



**STATEMENT OF
DAVY LEGHORN, ASSISTANT DIRECTOR
ECONOMIC DIVISION
THE AMERICAN LEGION**

**BEFORE THE
SUBCOMMITTEE ON CONTRACTING AND THE WORKFORCE
COMMITTEE ON SMALL BUSINESS
AND
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
VETERANS' AFFAIRS COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES**

ON

**CHALLENGES FACING SERVICE-DISABLED VETERAN-OWNED
SMALL BUSINESSES**

MARCH 19, 2013

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A few months ago, twenty full time employees were laid off and had to receive unemployment benefits in Wisconsin when a service-disabled veteran owned construction firm lost \$1.7 million worth of work and the ability to bid on contracts, due to the lengthy verification appeals process.

Chairman Hanna and Chairman Coffman, Ranking Member Meng and Ranking Member Kirkpatrick and Members of the subcommittees:

On behalf of our National Commander, James E. Koutz, and the 2.4 million members of The American Legion, we thank you for this opportunity to testify at this joint hearing on the challenges facing small businesses owned and controlled by veteran owned and service-disabled veterans seeking federal contracts using the Department of Veterans Affairs' (VA) contracting program.

Many veterans find VA's Veterans First Contracting Program verification process to be overly burdensome, which is why The American Legion passed a resolution titled: *Support Verification Improvements for Veterans' Businesses within the Department of Veterans Affairs*.¹

The American Legion believes that Public Law 106-50² made all federal agencies stakeholders in supporting veterans' entrepreneurship. A subsequent law passed in 2006³ provides VA with the authority in setting higher agency standards for SDVOSB and VOSB set-asides. A new procurement hierarchy within VA was created, which places the highest priority with SDVOBs followed by VOSBs. VA refers to this program as the Veterans First Contracting Program (Vet First).

¹ American Legion Resolution No. 108.

² The Veterans Entrepreneurship and Small Business Development Act of 1999.

³ The Veterans Health Care, Benefits and Information Technology Act of 2006; PL 109-461.

The process of verification involves a review of a business' governance documentation and a determination as to whether the documentation is in compliance with VA's Center for Veteran's Enterprises' (CVE) legal requirements⁴ for admittance into the Vet First Program. The main challenge with the program is striking the appropriate balance between the amount of government intrusion necessary to verify a business and the amount of government oversight necessary to protect the integrity of the program.

Good Business Sense vs. CVE's Requisite Threshold:

Access to capital, increased capacity for performance and attraction of investors are key elements of growth; this growth stems from good business management. VA's requirements for admittance into the Vet First Program often conflict with good governance. The American Legion believes that VA must reconcile requirements for the growth of small businesses with the requirements for obtaining verification status.

The goal of a small business is to grow and graduate from a federal small business set-aside program. However, some of CVE's 'unconditional control' requirements for verification stifle the growth of small businesses. For example, the veteran owner's control in the business must be so absolute for verification purposes that it wards off potential investors.

The current requirement of 'unconditional control' prevents partnerships and the hiring of those who have substantial knowledge, accreditation or certification in the relevant field of the contract. Though the veteran owner may be well suited at managing staff, developing long-term strategy and making investments decisions, CVE seemingly values an owner's capacity to execute the operational tasks above all else. The American Legion believes that an owner's lack of certification and accreditation should not be a bar to verification, as long as the owner can demonstrate that he manages members of his staff that have the certifications and accreditations.

A cornerstone of growing a company is also finding competent operational staff that does not need to be micromanaged. Because CVE values the execution of operational task above all else, veteran owners often find that they must demonstrate that they manage the day-to-day operations, the hiring, the business development and the flow of money in order to be verified. Though competent business owners should have all these things in their peripherals, the point of hiring competent experts that can work independently is so that the owner can develop long-term strategy, investment strategies and manage the employees. The American Legion believes that an owner's diminished involvement in the execution of operational tasks or reliance on competent operations staff should not bar the firm from verification.

Some strategies to consider in reconciling the difference between what is required for the growth of a small business and what is required to obtain verification status is the alignment of the regulations that guide VA's verification program⁵ with the process and regulations that guide SBA's SDVOSB program,⁶ and SBA's small business size regulations.⁷ CVE should also consider the removal or alteration of regulations that restrict the growth of small business.

⁴ 38 CFR §74.

⁵ Ibid.

⁶ 13 CFR §125.

⁷ 13 CFR §121.

A Preponderance of Evidence:

According to CVE, in instances where subjective matters play a role in a denial, the denial is based on the totality of circumstances. These instances where the ‘preponderance of evidence’ is in relative equipoise, reasonable doubt is supposed to be resolved in the veteran’s favor. Though this is practiced by VA’s Office of General Counsell (OGC), this is seemingly not common practice amongst the examiners and site-inspectors. The American Legion has reviewed cases from firms that have been denied based on subjective issues, where if the ‘benefit of the doubt’ had been adequately applied by the examiner, appeals could have been avoided.

The American Legion believes that a small business should obtain VA verification when the ‘preponderance of evidence’ is sufficient⁸ to establish control, not when control has been established ‘beyond a reasonable doubt.’ In order to limit inconsistencies in the decisions rendered, The American Legion recommends that VA publish the decisions made by OGC. Further, in instances where applications are denied over subjective issues, OGC should have a heightened obligation to weigh the ‘preponderance of evidence,’ and explain why the ‘benefit of the doubt’ could not be resolved in the veteran’s favor.

Backlog’s Effect on Small Business:

There are severe lags in the time that is required for the initial verification application to get processed. It is currently just over 50 days for an initial decision and an additional 130 days for those cases that are appealed and go through ‘request for reconsideration.’ However, The American Legion would be remiss if we did not mention that CVE has significantly cut down the amount of time it takes for a small business owner to receive an initial decision. Back in October 2012, it took substantially longer; approximately 85 days for CVE to make a determination on an initial application. Though The American Legion recognizes the hard work and dedication of VA’s CVE and OSDDBU staff and all the ground they have covered since the summer of 2011, we must remain objective and critical of the shortcomings that still plague the process.

The American Legion has been involved with VA verification since the program’s inception. Most notably, The American Legion is a participant in the Verification Assistance Counseling Program and we have worked with several small business owners who have been denied verification status. During the lengthy appeals process, these firms lose business; they lose the ability to bid on contracts and in many cases are forced to lay off employees. Hence, The American Legion cannot stress how grave the lengthy appeals process is to these small business owners whose lives and worldly investments are tied to their businesses.

SBA and VA needs to work closer together to minimize the inconsistencies in the decisions being made. Currently, VA’s Office of General Counsel (OGC) makes the final determinations; OGC does not utilize SBA’s case laws in their decisions nor do they publish their decision. SBA has the legal expertise, 60 years of long-standing experience, ample base of precedential case law that can be applied to future rulings. VA does not. Further, SBA’s Office of Hearings and

⁸ When the evidence for demonstrating the veteran owner’s control over his business is balanced.

Appeals (OHA) has a 15 day turnover rate for final decisions on appellate claims and OHA does so with substantially less resources. Comparatively, VA's OGC currently averages over 130 days for rendering decisions on appellate claims. In the realm of appeals, there is added value for VA to fall back on SBA's expertise and case laws. The American Legion would impress upon the Committee that increasing SBA's role in the appellate process would ensure more consistency in the final decisions being made.

On the matter of the six month waiting period for reapplication,⁹ The American Legion questions why CVE places penalties for reapplication. Tom Leney, Executive Director of the Veterans and Small Business Programs for the Department of Veterans Affairs often says that 98 percent of the small businesses being denied are not maliciously trying to defraud the government and that the majority of the denials are fueled by ignorance of the law. If this is the case then, The American Legion believes that the punitive waiting period should be eliminated altogether.

Differences between CVE and SBA:

The American Legion supports Verification. Government contracting officers are risk averse; they like certifications and they like it when a firm has been verified by an agency. When a contract is awarded, a contracting officer can rest assured knowing that the recipient of the award has been vetted by a third party.

SBA's model and VA's model for verifying a small business follows similar regulations, except where SBA allows firms to self certify as SDVOSBs and VA does not. VA requires a firm to enter a rigorous process on the front end, where every issue that may arise from the present and the future would have to be resolved before a firm is verified. SBA's process of self certification polices itself through status protests from the small business community once a contract has been awarded. SBA would then subject the protested firm to rigorous scrutiny.

In order to root out bad actors that would seek to defraud the federal government, VA has taken cases heard by OHA and set those violations as bright-line rules and single points of failures in evaluating an application. However, despite the conjuring of numerous regulations and bright-line rules, fraudulent applicants will always find ways to skirt the legal process. The 'zero defect' mentality that VA is admirably trying to enforce, is not realistic in application. By doing so, VA has inadvertently made the process punitive and burdensome for the majority of firms seeking verification, which created the current backlog of initial applications and appellate claims.

8(a) is a business development program where SBA assists small businesses by ensuring that they stay eligible in the program. Comparatively, Vet First takes the form of a certification program, where CVE's role is the gatekeeper, determining who is eligible. The two programs may serve similar purposes, but they have different goals. There is no need for VA to align their regulations¹⁰ with the regulations that govern the 8(a) programs.¹¹ Because in doing so, VA has created bright line rules that do not exist within SBA's SDVOSB program.

⁹ Once a small business owner accepts a denial decision, VA stipulates that the firm must wait a period of six months before they can reapply.

¹⁰ 38 CFR §74.

¹¹ 13 CFR §124.

The only thing VA should take away from SBA's 8(a) program is the underlining mentality of leniency and assistance in ensuring that small businesses that enter the program stay in the program. The American Legion advocates for more human interaction in the initial application process. VA's news release issued on March 5, 2013 allowing applicants the opportunity to correct minor deficiencies before an initial denial is a step in the right direction. However, until CVE changes their extreme interpretations of regulations and their 'zero defect' mentality, the initial denial rate will remain high.

The American Legion believes VA's rigid process of verifying ownership and control is overzealous and impractical. A rigid process on the front end stifles entrepreneurship. We reiterate that being vetted by an agency on the front end is good for small businesses; the 8(a) program is a good example of this. However, in order to become an effective and practical gatekeeper, VA needs to compromise on a reasonably positioned threshold for inclusion into the Vet First Program.

Veterans' Community Perspective:

Overall, the veteran community is not pleased with the way the Vet First Program has been managed by Department of Veterans Affairs' Center for Veteran Enterprise. Currently there are significantly more verification applications being denied than approved. The task of gathering and formatting the substantial amount of documentation that VA requires a small business owner to supply is both cumbersome and intrusive. Many small business owners are beginning to question CVE's reasoning that the requisite documentation actually establishes ownership and control.

The American Legion believes the current application of 38 CFR §74 and VA's verification process is overtly adversarial and assumes that a veteran owned small business is "guilty until proven innocent." There have been many instances where small business owners had to threaten CVE with a lawsuit in conjunction with soliciting congressional interest in order to overturn a denial and restore their SDVOSB/VOSB status.

Growth of CVE:

The American Legion is keenly aware that there are propositions being made that would in effect make the verification process government-wide. With the current state of the backlog and a process that has not been perfected, The American Legion does not believe that CVE could shoulder the responsibility of handling what GAO estimates as 16,400¹² more applications into an already strained verification program.

As of October 2012, VA's CVE verification program had 28 full-time equivalent federal employees and 174 contractors. This was an increase of about 3 full-time equivalent staff and 64 contractors since December 2011. The American Legion does not want the current verification process to grow any larger with more internal processes that would delay the final adjudication

¹² U.S. Government Accountability Office. *Veteran-Owned Small Businesses: Planning and Data System for VA's Verification Program Need Improvement*, GAO-13-95. Washington, DC: Government Accountability Office, 2013.

and add to the existing backlog. Further, we would not approve of expanding the program government wide in its current state.

Absent regulatory authority, the Federal Aviation Administration (FAA) has adopted VA Verification as a prerequisite for participating in their SDVOSB set asides. Further, the January 2013 GAO report on the Verification Program¹³ did not mention that several states such as Maryland, Virginia, Illinois, Indiana and Pennsylvania, have adopted legislation streamlining VA verified SDVOSBs into state set-aside programs; these actions would inadvertently drive firms who never had interest in participating in the Vet First Program to seek verification status as well. It is not unreasonable to forecast that other states will follow suit. The verification program will continue to grow in the interim, regardless of whether or not government-wide expansion comes to pass and continue to place an unfair burden on veterans trying to compete in an already struggling economy.

Conclusion:

The American Legion will continue to work with the Small Business Administration and the Department of Veterans Affairs to improve the process, revise the verification program's regulations and to continue providing counseling services to our veteran entrepreneurs. Now is the time to fix the process and to find the compromise between the requirements for the growth of small business and the requisite threshold for obtaining verification status. The American Legion believes that the responsibility is upon all the stakeholders to ensure that we become better stewards of the verification program.

The American Legion appreciates the opportunity to testify today. Again, thank you Chairmen Hanna and Coffman, Ranking Members Meng and Kirkpatrick and Members of the respective subcommittees for allowing The American Legion to present its views on these very important issues.

For additional information regarding this testimony, please contact Mr. Jeffrey Steele at The American Legion's Legislative Division, 202-263-2987 or jsteele@legion.org.

¹³ Ibid.

**BIOGRAPHY FOR
DAVY LEGHORN
ASSISTANT DIRECTOR
NATIONAL ECONOMIC COMMISSION
THE AMERICAN LEGION**

Davy Leghorn was appointed to the position of Assistant Director of the Economic Division of The American Legion in January, 2012. Mr. Leghorn oversees the employment and small business portfolios and administers The American Legion's National Veteran Hiring Initiative.

He previously worked as a National Appeals Representative for The American Legion at the Department of Veteran Affairs' Board of Veterans' Appeals, where he provided representation to veterans, their spouses and dependents in appellate hearings before the Veterans Law Judges.

Mr. Leghorn served as a mortar infantryman in the Army with the 2/72 Armored Battalion, 4/7 Cavalry and 3/15 Infantry, then as a Civil Affairs Specialist with 450th Civil Affairs Battalion.

He currently serves as Second Vice Commander for George Washington Post #1 in The American Legion Department of the District of Columbia.

List of attachments;

Attachment A: The American Legion Resolution No. 180

Attachment A:

**NINETY-THIRD NATIONAL CONVENTION
OF
THE AMERICAN LEGION
Minneapolis, Minnesota
August 30, 31, September 1, 2011**

Resolution No. 108: Support Verification Improvements for Veterans' Businesses Within the Department of Veterans Affairs

Origin: Convention Committee on Economic (Employment and Veterans Preference)

Submitted by: Convention Committee on Economic (Employment and Veterans Preference)

WHEREAS, The historical high unemployment rate of returning veterans and the current state of the economy present a career challenge for former military personnel, resulting in unemployment; and

WHEREAS, The military is downsizing, which means that thousands of former military personnel who have honorably served their country will be unemployed; and

WHEREAS, Small business development assistance to veterans who have honorably served this country is a veterans' benefit that dates back to the Servicemen's Readjustment Act of 1944; and

WHEREAS, Small business benefits specifically for veterans always have included assistance in creating and operating veteran-owned small businesses; and

WHEREAS, The Department of Veterans Affairs (VA) is authorized under the Veterans First program to enter into contracts first with Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) and then with Veteran-Owned Small Businesses (VOSBs); and

WHEREAS, Congress has made findings that VA has entered into contracts pursuant to the Veterans First program with companies that were not legitimate SDVOSBs or VOSBs; and

WHEREAS, Pursuant to recent legislation, VA has implemented a formal verification process which companies must undergo prior to being found eligible to participate in the Veterans First contracting program; and

WHEREAS, Many veterans have found the verification process to be overly burdensome, lengthy and too troublesome to undergo; now, therefore, be it

RESOLVED, By The American Legion in National Convention assembled in Minneapolis, Minnesota August 30, 31, September 1, 2011, That The American Legion recommend the simplification and streamlining of the Department of Veterans Affairs verification of Service-Disabled Veteran-Owned Businesses (SDVOSBs) and Veteran-Owned Small Businesses (VOSBs) interested in participating in the agency's Veterans First Contracting Program; and, be it finally

RESOLVED, That The American Legion endorses VA's efforts to ensure that contracts awarded pursuant to the Veterans First Program are awarded to companies that truly are entitled to receive these contracting benefits.