has filed and defended numerous SDV status and size protests before the SBA and OHA, and has assisted numerous SDVOSBC firms in organizing joint ventures, corporations, partnerships and related business entities. We also regularly represent SDVOSBC firms in protests before the GAO and the USCFC.

This law firm is registered in the DVA website as a SDVOSBC and has been a certified disabled veteran business enterprise (“DVBE”) in the State of California since 1996. I mention this firm’s resume` to demonstrate that the comments on the proposed regulations are based upon substantial practical, legal and litigation experience with the current regulations and in issues dealing with SDVOSBCs. This law firm does not bid on or perform SDVOSBC set-aside contracts only because there are no set-asides for legal services.

This letter attempts to respond in some detail to the proposed CVE regulations. Throughout this letter I will use the term “veteran” as inclusive of the term “service-disabled veteran”. When the term “VOSBC” is used it will also mean “SDVOSBC” The only difference between the terms is that the service-disabled veteran has a verifiable disability and has first priority for contracting.

The proposed regulations are inconsistent in the use of the terms “veteran” and “service-disabled veteran” which naturally creates some confusion. The proposed regulations state that the term “service-disabled veteran” is a subset of the term “veteran” but then repeatedly ignores the well-stated definition and uses both terms and either term inconsistently.

At all times the DVA must draft regulations regarding veterans with the understanding that the purpose of the proposed statute or regulation is to assist the veteran in establishing and growing small businesses. The question that must be considered is does the regulation promote or stifle veteran owned businesses. What is clear is that the purpose of the proposed establishment of the CVE is to prevent individuals or other businesses from abusing the veteran set-aside initiative by establishing fraudulent veteran owned and controlled small businesses. The fact that the commercial construction market has collapsed makes the federal government construction market literally the only market available. As the VOSBC program is relatively new and the emphasis on set-asides even more recent it is to be expected that the program will be abused by large companies trying to cash in on the now very sizeable program.

Please consider the following comments:

**38 C.F.R. §74.1 Definitions:**

**Days**-The definition should read that ...”the day of receipt of a letter or decision is not counted...”. The words “...day from which the period begins to run is not counted,...” is meaningless.

**Full-time**- Only government employees or an employee of well-established companies work 9-5. There are no normal business hours for small business owners. Most small business owners work 24/7. They eat, sleep and live their businesses and are working their business plans long after regular 9-5 employees go home.

This rule is overly draconian and does nothing to ensure VOSBC are properly owned and controlled but very definitely does stifle and limit growth to already established companies.

The term “normal business hours for the industry” should not be changed. Normal business hours are different for the general categories of construction, sales, and services and/or consulting.

**Joint Venture**-This business type structure should be the most regulated and scrutinized as it is the one business structure that is most susceptible to abuse. Yet, if organized and executed properly, is the one business structure that will promote growth in the veteran businesses and allow them to operate independently of other relationships. The current SBA regulations allow a VOSBC JV to submit three offers before affiliation is automatically considered. Once the SBA opines there is no affiliation the JV can submit any number of offers and is not limited in the number of contracts to be awarded. The revised SBA regulations are proposing the change the term “offers” to “awards”.

The use of the words “...continuing or permanent basis...” is extremely ambiguous, over broad and meaningless.

This definition must limit either the VOSBC JV to a specific number of awards or offers. It is suggested that two awards be used and thereafter the business entities that comprise that JV can no longer comprise a joint venture for a period of at least two years after the award of the second contract.

A JV arrangement that involves multiply offer and/or awards (more than two) should be considered prima facia improperly constituted and strongly discouraged.

The CVE must verify all joint venture agreements.

**Negative control**-The definition here only addresses a corporation. Negative control can exist in any business entity-a corporation, partnership, LLP, LLP. The definition should be expanded to include partners, shareholders, owners, etc.

**Participant**-Since here the term “veteran” includes “service-disabled veteran” it would be expected that the term “participant” would be used throughout the regulations which follow. However, the regulations seem to thereafter be inconsistent in the use of the terms.

**Service-disabled veteran owned small business concern**- The word “unconditionally” should be placed before the word “owned” to make the definition consistent with later use of the term “Unconditional ownership”.

**Unconditional ownership**-This definition is quite complete but should also indicate that ownership means any business entity that is established by the veteran.

**Verification eligibility period**- The VA is taking on a huge administrative burden by requiring yearly applications. But that said consider the following: Who is to initiate the yearly application? How much time in advance of the year expiration must the application be submitted?; Will the VA send our reminder letters requesting certain documents?; and, What happens to the verification if the CVE cannot process the yearly reapplication expeditiously? This issue of yearly verification is administratively very aggressive, and while laudatory, is not well thought-out or well drafted.

The State of California Department of General Services (“DGS”) has a program of recertifying DVBE’s every year which commences with a letter from DGS requesting the required documents. However, the DGS automatically extends the certification period pending the DGS review of the completed application and starts the new certification year upon the approval of the DVBE.

**Veteran-owned small business**- Since veterans include service-disabled veterans and VOSBC include SDVOSBC the regulations should be consistent in the use of the terms “veterans” and “VOSBC”.

**38 C.F.R. §74.2 Eligibility requirements**: This requirement is the most important element of the regulations. As of January 7, 2010 a VOSBC must be verified to be eligible to bid on DVA projects. Therefore, the DVA has to be extremely timely in processing CVE

applications. Therefore it is recommended there be a grace period for a VOSBC to obtain verification.

A second problem is that all the other agencies of the United States do not require SDV verification. Therefore, unless the entire VOSBC verification process is transferred to the DVA, including an appeal process there will be two separate SDVOSBC confirmation procedures. There must be a separate appeal process outside in some manner independent of the CVE. For example, the SBA verifies status under the current status protest regulations but the OHA (an independent office within the SBA) is the body that considers any appeal.

**38 C.F.R. §74.3 Ownership**-This section very closely follows the current SBA and DVA regulations and, with a few minor exceptions, is extremely well-written and easy to follow.

However, the joint venture, which is the single most popular business structure and the one most likely to be abused, is not addressed. It is arguable whether the issue is “ownership” or “control” of the joint venture which must be addressed but the language has to be in either this section or *38 C.F.R. §74.4 Control requirements*.

Regarding a VOSBC joint venture the language in 13 C.F.R. §§ 125.8 to 125.15 and FAR 19.1403 (a) & (b). Is well-drafted and easy to follow.

***(d) Profits and distributions.*** The regulation should include a statement that the VOSBC venturer of any VOSBC joint venture must receive 51% of the profits of the joint venture. This section (d) (4) is so badly drafted as to be meaningless.

**38 C.F.R. §74.4 Control requirements:**

***(b)***-It is implied and should be deleted that ownership and control “may” reside in different person(s). Ownership and control “must” reside in the veteran(s) and no other person(s). If licenses are required to legally operate the VOSBC, veteran(s) must hold the licenses. If the license holder withdraws from the business entity the entity cannot function in the area licensed. This is a classic case of negative control. Requiring the veteran(s) to hold the license(s) makes it easy to determine management experience. There is nothing inherently difficult about obtaining the required licensed to operate a business.

***(c)(1) to (3)***-If a VOSBC is properly registered and certified and then organizes a joint venture the veteran owns more than one business which is should not only be acceptable but encouraged. Yet since the joint venture is a separate legal entity the veteran violates the “second business” rule by forming a joint venture. There should be no restrictions on the number of businesses that a veteran can own and control and/or register and obtain verification. A regulation requiring only one business per veteran does nothing to ensure the viability of or curtail fraudulent VOSBCs. Only government employees or employees of established businesses work normal business hours. Small business owners have no normal business hours. The current use of the term “normal business hours for the industry” should not be changed.

***Examination or Site Visits:*** This is the single most valuable enforcement tool of the DVA or CVE and should be strongly emphasized. Experienced teams should be formed immediately and the CVE should rely heavily on site visits.

***Appeal of CVE Denials of Verification:*** The CVE should not be both the verifier and act as the reviewer of an appeal. In my experience the SBA has done an excellent timely expeditious review of status protests and the OHA have similarly performed excellent timely expeditious review of the SBA decisions. There must be an appeal office separate from the CVE.

***Hiring of veterans:*** It is recommended there be a mandatory requirement for VOSBCs that at least 50% of their employees must be veterans.

***Bonding assistance:*** To bid on a construction contract requires bonding from a treasury listed surety. Sureties only bond companies with cash on hand that is not needed for operations. Unless the veteran has a money printing press the cash to grow has to be generated somewhere. Special bonding assistance from the SBA or the DVA would be a very positive factor in growing VOSBCs.

***Residence address geographically close to business address:*** There should be a section in control that requires the veteran's residence address be close, within 60 miles, of the principal address of the business entity.

There is one point I want to emphasize. The joint venture business structure is the single most significant structure to the success or failure of this set-aside program. Large businesses and non-VOSBCs are fraudulently using this program to front VOSBCs on a continuing basis. At the same time the joint venture is the easiest way for the growth of VOSBCs to be encouraged and fostered. A VOSVC joint venture should be used for a maximum of two awards. The CVE must verify all VOSBC joint ventures.

The past 16 months has been period of unprecedented growth for the VOSBC community. The growth has been substantially due to the policies of the "veterans first" policy of the DVA. This policy has, with the sole exception of the NAVY, also resulted in an explosive growth of SDVOSBC set-asides from numerous other federal agencies.

A verification procedure is mandatory. The current status and size protest program of the SBA has assisted in weeding out fraudulently constituted VOSBCs. The DVA should be wary of divorcing itself from the SBA and a currently smoothly operating status and size verification program.

The SBA and the OHA have a substantial history ( more than 20 years) of case law which gives credibility and stability to the verification process. Will the CVE rely on that body of case law in verifying VOSBCs?

The comments in this letter are strictly the opinions and recommendations of the undersigned.  
Please contact me with any questions.

Sincerely,

William L. Bruckner  
BRUCKNER & WALKER, LLP