

# IMPROVING OPPORTUNITIES FOR SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESSES ACT OF 2014

DECEMBER 11, 2014.—Ordered to be printed

Mr. GRAVES of Missouri, from the Committee on Small Business,  
submitted the following

## R E P O R T

together with

## DISSENTING VIEWS

[To accompany H.R. 2882]

[Including cost estimate of the Congressional Budget Office]

The Committee on Small Business, to whom was referred the bill (H.R. 2882) to amend the Small Business Act and title 38, United States Code to provide for a consolidated definition of a small business concern owned and controlled by veterans, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill, as amended, do pass.

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## I. AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

### SECTION 1. SHORT TITLE.

This Act may be cited as the “Improving Opportunities for Service-Disabled Veteran-Owned Small Businesses Act of 2014”.

### SEC. 2. SBA TO ASSUME CONTROL OF VERIFICATION OF OWNERSHIP AND CONTROL STATUS OF APPLICANTS FOR INCLUSION IN THE DATABASE OF SMALL BUSINESSES OWNED AND CONTROLLED BY SERVICE DISABLED VETERANS AND VETERANS.

The Small Business Act (15 U.S.C. 631 et seq.) is amended by adding at the end the following:

#### “SEC. 48. VETS FIRST PROGRAM.

“In order to increase opportunities for small business concerns owned and controlled by service-disabled veterans and small business concerns owned and controlled by veterans in the Federal marketplace, not later than 180 days after the effective date of this section, the Administrator shall enter into a memorandum of understanding with the Secretary of Veterans Affairs that transfer control and administration of the program under subsections (e) through (g) of section 8127 of title 38, United States Code, to the Administrator, consistent with the following:

“(1) Not later than 270 days after completing the memorandum of understanding, the Administrator shall make rules to carry out the memorandum. If the Administrator does not make such rules by such date, the Administrator may not exercise the authority under section 7(a)(25)(A) until such time as those rules are made.

“(2) The Administrator shall assume authority and responsibility for maintenance and operation of the database and for verifications under the program. Any verifications undertaken by the Administrator shall employ fraud prevention measures at the time of the initial application, through detection and monitoring processes after initial acceptance, by investigating allegations of potential fraud, removing firms that do not qualify from the database, and referring cases for prosecution when appropriate

“(3) Any appeal by a small business concern, at the time that verification is denied or a contract is awarded, of any determination under the program shall be heard by the Office of Hearings and Appeals of the Small Business Administration.

“(4)(A) The Secretary shall, for a period of 6 years commencing on a date agreed to in the completed memorandum, reimburse to the Administrator of the Small Business Administration any costs incurred by the Administrator for actions undertaken pursuant to the memorandum from fees collected by the Secretary of Veteran Affairs under multiple-award schedule contracts. The Administrator and the Secretary shall endeavor to ensure maximum efficiency in such actions. Any disputes between the Secretary and the Administrator shall be resolved by the Director of the Office of Management and Budget.

“(B) The Secretary and the Administrator may extend the term of the memorandum of understanding, except for the reimbursement requirement under subparagraph (A). The Secretary and the Administrator may in a separate memorandum of understanding provide for an extension of such reimbursement.

“(5) Not later than 180 days after the date of enactment of this section, and every 180 days thereafter, the Secretary and the Administrator shall—

“(A) meet to discuss ways to improve collaboration under the memorandum to increase opportunities for service-disabled veteran-owned small businesses and veteran-owned small businesses; and

“(B) consult with congressionally-chartered Veterans Service Organizations to discuss ways to increase opportunities for service-disabled veteran-owned small businesses and veteran-owned small businesses.

“(6) Not later than 180 days after the date of enactment of this section, and every 180 days thereafter, the Secretary and the Administrator shall report to the Committee on Small Business and the Committee on Veterans’ Affairs of the House of Representatives, and the Committee on Small Business and Entrepreneurship and the Committee on Veterans’ Affairs of the Senate on the

progress made by the Secretary and the Administrator implementing this section.

“(7) In any meeting required under paragraph (5), the Secretary and the Administrator shall include in the discussion of ways to improve collaboration under the memorandum to increase opportunities for small businesses owned and controlled by service-disabled veterans who are women or minorities and small business concerns owned and controlled by veterans who are women or minorities.”.

#### SEC. 3. MEMORANDUM OF UNDERSTANDING.

Section 8127(f) of title 38, United States Code, is amended by adding at the end the following:

“(7) Not later than 180 days after the effective date of this paragraph, the Secretary shall enter into a memorandum of understanding with the Administrator of the Small Business Administration consistent with section 48 of the Small Business Act, which shall specify the manner in which the Secretary shall notify the Administrator as to whether an individual is a veteran and if that veteran has a service-connected disability.”.

## II. PURPOSE AND BILL SUMMARY

The purpose of H.R. 2882, the “Improving Opportunities for Service-Disabled Veteran-Owned Small Businesses Act of 2013,” is to improve the operation of the two contracting programs intended to promote the use of service-disabled veteran-owned small businesses (SDVOSBs). In 1999, Congress established a goal of awarding at least three percent of all federal prime contract dollars and sub-contract dollars to SDVOSBs.<sup>1</sup> To assist federal agencies attempting to meet this goal, Congress established a government-wide program, administered by the Small Business Administration (SBA), that allowed federal agencies to limit competition for federal contracts to SDVOSBs when there was an expectation that two or more SDVOSBs would submit fair and reasonable offers, or to award contracts on a sole-source basis to SDVOSBs if there were not two or more offerors and the contract was valued at less than \$3 million (\$5 million in the case of manufacturing contracts).<sup>2</sup> In recognition of the special role that the Department of Veterans Affairs (VA) has to play in providing assistance to service-disabled veterans (SDVs), in 2006, Congress acted to allow VA to prioritize SDVOSBs when contracting.<sup>3</sup> However, to prevent fraud in this enhanced program, called Vets First, Congress required that the Secretary of the VA to verify the eligibility of all SDVOSBs.<sup>4</sup> While these programs have led to increasing contract opportunities—SDVOSBs received \$12.2 billion in federal prime contracts in fiscal year 2012, and 27.5 percent of those contracts were awarded by the VA<sup>5</sup>—the VA’s implementation of its verification program has led to conflict between the SBA government-wide program and the VA Vets First program. As a result, a single firm may qualify for the VA program, but not the SBA program, or vice versa. This leads

<sup>1</sup> Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106–50, § 502, 113 Stat. 233, 247 (1999). The goals may now be found at Section 15(g)(1)(A)(iii) of the Small Business Act (the Act). Originally, title II of the Act of July 30, 1953, c. 282, 67 Stat. 232 was designated as the Small Business Act of 1953. A plethora of amendments in subsequent Congresses led to a rewrite in 1958. Pub. L. No. 85–536, § 1, 72 Stat. 384 (1958). The Act is codified at 15 U.S.C. §§ 631–657s.

<sup>2</sup> Veterans Benefits Act of 2003, Pub. L. No. 108–183, § 308, 117 Stat. 2651, 2662 (2003) (codified at Section 36 of the Act, 15 U.S.C. § 657f).

<sup>3</sup> Pub. L. No. 109–461, § 503, 120 Stat. 3403, 3435 (2006) (codified at 38 U.S.C. § 8128).

<sup>4</sup> *Id.* at § 502, 120 Stat. at 3432, codified at 38 U.S.C. § 8127(f).

<sup>5</sup> Federal Procurement Data System, available at [www.fpds.gov](http://www.fpds.gov), last accessed February 7, 2013.

to uncertainty, confusion and unnecessary expense for the SDVOSBs and the agencies attempting to contract with them.

H.R. 2882 attempts to harmonize the SBA program and the Vets First program, while reducing costs. It does so by requiring that VA transfer its verification responsibilities to the SBA, under a process to be negotiated between the two agencies. While VA would continue to determine whether the individuals asserting ownerships were themselves SDVs, SBA would assess the ownership structure of the entity and verify that it was an SDVOSB. As SBA has the experience determining whether or not firms are small, through an analysis of their ownership structure, this disposition of the responsibilities allows each to focus on its core competencies. Likewise, any challenges to a firm's status, or appeals of the agency determination, would be heard by the Office of Hearings and Appeals (OHA) at SBA. To fund the work SBA will perform for VA, SBA and VA are to negotiate a sum that shall be paid by VA out of fees VA collects for its multiple-award schedules. Any disputes between the two agencies are to be resolved by the Office of Management and Budget in the Executive Office of the President. The Congressional Budget Office estimates that this move will save an average of \$5 million per year, which VA could then redirect to provide other types of assistance to SDVOSBs. Thus, H.R. 2882 will facilitate greater clarity, transparency and accountability in SDVOSB determinations.

### III. NEED FOR LEGISLATION

During the 112th and 113th Congresses, the Committee repeatedly received complaints from SDVOSBs about the inconsistency in the VA eligibility determinations for the Vets First program. As a result, in conjunction with the Committee on Veterans' Affairs of the House of Representatives, the Committee began to investigate these allegations. While some difference between eligibility determinations could be attributed to variations in the statute, the Committees found that much of the discord was due to regulatory and interpretive differences.

With a few important exceptions, the SBA program and the Vets First program use the same definitions, relying on the VA's definition of SDV to determine whether an individual qualifies for the program, and using the Act's definitions of small business.<sup>6</sup> This is eminently sensible, as it entrusts to each agency that which the agency has the most experience defining. The only difference occurs when the two concepts are combined in an attempt to define SDVOSBs. Both statutes agree that the term means a small business concern that is at least 51 percent owned by one or more SDVs or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more SDVs.<sup>7</sup>

<sup>6</sup>Section 3(q) of the Small Business Act defines "veteran" in accordance with 38 U.S.C. §101(2) and service-disabled veteran is defined by reference to 38 U.S.C. §101(16). The Vets First adopts the definition of small business found in Section 3(a) of the Act. 38 U.S.C. §8127(1)(1).

<sup>7</sup>Compare 15 U.S.C. §632(q)(2)(A) (Small Business Act definition of SDV small business) with; 38 U.S.C. §8127(k)(2) (statutory definition of SDV small business for VA). Under the statute governing the Vets First program, the statute actually requires that the service disabled veterans are "are unable to manage the daily business operations of such concern" (38 U.S.C. §8127(l)(2)(b)), but in regulation this has been interpreted to require the management of the daily business operations. 38 C.F.R. §74.1. The Small Business Act requires that, "the management and daily business operations of [the concern] are controlled by one or more service-dis-

However, there are three critical differences. First, the SBA program, but not the Vets First program, explicitly extends benefits to firms that, “in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.”<sup>8</sup> The discrepancy regarding permanent caregivers is addressed by VA in its regulations, which extends rights to these individuals.<sup>9</sup> Second, the VA but not the SBA allows the surviving spouse of a 100 percent disabled veteran to continue participating as a SDVOSB for up to ten years if, after the death of a veteran, the surviving spouse of such veteran acquires ownership rights.<sup>10</sup> Third, the government-wide program permits self-certification by SDVOSBs, subject to protests, while the Vets First program requires that VA maintain a database of SDVOSBs that are certified as such by the VA.<sup>11</sup>

Both SBA and VA processes for certifying SDVOSBs are imperfect. As previously mentioned, SBA relies upon a process of self-certification. If a contracting officer, SBA, or an interested party believes that the firm does not qualify, they may raise a protest to the SBA Director of the Office of Government Contracting (DGC).<sup>12</sup> The DGC then has 15 days to investigate and issue a decision.<sup>13</sup> Appeals of the DGC’s decision are heard by OHA and decided in 15 days, at which time a published decision is made publicly available.<sup>14</sup> While this process has the advantage of allowing 16,576 SDVOSBs to quickly begin competing for contracts, it also leaves open the door for fraud.<sup>15</sup> Indeed, GAO previously recommended that the relevant parties expand “the use of the VA VetBiz ‘verified’ database governmentwide [sic] for purposes of validating all SDVOSB eligible firms for contracting.”<sup>16</sup> However, VA has previously stated that such a program would cost nearly \$100 million annually, and GAO more recently tempered the recommendation, stating that “an expansion of VA’s authority to address government-wide program problems should not be undertaken until VA demonstrates that its process is successful in reducing its own SDVOSB program’s vulnerability to fraud and abuse.”<sup>17</sup>

In contrast, VA’s SDVOSB program requires that VA annually verify the status of the 5,509 SDVOSBs currently certified in its database.<sup>18</sup> Additionally, in fiscal year 2012, VA received 4,900 new initial applications for both the SDVOSB and VOSB program.<sup>19</sup> VA

abled veterans or, in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.” 15 U.S.C. § 632(q)(2)(B).

<sup>8</sup>The Act, § 3(q)(2)(B).

<sup>9</sup>38 C.F.R. § 74.1.

<sup>10</sup>37 U.S.C. § 8127(h).

<sup>11</sup>*Compare* Act, § 36(q)(2)(B), with 38 U.S.C. § 8127(f).

<sup>12</sup>13 C.F.R. § 125.24–25.

<sup>13</sup>*Id.* at § 125.25–27.

<sup>14</sup>*Id.* at § 134.514.

<sup>15</sup>SDVOSB numbers are taken from the federal System for Award Management on November 24, 2014. [www.sam.gov](http://www.sam.gov). For information on fraud, see, e.g. Government Accountability Office (GAO), Case Studies Show Fraud and Abuse Allowed Ineligible Firms to Obtain Millions of Dollars in Contracts (2009)(GAO–10–108) (hereinafter Case Studies).

<sup>16</sup>*Id.* at 21.

<sup>17</sup>GAO, SDVOSB Program: Vulnerability to Fraud and Abuse Remains 2 (2012) (GAO–12–697).

<sup>18</sup>The number of verified firms is from the VIP database. *available* at [www.vip.vetbiz.gov](http://www.vip.vetbiz.gov). Recertification requirements are address in 38 C.F.R. § 74.15; cf. <http://www.va.gov/osdbu/faqs/verification.asp> (recertification is required every two years, which is inconsistent with the regulations).

<sup>19</sup>GAO, Veteran Owned Small Businesses: Planning and Data System for VA’S Verification Program Need Improvement 44 (2013) (GAO–13–95) (hereinafter Planning and Data).

uses over 200 full-time equivalents and spends \$33 million annually operating a four step certification process after an application is submitted:

- VA employees screen it to ensure that it meets the minimum eligibility requirements;
- VA contractors conduct an initial evaluation and make a preliminary recommendation for approval, denial or additional review;
- VA contractors and employees review the initial recommendation, and if necessary, conduct site visits; and
- VA supervisors make a formal determination and issue a letter decision to the applicant.<sup>20</sup>

This process takes approximately 85 days, and 61 percent of applicants are accepted.<sup>21</sup> Only two percent of the firms rejected by VA are rejected because the individual is not a veteran or SDV.<sup>22</sup> That means that 98 percent are rejected due to the structure of the business itself—whether it is independently owned and operated, and controlled by a veteran or SDV. Those that are rejected may appeal the decision through a Request for Consideration, which is conducted by the same office that made the initial determination—the VA’s Center for Verification and Evaluation (CVE).<sup>23</sup> Requests for reconsideration are granted on 48 percent of appeals, but generally take an additional 147 days. In contrast with SBA’s process where appeals are decided by independent judges “where the standard of review is whether the determination of eligibility was based on a clear error of fact or law or whether the decision was arbitrary, capricious or contrary to law, [VA] has no such appellate procedure.”<sup>24</sup> Compounding the problem, VA’s decisions, unlike those of the SBA, are not published, and do not represent legal precedent. This could result in similarly situated entities be treated differently, which violates the basic tenet of reasoned decision making required by the Administrative Procedures Act (APA).<sup>25</sup>

GAO and the federal courts have taken issue with VA’s process. GAO recently found that while “VA has made progress toward reducing its vulnerability to fraud and abuse,” the agency’s strategic planning and data capabilities necessary to prevent that fraud remain inadequate.<sup>26</sup> The Court of Federal Claims (COFC), when examining transfer restrictions and appeals under the VA process, found that VA’s appeals process “contravened the minimal requirements for informal adjudication set forth in Section 555 of the

<sup>20</sup>*Id.* at 8.

<sup>21</sup>*Id.* at 14, 44.

<sup>22</sup>*Consistently Inconsistent: Hearing Before the Subcomm. on Contracting and Workforce of the House Comm. on the Small Business and the Subcomm. on Oversight and Investigations of the House Comm. on Veterans Affairs*, H. Rpt. 113–006 at 13 (2013) [hereinafter *Consistently Inconsistent*].

<sup>23</sup>Planning and Data, *supra* note 19, at 44; VA’s regulations require a decision in 60 days. 38 C.F.R. § 74.11. It is worth noting that the CVE was known as the Center for Veterans Enterprise until September 30, 2013, when its name was changed to more accurately reflect its mission. [http://www.va.gov/osdbu/press\\_releases/news20131010.asp](http://www.va.gov/osdbu/press_releases/news20131010.asp). Further, CVE is a program office of the VA’s Office of Small and Disadvantaged Business Utilization (OSDBU), despite the fact that the Act prohibits the OSDBU from carrying out functions not enumerated in the Act. § 16(k)(6), 15 U.S.C. § 644(k)(15). Therefore, removing this function from the OSDBU will free up those resources to be deployed as intended by Congress.

<sup>24</sup>Planning and Data, *supra* note 19, at 56.

<sup>25</sup>*See Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

<sup>26</sup>Planning and Data, *supra* note 19, at 33–34.

[APA].”<sup>27</sup> While the GAO finding highlighted the lack of long term planning and data systems that allow VA to monitor applications and processes to ensure consistence, the COFC holdings went to a more crucial problem; the VA’s current verification program does not adequately balance the due process rights of the SDVs firms with the VA’s obligation to prevent fraudulent contracting.

However, the VA’s regulatory and interpretive application of its program has led to inconsistencies that cannot be attributed simply to statutory differences or the process differences for qualifying firms. Instead, veterans service organizations (VSOs) alleged that the regulatory differences between the two SDVOSB programs exceed those differences that would be expected given the statutory discrepancies. As a result, and at the request of the Committees, SBA and VA undertook a joint review of the regulations governing each program. VA has stated that this analysis demonstrates that there are only three differences between the regulations: (1) VA allows surviving spouses to inherit limited benefits; (2) VA requires change of ownership notification; and (3) VA has a program for veteran-owned small businesses (VOSB).<sup>28</sup> Furthermore, VA stated that they were aware of only one interpretive difference in the application of the regulations, and that concerned a question of whether SDVs control a company with a three-person board if one SDV and one non-SDV could align against a second SDV.<sup>29</sup> Based on this, the conflict would appear minimal at best.

However, SBA stated “while it is true that the wording of the regulations pertaining to the VA’s and SBA’s eligibly [*sic*] requirements is similar, there are some key differences in interpretations.”<sup>30</sup> Specifically, the VA and SBA comparison of their regulations found that VA considered three sources of regulations: VA’s SDVOSB regulations,<sup>31</sup> SBA’s SDVOSB regulations,<sup>32</sup> and SBA’s 8(a) business development (8(a)) program regulations.<sup>33</sup> This framing of the discussion itself presents two problems. First, looking at the regulations regarding the 8(a) program may be informative, but should not be controlling since the programs have different statutory purposes. The 8(a) program is a time-limited program intended to assist socially and economically disadvantaged individuals who are trying to establish successful small businesses, and contracting is used as a tool in the development process.<sup>34</sup> In contrast, both SDVOSB programs are contracting programs intended to help the federal government meet its statutory goals of awarding at least three percent of all prime contract and subcontract dollars to SDVOSBs.<sup>35</sup> When VA patterned its rules off of the 8(a) program regulations, it failed to recognize the difference between the SDVOSB and 8(a) programs. This has led to situations in which the VA requires SDVOSB living in community property states to have their spouses preemptively relinquish any interest in the firm

<sup>27</sup> *Miles Construction, LLC v. United States*, 113 Fed. Cl. 174, 177 (2013) (citing *Miles Construction, LLC v. United States*, 108 Fed. Cl. 792, 805 (2013)); cf. *KWV, Inc. v. United States*, 113 Fed. Cl. 534, 539 (2013) (noting superficiality of VA OSDBU consideration under Vets First).

<sup>28</sup> Comments of Tom Leney, Executive Director of the Veterans and Small Business Programs for VA, to VET Force (Feb. 12, 2013).

<sup>29</sup> *Id.*

<sup>30</sup> Planning and Data, *supra* note 19, at 56.

<sup>31</sup> 38 C.F.R. Part 74.

<sup>32</sup> 13 C.F.R. §§ 125.8–125.29.

<sup>33</sup> 13 C.F.R. Part 124.

<sup>34</sup> 13 C.F.R. § 124.1.

<sup>35</sup> Small Business Act, § 15(g); 38 U.S.C. § 8127(c).

lest the spouse be considered an owner,<sup>36</sup> even though the underlying statute will allow the same spouse to qualify for the program after the SDV's death.<sup>37</sup> A similar requirement, with respect to community property states, does not exist in the SBA program.<sup>38</sup> Additionally, like the 8(a) program, VA requires that SDVs receive the majority of the pay or profits of the firm.<sup>39</sup> SBA has not included this requirement in the SDVOSB regulations, although distribution of profits would be considered in analyzing control, because pay itself is not always determinative of control.

Perhaps more egregiously though, the VA's analysis excluded the relevant SBA regulations that address issues fundamental to whether a SDV owns and controls a firm and whether the firm is itself small, which are found at Part 121 of the SBA's regulations. These regulations provide the underpinnings for the ownership and control provisions found in SBA's SDVOSB and 8(a) programs. For example, these regulations tell firms how stock ownership will be used to determine control of a company, and how board composition affects this calculus<sup>40</sup>—the very situation VA admitted caused interpretive differences.<sup>41</sup> However, these regulations go far beyond that one example—they address when agreements to act in the future will be given present effect, how to treat companies with common management, companies with substantially identical business or economic interests, companies spun off from other companies, joint ventures, companies that are unduly reliant on an ostensible subcontractor, companies with franchise and license agreements, or companies where the totality of the circumstances indicate that the business is not independently owned and controlled.<sup>42</sup> To attempt to determine if a firm is a SDVOSB without examining it in light of these regulations belies the clear statutory language of the Vets First program, which directs VA to use SBA's definition of a small business, because these are the regulations that define whether a firm is small.<sup>43</sup>

This has led to bright line rules at VA that do not exist at SBA. For example, VA will deny SDVOSB status if ownership in the entity carries with it the requirement that a right of first refusal to purchase the SDV's ownership interest will be offered to another owner or third party.<sup>44</sup> While SBA does consider agreements regarding transfer of ownership, it looks at each agreement to determine whether its terms mean that the SDV does not unconditionally control the company. Similarly, VA requires that that at least one SDV who “manage[s] the applicant or participant must devote full-time to the business during the normal working hours of firms in the same or similar line of business.”<sup>45</sup> SBA does not require this, as long as SDVs can prove actual ownership and control over day-to-day decisions. Most recently, VA decided that franchisees

<sup>36</sup> 38 C.F.R. § 74.3(f).

<sup>37</sup> 38 U.S.C. § 8127(h).

<sup>38</sup> 38 C.F.R. § 74.3(f).

<sup>39</sup> 38 C.F.R. § 74.3(d).

<sup>40</sup> 13 C.F.R. § 121.103(c). For an in-depth discussion of affiliation and control issues, see Committee on Small Business, “What is a Small Business for Purpose of Federal Contracting?” 6–16 (2013), available at <http://smallbusiness.house.gov/resources/committee-publications.htm>.

<sup>41</sup> *Supra* note 17.

<sup>42</sup> 13 C.F.R. § 121.103(a)(5), (d)–(i).

<sup>43</sup> 38 U.S.C. § 8128.

<sup>44</sup> <http://www.va.gov/osdbu/veteran/transferRestrictionsBrief.asp>.

<sup>45</sup> 38 C.F.R. § 74.4(c)(4).



may not be SDVOSBs,<sup>46</sup> even though SBA does not consider that the existence of a franchisor/franchisee relationship to automatically exclude franchisees from designation as a small business.<sup>47</sup>

Indeed, the regulatory and interpretive differences are being borne out by case law. Within SBA, any appeal regarding a firm's size or status is heard by the OHA, a body of administrative law judges that provides final agency action through published decisions. Recently, OHA identified fourteen cases:

in connection with [SDVOSB] set-asides where (1) OHA determined the subject business concern was not small and thus was ineligible for the contract at issue, and (2) had the [VA regulations] been the sole governing rules, the business concern would have been eligible for the contract. In each of these 14 cases, the different outcome is owed to the operation of SBA's affiliation rule at 13 C.F.R. § 121.103. The affiliation rule, an integral part of small business size analysis, is not a part of the [VA's] SDVO status regulations.<sup>48</sup>

These cases should not be seen as an exhaustive list, since OHA does not have the ability to review cases that VA denies, nor does OHA see each case that VA approves. However, it does illustrate how different applications of regulations by even the most well-intentioned parties can lead to regulatory and interpretive discrepancies.

Given that veterans own about 2.4 million businesses, or nine percent of all of America's businesses, and that these concerns generate \$1.2 trillion in receipts and employ nearly 5.8 million Americans, these regulatory and interpretive discrepancies have the potential to damage a significant sector of our economic base and undermine confidence in federal contracting processes.<sup>49</sup> Legitimate SDVOSBs should not be denied the ability to compete for contracts at VA simply because VA is incorrectly interpreting the Act. Likewise, truly fraudulent firms denied entry into the Vets First program should not be able to then self-certify as SDVOSBs for government-wide contracts, and firms that SBA determines to be other than SDVOSBs should not be able to receive contracts under the Vets First program. Unfortunately, all three scenarios are occurring.

Therefore, H.R. 2882 is an important step in rectifying these opportunities for abuse. By continuing to have VA state whether an individual is a SDV or a veteran, ineligible individuals will not be

<sup>46</sup> VA's website states that, "Due to the level of control that is generally contained in a Franchise Agreement, the Franchisor maintains a significant amount of control over certain day-to-day activities as well as certain long term decisions of the Franchisee (the Applicant). That is the nature of a franchise. With this type of agreement, the applicant would not be eligible for the [Vets First program]." <http://www.va.gov/osdbu/faqs/109461.asp#q010> (last accessed on November 4, 2014).

<sup>47</sup> 13 C.F.R. § 121.103(i).

<sup>48</sup> Email from SBA to Committee Staff, "OHA decisions on Service-Disabled Veteran-Owned Status and Size Cases," (Feb. 12, 2013). The cases are: *Chu & Gassman, Inc.*, SBA No. SIZ-5394 (2012); *Chu & Gassman, Inc.*, SBA No. SIZ-5344 (2012); *EarthCare Solutions, Inc.*, SBA No. SIZ-5183 (2011); *Specialized Veterans, LLC*, SBA No. SIZ-5138 (2010); *A1 Procurement, LLC*, SBA No. SIZ-5121 (2010); *J.M. Waller Associates, Inc.*, SBA No. SIZ-5108 (2010); *DooleyMack Government Contracting, LLC*, SBA No. SIZ-5086 (2009); *DooleyMack Government Contracting, LLC*, SBA No. SIZ-5085 (2009); *Blue Cord Construction, Inc.*, SBA No. SIZ-5077 (2009); *Taylor Consultants, Inc.*, SBA No. SIZ-5049 (2009); *Heritage of America, LLC*, SBA No. SIZ-5017 (2008); *Mission Solutions, Inc.*, SBA No. SIZ-4828 (2006); *B & M Construction, Inc.*, SBA No. SIZ-4805 (2006); *Catapult Technology, Ltd.*, SBA No. SIZ-4795 (2006).

<sup>49</sup> *Consistently Inconsistent*, *supra* note 22, at 6.

able to gain access to Vet First contracts, and SBA will continue to rely upon VA documentation in its appeals process when looking at the individuals owning and controlling a firm. However, issues such as business structure and ownership will be transferred to SBA, which has a detailed body of regulations and case law to guide its decisions. Further, those challenging eligibility determinations will be able to avail themselves of an independent appellate process that meets the constitutional due process rights and comports with the APA's mandate of reasoned decisionmaking. Additionally, it will be more difficult for a firm denied access to one program to then apply to the other. Denial from the SBA program would be an immediate bar to the Vets First program, except in cases where the individual was a surviving spouse. Likewise, a firm denied entry into the Vets First program could not then self-certify into the SBA program, since it would have already had its status adjudicated by SBA. This solution is not perfect, since it does not reconcile the definitions between the programs, and does not address the issues of fraud in the self-certification program, but it creates a template that could be expanded upon in the future to address those issues.

#### IV. HEARINGS

In the 113th Congress, the Subcommittee on Contracting and Workforce held a joint hearing with the Subcommittee on Oversight and Investigations of the Committee on Veterans' Affairs on March 19, 2013. The hearing examined the discrepancies between the Vets First and SBA procurement programs for SDVOSBs. During the hearing, Tom Leney, Director of VA's Office of Small and Disadvantaged Business Utilization, stated that he "would be happy if the SBA were to take this burden" of verification.<sup>50</sup>

#### V. COMMITTEE CONSIDERATION

The Committee on Small Business met in open session, with a quorum being present, on March 5, 2014 and ordered H.R. 2882 reported to the House by a voice vote at 4:02 p.m. During the markup, four amendments were offered, and three were adopted.

Amendment Number One filed by Mr. Graves (R-MO) was an amendment in the nature of a substitute and was adopted as base text by unanimous consent.

Amendment Number Two filed by Ms. Kuster (D-NH) was an amendment to require VA and SBA to consult regularly with VSOs on ways to improve services to veterans and SDVs. It passed by voice vote.

Amendment Number Three filed by Ms. Hahn (D-CA) was an amendment to require that VA and SBA, as part of the Memorandum of Understanding required by H.R. 2882, work to increase opportunities for SDVOSBs owned and controlled by female and minority veterans. It was adopted by voice vote.

Amendment Number Four filed by Ms. Velázquez (D-NY) was an amendment authorizing \$15 million in appropriations for SBA rather than a transfer of funds from VA. The amendment failed by a vote of 10 Ayes to 13 Noes.

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<sup>50</sup> *Consistently Inconsistent*, *supra* note 22, at 26.

## VI. COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the recorded votes on the motion to report the legislation and amendments thereto.

Amendment Number Four filed by Ms. Velázquez (D–NY) failed by a recorded vote of 10 Ayes to 13 Noes.

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**AMENDMENT TO THE AMENDMENT IN THE  
NATURE OF A SUBSTITUTE TO H.R. 2882  
OFFERED BY MS. KUSTER OF NEW HAMPSHIRE**

Page 4, line 1, strike “meet” and insert the following:

1                   “(A) meet”.

Page 4, line 4, strike the period at the end and insert “; and”.

Page 4, insert after line 4 the following:

2                   “(B) consult with veterans service organi-  
3                   zations to discuss ways to increase opportuni-  
4                   ties for service-disabled veteran-owned small  
5                   businesses and veteran-owned small busi-  
6                   nesses.”.



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**AMENDMENT TO THE AMENDMENT IN THE  
NATURE OF A SUBSTITUTE TO H.R. 2882  
OFFERED BY MS. HAHN OF CALIFORNIA**

Page 4, line 14, insert after “section.” the following:

1           “(7) In any meeting required under paragraph  
2           (5), the Secretary and the Administrator shall in-  
3           clude in the discussion of ways to improve collabora-  
4           tion under the memorandum to increase opportuni-  
5           ties for small businesses owned and controlled by  
6           service-disabled veterans who are women or minori-  
7           ties and small business concerns owned and con-  
8           trolled by veterans who are women or minorities.”.



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**AMENDMENT TO THE AMENDMENT IN THE  
NATURE OF A SUBSTITUTE TO H.R. 2882  
OFFERED BY MS. VELÁZQUEZ OF NEW YORK**

Page 4, line 14, insert after “this section.” the following:

- 1 “(7) The Administrator shall implement para-
- 2 graph (3) beginning not later than the date of enact-
- 3 ment of this paragraph.
- 4 “(8) There are authorized to be appropriated to
- 5 carry out this section \$15,000,000 for each fiscal
- 6 year.”.

Page 3, strike line 3 and all that follows through line 22.



3/7/2014 9:29:12 AM FULL COMMITTEE ROSTER ROLL CALL

# **FULL COMMITTEE ON SMALL BUSINESS ROLL CALL**

**BILL: HR 2882**  
**DATE: March 5, 2014**  
**ROLL CALL: 3**  
**AMENDMENT NUMBER: 3**  
**VOTE: (AYE) 10 (NO) 13**

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. GRAVES, Chairman		X		
Mr. CHABOT		X		
MR. KING				X
MR. COFFMAN		X		
MR. LUETKEMEYER		X		
MR. MULVANEY		X		
MR. TIPTON		X		
MS. HERRERA BEUTLER		X		
MR. HANNA		X		
MR. HUELSKAMP		X		
MR. SCHWEIKERT		X		
MR. BENTIVOLIO		X		
MR. COLLINS		X		
MR. RICE		X		
MS. VELAZQUEZ, RANKING MEMBER	X			
MR. SCHRADER	X			
MS. CLARKE	X			
MS. CHU	X			
MS. HAHN	X			
MR. PAYNE, JR.	X			
MS. MENG	X			
MR. SCHNEIDER				X
MR. BARBER	X			
MS. KUSTER	X			
MR. MURPHY	X			
<b>TOTALS</b>	<b>10</b>	<b>13</b>		

## VII. SECTION-BY-SECTION ANALYSIS OF H.R. 2882

*Section 1. Short title*

This Section designates the bill as the “Improving Opportunities for Service-Disabled Veteran-Owned Small Businesses Act of 2013.”

*Section 2. SBA to assume control of verification of ownership and control status of applicants for inclusion in the database of small businesses owned and controlled by service disabled veterans and veterans*

Under current law, eligibility for the VA’s Vets First program is controlled by subsections (e) through (g) of § 8127 of title 38, United States Code. Specifically, subsection (e) states that a small business concern may only receive a contract under § 8127 if the small business concern and its owner are listed in a database of veteran-owned small businesses maintained by the VA Secretary. Subsection (f) addresses the specifics of this database, requiring that VA “maintain a database of small business concerns owned and controlled by veterans and the veteran owners of such business concerns.”<sup>51</sup> This database is known as the Vendor Information Page (VIP) database. VA is granted the authority to collect the necessary information to verify firms that voluntarily apply for the VIP database, but may not include any firm “until the Secretary receives such information as may be necessary to verify that the individual is a veteran.”<sup>52</sup> Specifically, the VA must verify that:

(A) the small business concern is owned and controlled by veterans; and

(B) in the case of a small business concern for which the person who owns and controls the concern indicates that the person is a veteran with a service-connected disability.<sup>53</sup>

The VA has the authority to share the database with the public and other agencies, but may also protect sensitive and confidential information.<sup>54</sup> Finally, subsection (g) grants VA the authority to suspend or debar companies misrepresenting their status as SDVOSBs or VOSBs.<sup>55</sup>

H.R. 2882 transfers the processes instead transfers this responsibility to the SBA by amending the Act to add a new section 48. In order to increase opportunities for SDVOSBs and VOSBs, the new section 48 requires that, within 180 days of enactment, the Administrator and the Secretary enter into a Memorandum of Understanding (MOU) transferring control and administration of the program under subsections 8127 (e) through (g) of title 38 from VA to the SBA. However, the new section 48 contains seven enumerated paragraphs which govern the MOU.

The subsection (1) requires that within 270 days of completing the MOU, the Administrator promulgate any regulations necessary to implement the new authority. The Committee presumes that few regulations will be necessary, but that SBA will need to address the definitional variations between title 38 and the Act and will need to account for verification of VOSBs. Given SBA’s abysmal

<sup>51</sup>38 U.S.C. § 8127(f)(1). The definition of a “small business concern” remains that given in section 3 of the Act. *Id.* at § 8127(l)(1).

<sup>52</sup>*Id.* at § 8127(f)(2)(B).

<sup>53</sup>*Id.* at § 8127(f)(4)(A)–(B).

<sup>54</sup>*Id.* at § 8127(f)(5)–(6).

<sup>55</sup>*Id.* at § 8127(g).



record of promulgating regulations in a timely fashion, H.R. 2882 states that if SBA does not issue the regulations by the specified deadline, SBA may no longer exercise its authority to conduct pilot programs under section 7(a)(25)(A) of the Act.

Next, subsection (2) requires that SBA, as part of its verification process, to employ fraud prevention measures at the time of initial application, through detection and monitoring processes after initial acceptance, and by investigating allegations of potential fraud. SBA is further directed to remove firms that do not qualify from the VIP database, and to refer cases of fraud for prosecution when appropriate. VA currently reviews each firm annually, and conducts site visits of each firm, but it also gives firms a period of time to correct inaccuracies when fraud is alleged. While the Committee is not convinced that a site visit is appropriate for firms failing to have received federal contracts, this provision should ensure that the fraud prevention measures for the program remain strong.

Subsection (3) requires that any appeal of the SBA's decision on verification of VOSBs or SDVOSBs be heard by OHA. This directly addresses the failures in the current appeals process at VA, where appeals are heard and decided by the Office of Small and Disadvantaged Business Utilization despite the fact that this very office made the initial determination. This should remedy the procedural defects the COFC found with the VA verification process.

Subsection (4) provides the funding mechanism for the transfer in authority from VA to SBA. Specifically, in subsection 4(A), it states that for six years VA will reimburse SBA for the costs that SBA incurs implementing the MOU. The funds are to be drawn from the fees collected by the Secretary in the administration of the VA's multiple-award schedules contracts, commonly known as the supply fund. Currently, VA collects over \$100 million per year from this fund, which is not subject to appropriations, and has a significant reserve. These are the funds VA has been using to pay for the verification activities to date, and per the CBO cost estimate, the shift from VA to SBA will actually save VA at least \$5 million per year. Should there be a disagreement between the VA and SBA over the amount of funds required, subsection (4) says that the dispute shall be resolved by the Director of the Office of Management and Budget. Finally, paragraph (4)(B) permits SBA and VA to extend the duration of the MOU beyond the initial six years. Therefore, SBA will have six years to prove to VA and Congress that it can efficiently and transparently manage the verification process.

Subsection (5) addresses the semi-annual obligations of the VA and SBA pursuant to the MOU. In paragraph (A), the heads of the two agencies are required to meet every six months to discuss how they can increase opportunities for SDVOSBs and VOSBs. The next subparagraph, paragraph (B) requires that VA and SBA also meet with VSOs every 180 days to seek ways to improve opportunities SDVOSBs and VOSBs. These requirements should ensure that the MOU receives the highest level of attention, and that it leads to a more collaborative relationship between the agencies.

Subsection (6) adds the requirement that VA and SBA report to the Committees on Small Business and on Veterans' Affairs of the House of Representatives, and the Committees on Small Business and Entrepreneurship and on Veterans' Affairs of the Senate every six months. The report is to detail the progress being made by the

two agencies in implementing the MOU. This will ensure that Congress is promptly made aware of any problems with implementation.

Finally, paragraph (7) requires that during the meetings required by paragraph (5), the SBA and VA include in the discussion ways to improve opportunities for SDVOSBs and VOSBs that are owned and controlled by minorities and women.

### *Section 3. Memorandum of Understanding*

Section 3 of H.R. 2882 amends section 8127(f) of title 38, United States Code, by adding a new paragraph at the end of subsection (f). The new paragraph (7) directs the Secretary of the VA to enter into a MOU with the SBA. It further directs that the MOU conform with the new section 48 of the Act. Thus, the SBA and VA are given identical direction from Congress.

## VIII. CONGRESSIONAL BUDGET COST ESTIMATE

### *H.R. 2882—Improving Opportunities for Service-Disabled Veteran-Owned Small Businesses Act of 2013*

Under a program administered by the Department of Veterans Affairs (VA), small businesses that are owned by service-disabled veterans are eligible for special consideration in the process of awarding federal contracts. The VA maintains a database of businesses and owners eligible to participate in that preference program; H.R. 2882 would transfer authority to maintain that database to the Small Business Administration (SBA). The bill also would direct VA to reimburse SBA for its costs to operate the program, which would include not only database development and management activities, but also efforts to verify the small businesses' eligibility to participate in the program and to hear appeals of eligibility determinations.

CBO estimates that enacting H.R. 2882 would affect direct spending; therefore, pay-as-you-go procedures apply. CBO estimates, however, that those effects would not be significant. The VA collects fees from agencies that participate in joint contracting opportunities with VA; the agency is authorized to spend those fees without further appropriation action to pay for, among other things, the database and verification system for small businesses.

Based on information from VA and SBA, CBO expects that SBA will spend less to operate the certification program each year than VA because it can use some systems already in place that provide similar certification services for other preference programs such as the HUBZone program. CBO estimates that SBA would spend, on average, about \$5 million per year less than VA would to administer the verification system. CBO expects that the savings realized by VA would be spent on other authorized activities; therefore, the effect on direct spending would not be significant. CBO assumes that amounts transferred from VA under the bill would be recorded as offsets to discretionary spending by SBA; therefore, we estimate that implementing H.R. 2882 would have no significant net effect on spending subject to appropriation.

H.R. 2882 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contacts for this estimate are Susan Willie and Dwayne Wright. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

#### IX. UNFUNDED MANDATES

H.R. 2882 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act, Pub. L. No. 104-4, and would impose no costs on state, local or tribal governments.

#### X. NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House, the Committee provides the following opinion and estimate with respect to new budget authority, entitlement authority and tax expenditures. The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to §402 of the Congressional Budget Act of 1974, to the extent that the Office found that H.R. 2882 does not affect direct spending or revenues. However, the Committee believes that the estimate underestimates the savings that would occur pursuant to the enactment of H.R. 2882. SBA has stated that it will cost \$15 million to implement H.R. 2882, which would result in a saving of over \$18 million per year, but the estimate provided by the Congressional Budget Office only forecasts savings of \$5 million per year. Given that SBA will bear the vast majority of implementation costs, the Committee believes that estimate to be more accurate.

#### XI. OVERSIGHT FINDINGS

In accordance with clause (2)(b)(1) of rule X of the Rules of the House, the oversight findings and recommendations of the Committee on Small Business with respect to the subject matter contained in H.R. 2882 are incorporated into the descriptive portions of this report.

#### XII. STATEMENT OF CONSTITUTIONAL AUTHORITY

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the authority for this legislation in Art. I, § 8, cls. 1, 3, and 18 and Art. IV, § 3, cl. 2 of the Constitution of the United States.

#### XIII. CONGRESSIONAL ACCOUNTABILITY ACT

H.R. 2882 does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of § 102(b)(3) of Pub. L. No. 104-1.

#### XIV. FEDERAL ADVISORY COMMITTEE ACT STATEMENT

H.R. 2882 does not establish or authorize the establishment of any new advisory committees as that term is defined in the Federal Advisory Committee Act, 5 U.S.C. App. 2.

#### XV. STATEMENT OF NO EARMARKS

Pursuant to clause 9 of rule XXI, H.R. 2882 does not contain any Congressional earmarks, limited tax benefits or limited tariff benefits as defined in subsections (d), (e) or (f) of clause 9 of rule XXI of the Rules of the House.

#### XVI. STATEMENT OF DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c) of rule XIII of the Rules of the House, no provision of H.R. 2882 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program, a program that was included in any report from the GAO pursuant to § 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

#### XVII. DISCLOSURE OF DIRECTED RULE MAKINGS

Pursuant to clause 3(c) of rule XIII of the Rules of the House, H.R. 2882 directs SBA to promulgate rules within 270 days of finalizing the MOU in order to account for definitional variations between the Small Business Act and title 38, United States Code.

#### XVIII. PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House, the Committee establishes the following performance-related goals and objectives for this legislation:

H.R. 2882 increases efficiency, consistency and transparency in verification of small business concerns owned and controlled by veterans and service-disabled veterans seeking federal contracts. This should allow more concerns to be certified annually for a lower cost.

#### XIX. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

### SMALL BUSINESS ACT

\* \* \* \* \*

#### **SEC. 48. VETS FIRST PROGRAM.**

*In order to increase opportunities for small business concerns owned and controlled by service-disabled veterans and small business concerns owned and controlled by veterans in the Federal marketplace, not later than 180 days after the effective date of this section, the Administrator shall enter into a memorandum of understanding with the Secretary of Veterans Affairs that transfer control and administration of the program under subsections (e) through (g) of section 8127 of title 38, United States Code, to the Administrator, consistent with the following:*

(1) Not later than 270 days after completing the memorandum of understanding, the Administrator shall make rules to carry out the memorandum. If the Administrator does not make such rules by such date, the Administrator may not exercise the authority under section 7(a)(25)(A) until such time as those rules are made.

(2) The Administrator shall assume authority and responsibility for maintenance and operation of the database and for verifications under the program. Any verifications undertaken by the Administrator shall employ fraud prevention measures at the time of the initial application, through detection and monitoring processes after initial acceptance, by investigating allegations of potential fraud, removing firms that do not qualify from the database, and referring cases for prosecution when appropriate

(3) Any appeal by a small business concern, at the time that verification is denied or a contract is awarded, of any determination under the program shall be heard by the Office of Hearings and Appeals of the Small Business Administration.

(4)(A) The Secretary shall, for a period of 6 years commencing on a date agreed to in the completed memorandum, reimburse to the Administrator of the Small Business Administration any costs incurred by the Administrator for actions undertaken pursuant to the memorandum from fees collected by the Secretary of Veteran Affairs under multiple-award schedule contracts. The Administrator and the Secretary shall endeavor to ensure maximum efficiency in such actions. Any disputes between the Secretary and the Administrator shall be resolved by the Director of the Office of Management and Budget.

(B) The Secretary and the Administrator may extend the term of the memorandum of understanding, except for the reimbursement requirement under subparagraph (A). The Secretary and the Administrator may in a separate memorandum of understanding provide for an extension of such reimbursement.

(5) Not later than 180 days after the date of enactment of this section, and every 180 days thereafter, the Secretary and the Administrator shall—

(A) meet to discuss ways to improve collaboration under the memorandum to increase opportunities for service-disabled veteran-owned small businesses and veteran-owned small businesses; and

(B) consult with congressionally-chartered Veterans Service Organizations to discuss ways to increase opportunities for service-disabled veteran-owned small businesses and veteran-owned small businesses.

(6) Not later than 180 days after the date of enactment of this section, and every 180 days thereafter, the Secretary and the Administrator shall report to the Committee on Small Business and the Committee on Veterans' Affairs of the House of Representatives, and the Committee on Small Business and Entrepreneurship and the Committee on Veterans' Affairs of the Senate on the progress made by the Secretary and the Administrator implementing this section.

(7) In any meeting required under paragraph (5), the Secretary and the Administrator shall include in the discussion of

*ways to improve collaboration under the memorandum to increase opportunities for small businesses owned and controlled by service-disabled veterans who are women or minorities and small business concerns owned and controlled by veterans who are women or minorities.*

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**TITLE 38, UNITED STATES CODE**

\* \* \* \* \*

**PART VI—ACQUISITION AND DISPOSITION OF  
PROPERTY**

\* \* \* \* \*

**CHAPTER 81—ACQUISITION AND OPERATION OF HOS-  
PITAL AND DOMICILIARY FACILITIES; PROCUREMENT  
AND SUPPLY; ENHANCED-USE LEASES OF REAL PROP-  
ERTY**

\* \* \* \* \*

**SUBCHAPTER II—PROCUREMENT AND SUPPLY**

\* \* \* \* \*

**§ 8127. Small business concerns owned and controlled by  
veterans: contracting goals and preferences**

(a) \* \* \*

\* \* \* \* \*

(f) DATABASE OF VETERAN-OWNED BUSINESSES.—(1) \* \* \*

\* \* \* \* \*

*(7) Not later than 180 days after the effective date of this paragraph, the Secretary shall enter into a memorandum of understanding with the Administrator of the Small Business Administration consistent with section 48 of the Small Business Act, which shall specify the manner in which the Secretary shall notify the Administrator as to whether an individual is a veteran and if that veteran has a service-connected disability.*

\* \* \* \* \*

## DISSENTING VIEWS

### Improving Opportunities for Service-Disabled Veteran-Owned Small Businesses Act of 2013

#### BACKGROUND

Congress has designated service-disabled veteran-owned small businesses as a key group that can benefit from contract assistance.<sup>1</sup> To underscore this commitment, the Veterans Entrepreneurship and Small Business Development Act of 1999 established an annual goal of not less than 3 percent on all federal prime contract and subcontract awards for service-disabled veteran-owned small businesses.<sup>2</sup> In order to achieve this goal, the Veterans Benefits Act of 2003 added a section to the Small Business Act creating certain incentives to provide greater contract opportunities to SDVOSBs. This program, which is overseen by the Small Business Administration (SBA), allows SDVOSBs to access federal contracts.

However, recognizing the importance of getting contracts to not only SDVOSBs, but Veteran-Owned Small Businesses (VOSBs) as a whole, Congress passed the Veterans Benefits, Health Care, and Information Technology Act of 2006.<sup>3</sup> The Act gave the Department of Veteran Affairs (VA) authority to create the VETS First program which would give priority preference in its small business contracting to SDVOSBs and VOSBs as well as make sole-source or set-aside awards.<sup>4</sup> Along with establishing VA's contracting preferences, the 2006 Act makes VA responsible for maintaining a database of SDVOSBs and other VOSBs. The Act requires VA to verify that all firms entered in the database are actually owned and controlled by one or more veterans and to confirm the status of any owner who indicates a service-connected disability. The VA's OSDBU has overall responsibility for the verification program with the Center for Veterans Enterprise (CVE) within the OSDBU maintaining the database and verifying firms.

In May 2008, the VA began verifying firms. However, since its implementation, the process has been wrought with problems and lacked uniformity. Last year, GAO released a report detailing that while there have been improvements to certification process, the VA continues to face challenges in establishing a stable and efficient program that could verify firms on a timely and consistent basis.<sup>5</sup>

H.R. 2882, Improving Opportunities for Service-Disabled Veteran-Owned Small Businesses Act of 2013, was introduced to move

<sup>1</sup>The Veterans Benefits Act of 2003, Pub. L. No. 108-183, Section 308.

<sup>2</sup>Veteran Entrepreneurship Act of 1999, Pub. L. No. 106-50, Section 502.

<sup>3</sup>Pub. L. No. 109-461.

<sup>4</sup>Pub. L. No. 109-461, Sec. 502.

<sup>5</sup>Government Accountability Office, *Veteran-Owned Small Businesses: Planning and Data System for VA's Verification Program Needs Improvement*, GAO 13-95 (Jan. 14, 2013).

the certification for the VETS First program from the VA to the SBA. While it is sound policy to place the program in the hands of an agency that is well-versed in certifications, the legislation relies on a confusing funding framework that is insufficient to ensure the program is sustainable. It is quite possible that for this very reason, this provision was deemed unworkable and omitted from the final version of the National Defense Authorization Act for 2015.<sup>6</sup>

#### IMPACT OF LEGISLATION

H.R. 2882 requires that VA and SBA enter into a Memorandum of Understanding (MOU) to transfer certifications for the program over to the SBA. Additionally, SBA will manage all appeals for the process. Instead of just authorizing funding for this program as is typical in legislative bodies across the world, smoke and mirror budgeting tactics were included for the purpose of concealing the true cost of the legislation from taxpayers. This confusing and byzantine maneuver requires that VA pay SBA for costs incurred in the administration of the program from the fees the VA collects under its multiple award schedule contracts. The MOU will begin on an agreed upon date and last for 6 years with the option of an extension, if agreed to by both parties. However, if extended, the parties must enact a separate MOU for an extension of the reimbursement mechanism.

The funding structure of the bill is too unstable as it hinges on two agencies, which the Committee has previously asked to work together in the past with little success, to come to agreement on paying for this program. To this point, Daniel Dellinger, the National Commander of the American Legion wrote to the Committee (full letter is attached) and stated that the underlying legislation “allows for possible delays in implementations and lapses in funding if the SBA and VA are unable to come to an agreement in a MOU. Veteran-owned businesses must not be allowed to become a bargaining chip simply because agencies fail to work out their differences.”

The bill fails to address what would occur in the likelihood that the agencies fail to reach an agreement for the initial funding or if the event of an extension of the program. The vast majority of veteran businesses who are denied certification through the current system have been denied because of their business structure, not their status as veterans or service-disabled veterans. Any disagreement between the two parties on funding would create a delay in certifying veteran-owned small businesses in a timely manner by those experts who are qualified in determining whether the business is indeed small.

Additionally, in the past, a similar structure was unsuccessfully used to pay for the certification of small businesses under the Small Disadvantaged Business program. After the initial authorization of the program ended, the program collapsed. Moreover, the Committee has seen programs that are not properly funded become

<sup>6</sup>This report was filed approximately nine months after the mark-up of this legislation and after the final agreement on the National Defense Authorization Act (NDAA) for 2015 was released. A provision based on H.R. 2882 was included in the House-passed version of the FY 2015 NDAA, but omitted from the final version of the FY 2015 NDAA.



susceptible to fraud, allowing ineligible firms to receive millions in contracting dollars.

In order to prevent these problems and ensure from the outset that this program has sufficient funding from the start, Ranking Member Velázquez introduced an amendment that would have simply provided a traditional authorization at \$15 million for each year that SBA performed the certification process of these veteran-owned small businesses. The levels of funding proposed in her amendment are on par with other small business contracting programs, such as the 8(a) and HUBZone programs, which are currently administrated by SBA. Though the amendment had the support of the American Legion, it was not agreed to by a vote of 10 ayes to 13 nays.

By not including a specific line item authorization of funding for this program, small businesses that invest time and money to enter into the federal marketplace will be deprived of the certainty that the certification program will be operational and that they will be able to recoup their investment. Furthermore, it deprives veteran-owned small businesses of the parity that is afforded to other small business subgroups. Finally, without an authorization of funding, the Office of Hearing and Appeals would be unable to hear appeals immediately, thus jeopardizing small businesses due process rights and undermining the appeals process.

#### CONCLUSION

While H.R. 2882 would provide veteran-owned small businesses the expertise needed to ensure that legitimate small businesses are accepted into the program, the funding mechanism used in the bill will produce a program that is balky, unreliable, and ultimately unworkable. By relying on a payment method for certification that has been proven unsuccessful and creates uncertainty, the legislation as passed by the Committee fails to treat veteran-owned small businesses like their counterparts and opens up the certification to problems from the start. The veteran businesses that will use this program deserve a line item authorization that provides a steady stream of funding to this vital certification process, which allows such firms to gain access to the federal marketplace.



OFFICE OF THE  
NATIONAL COMMANDER

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March 4, 2014

Honorable Nydia M. Velázquez  
United States House of Representatives  
2302 Rayburn House Office Building  
Washington, DC 20515

Dear Congresswoman Velasquez,

On behalf of the 2.4 million members of The American Legion, I would like to express our support for your amendment to H.R. 2882, which would authorize the appropriation of \$15 million each fiscal year for veteran small business verification by the Small Business Administration.

Stable funding for this program is crucial as it will take time and money to effectively transition this endeavor. Business owners who make the investment to participate in the federal marketplace deserve a sense of certainty that the program will function reliably. Current language allows for possible delays in implementation and lapses in funding if the SBA and VA are unable to come to an agreement in a Memorandum of Understanding. Veteran-owned businesses must not be allowed to become a bargaining chip simply because agencies fail to work out their differences.

In the past, we have seen that programs that are not properly funded are susceptible to fraud, allowing ineligible firms to receive millions in contracting dollars. Other contracting ventures such as the HUBZone and 8(a) programs have received appropriations. The American Legion believes that the veterans program should not be treated differently.

Many veteran-owned businesses have already been left out of the VA verification process due to the problems in said process. Therefore, The American Legion believes that Congress should do everything in its power to ensure that eligible businesses are able to compete in the marketplace, rather than potentially being left out due to an unwillingness to invest in the future of veteran-owned businesses.

Again, The American Legion supports and applauds your leadership in addressing this issue facing our nation's veteran business owners.

Respectfully,

  
DANIEL M. DELLINGER  
National Commander

