

**Testimony of Jonathan T. Williams<sup>1</sup>**  
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**Before the Subcommittee on Contracting and Workforce and  
The Subcommittee on Oversight and Investigations**

**Committee on Small Business and  
Committee on Veterans' Affairs**

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**SUMMARY**

SDVOSBs are confronting many challenges in attempting to take advantage of the two federal procurement programs for SDVOSBs. The challenges include:

- The two similar, but different, sets of rules cause confusion and lead to conflicting interpretations and inefficiency
- Non-business-friendly interpretations of existing rules decrease the usefulness of the programs for veterans
- “Deny first and ask questions later” approach to the SDVOSB verification process has led to many avoidable denials, as well as lengthy and expensive reconsideration requests
- Lack of visibility over the VA’s application results
- Administrative errors in the verification process have caused many SDVOSBs to lose valuable contracts with no recourse

To address the challenges facing SDVOSBs, the VA and the SBA should take several steps, including:

- Adopt more business-friendly interpretations of the regulations, including by permitting reasonable transfer restrictions on veteran ownership and by not requiring SDVOSB joint ventures to be separately verified by CVE
- Engage in more back-and-forth with veteran applicants while their verification application is pending and institute an initial screening phase to address issues in the applicant’s corporate records that can be easily corrected
- Confirm that the SBA should handle all size and affiliation inquiries
- Explore ways to minimize the unnecessary loss of contracts based on administrative errors and delays in the SDVOSB verification process
- Consolidate the two regulatory schemes into one with regulations and an appeal process similar to what is currently available through the SBA

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<sup>1</sup> This is Mr. Williams’ final written testimony and replaces the previously submitted written testimony dated March 7, 2013.

## INTRODUCTION

Chairman Coffman, Chairman Hanna, and distinguished Members of the Subcommittees, I would like to express my sincere thanks for the invitation to submit testimony for this hearing of the House Committee on Small Business Subcommittee on Contracting and Workforce and the House Committee on Veterans' Affairs Subcommittee on Oversight and Investigations. I am honored to present my experiences and those of my law firm in representing small businesses that participate in the Department of Veterans Affairs ("VA") and Small Business Administration ("SBA") procurement programs for Service-Disabled Veteran-Owned Small Businesses ("SDVOSBs").

My name is Jonathan Williams. I am a partner with PilieroMazza PLLC, a woman-owned law firm based in Washington, DC. We work primarily with small and mid-sized government contractors regarding all manner of issues that arise when doing business with the federal government. One area of government contracting for which we are well known is our familiarity with the federal procurement programs for small businesses, including the SDVOSB programs and the SBA's Section 8(a) Business Development Program. I have practiced law for 12 years and nearly all of this time I have spent working with government contractors, including small businesses that utilize these programs.

I am testifying on behalf of myself as well as on behalf of my colleagues at PilieroMazza. My testimony is based on our experiences and knowledge of the VA and SBA SDVOSB programs, the differences and inconsistencies between the programs, the challenges SDVOSBs face in using the programs, and the ways that we believe the programs could be improved to operate more fairly and efficiently.

## TESTIMONY

My testimony will address several of the most common challenges that our SDVOSB clients have confronted when seeking to use the SDVOSB contracting programs. These challenges occur in the interpretation of the similar, but different, regulations governing both programs, the verification process for entrance into the VA's program, and the administration of both programs. I will also discuss how, based on our experiences, we believe the SDVOSB programs can be improved to lessen the challenges for SDVOSBs and improve efficiency and oversight for the government. The SDVOSB programs are well-intentioned and have helped many veterans, but changes are necessary to ensure that these important programs are more accessible, more efficient, and help more of our military veterans to "realize the American dream they fought to protect."

### **A. Challenges Facing SDVOSBs in Using the SDVOSB Programs**

#### **1. Difficulties with the CVE Verification Process**

The biggest challenge facing the SDVOSBs with which we work is to navigate the verification process through the VA's Center for Veterans Enterprise ("CVE"). The application process is generally lengthy and confusing, with requests for a lot of documents, many of which may be duplicative or foreign to veterans. We have heard from many SDVOSBs about the need to submit documents multiple times because the VA lost their information. Last summer, we

heard from many SDVOSBs whose profiles in [www.VetBiz.gov](http://www.VetBiz.gov) were apparently erased due to a technological issue within the VA.

There is also a lack of consistency in the application process and results. For example, many firms have been denied because of perceived problems in their corporate records, such as transfer restrictions<sup>2</sup> in the operating agreement or bylaws and issues regarding voting and quorum for the board of directors. Yet, we have worked with firms that have been accepted into the program even though they have some of the same issues in their corporate records. Similarly, some applications and requests for reconsideration have been resolved in a few months, while other applications and requests for reconsideration have taken more than a year.

Our clients often complain about the lack of feedback from the VA once the application is submitted. The VA generally sends emails to applicants to keep them updated on their progress through the system, but not all firms receive these messages. And even when received, the messages convey little more than the overall status of the application. Coupled with the fact that it is very difficult to get someone from CVE on the phone to talk to you about your application, the unknowns during the application process often make it frustrating for veterans.

Because there is little discussion between the VA and the applicant about the substance of the application while it is pending, the first time veterans learn of problems in their application is typically when the VA issues a denial letter. The “deny first and ask questions later” approach to the application process is one of its biggest problems, in our view. We have seen some improvement from the VA on this in the last year, in particular for reconsideration requests handled through the VA’s Office of General Counsel. That said, there is still not as much back-and-forth with applicants as there should be. The SBA does a better job of this in processing applications for the 8(a) Program; the SBA typically sends questions to applicants to ferret out potential denial issues before the application is actually denied. In our experience, the VA forces most applicants to file a reconsideration request to address problems in the application after the application has been denied.

The lack of communication between the VA and applicants is problematic for several reasons. First, it forces the SDVOSB to go through the time and expense of a reconsideration request, often to address issues that could have been easily corrected while the application was pending. Indeed, over 60% of the reconsideration requests we have handled since mid-2011 involved correcting issues the VA had found in the SDVOSB’s corporate records. Such issues include transfer restrictions on veteran ownership and quorum or voting provisions that do not make clear that the veteran is in total control of the company. All SDVOSBs are small businesses, and resources are often scarce. These firms tend to obtain their operating agreements from the internet and these generic documents regularly include boilerplate provisions that are not consistent with the requirements of the SDVOSB programs. Generally, the issues are not difficult to correct. In fact, in every one of the cases we handled involving problems with corporate records, we were able to correct the issues on reconsideration. A lot of time and expense could have been saved if the VA had raised the issue sooner and helped the veteran to understand and address the issue before the application was denied.

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<sup>2</sup> A common transfer restriction is a “right of first refusal” whereby the owners of the company agree that, in the event an owner has an offer to buy his interest in the company, he must first give the other owners a right of first refusal to buy his interest.

With so many firms ending up in the reconsideration process that do not need to be there, it is not surprising that the VA has been unable to keep up with the reconsideration case load. The VA's regulations envision a 60-day period for reconsideration. In our experience, the VA is generally running one to two months behind and we have had some reconsideration requests take more than a year. The SBA generally makes SDVOSB eligibility decisions much sooner than the VA. We believe this is in part because the SBA has had a significant head start in managing application and review processes and has already worked through many of the growing pains the VA is currently experiencing.

Another challenge of the reconsideration process is that the VA often finds new reasons to deny a firm after the firm successfully addresses the initial reasons for denial. This leads to multiple rounds of reconsideration requests for the same firm. It is very frustrating, not to mention costly and time consuming, for an SDVOSB to be told it was denied because of A, only to wait three or four months (or more) to be told that A has been resolved but now the firm is denied because of B, C, and D. This happens frequently and is a further indication that the initial denials often come too soon and without enough discussion with the applicants.

The VA application process also lacks sufficient administrative review. Beyond the reconsideration process, which essentially returns the application to the same decision-makers for a "do over," applicants who believe they did not get a fair shake must file a law suit in federal court. The high cost of federal court litigation is no doubt a barrier to entry for many SDVOSBs. The SBA's Office of Hearings and Appeals ("OHA") is a good example of an administrative appeal process that offers review at a level above the initial decision-makers, by an administrative law judge, but that is generally far less costly than federal court litigation. At OHA, small businesses (including SDVOSBs) can have an administrative law judge review whether the initial SBA decision-maker made a clear error of law or fact. This is a helpful tool for small businesses, many of whom are successful in overturning SBA decisions through appeals to OHA. The fact that OHA decisions are publicly available also benefits the small business community at large. Conversely, there is no publicly available database of VA reconsideration or appeal decisions, which keeps veterans and their representatives in the dark about the VA's interpretations and precedent.

## **2. Flaws in the Verification Process Cause Veterans to Lose Valuable Contracts**

The application and reconsideration challenges are more than simply frustrating. When the CVE makes a mistake in denying an application, or delays for months in deciding a reconsideration request, this can cause veterans to lose contracts worth millions of dollars. We have been contacted by many firms that lost contracts because of easily correctable issues in their corporate records or because of administrative errors. Currently, VA contracting officers are not required to wait for a decision on a pending reconsideration request or appeal before moving on from an initial award decision. Some SDVOSBs have been successful in preserving a contract award after an adverse eligibility ruling because they had the resources to file for an injunction or the contacts with the right people within the VA. But for too many SDVOSBs, the contract is lost. In our view, not enough is being done to ensure that the good actors do not lose valuable contracts because of mistakes or delays in the VA process.

### **3. Inconsistencies Between the VA and the SBA Programs Has Led to Confusion and Inefficiency for SDVOSBs and the Government**

In our practice, we regularly encounter SDVOSBs and government procuring officials that are confused by the similar, but different, sets of rules that govern the VA and the SBA programs for SDVOSBs. For example, SDVOSBs have been forced to file bid protests with the U.S. Government Accountability Office because of procuring officials who have applied the VA's verification requirements to non-VA procurements. Contracting officers have sent SDVOSB protests on a non-VA contract to the VA, instead of the SBA. And VA contracting officers have failed to forward size protests to the SBA.

Contrary to the VA's view, there are many differences between the SBA and VA SDVOSB regulations. For example, there are several aspects of the VA's regulations (and how the agency interprets its rules) that are less business friendly than the SBA's SDVOSB regulations. The VA's regulations require the veteran to be the highest compensated, while the SBA's SDVOSB rules do not. The same is true for the VA's requirement to have a veteran as the full-time manager of the company, which is not found in the SBA's rules. The VA appears to have patterned its rules off the SBA's rules for both the SDVOSB and 8(a) programs, which has created confusion and different standards for admission into the VA's program.

Recently, the U.S. Court of Federal Claims issued a decision that underscores the inconsistencies between the two regulatory schemes. Both the SBA and the VA have interpreted their regulations as prohibiting transfer restrictions (such as a right of first refusal) on the veteran's ownership. In Miles Construction, LLC v. United States, No. 12-597C (Fed. Cl. 2013), the Court of Federal Claims found that the VA's rules do not permit the VA's prohibition on transfer restrictions. We believe the Court of Federal Claims reached the correct decision. In the past, we have had clients decline to pursue CVE verification because the owners were not able to agree on the lack of transfer restrictions. Miles Construction is an important, business-friendly ruling for veterans because reasonable transfer restrictions will help veterans to attract minority partners to help run and grow their businesses. And these restrictions do not impede the veteran's ownership and control of his company because the restrictions only come into play once the veteran has decided to sell his interest and leave the company.

If the Miles Construction decision stands, veterans will be able to institute reasonable transfer restrictions on their ownership and make their companies more attractive to minority investors. However, such flexibility would only be available at the VA. This is because OHA has issued several decisions finding that the SBA's SDVOSB regulations prohibit transfer restrictions. Miles Construction overruled the VA's interpretation, but not the SBA's interpretation. As a result, unless the SBA/OHA adopts the rationale of Miles Construction, there will likely be a lot of confusion between firms that operate in both programs, as they will be permitted to have transfer restrictions for one but not the other. In effect, this will greatly diminish the significance of Miles Construction as a business-friendly ruling for SDVOSBs that operate in both programs.

Another inconsistency between the two programs is in how they treat SDVOSB joint ventures. In our practice, joint ventures are a common and useful tool for small businesses hoping to perform larger projects that they would not be able to perform on their own. The SBA's rules permit a joint venture to be considered an SDVOSB for a procurement so long as

one of the joint venture partners is an SDVOSB. However, the VA only permits a joint venture to be considered an SDVOSB for a procurement if the joint venture itself goes through the CVE verification process. This is not an explicit regulatory requirement – it is a function of how the VA has interpreted its rules and could be altered with a new interpretation. The VA’s current interpretation creates inefficiencies because it requires a second verification process that is not necessary. If one of the joint venture partners has already been verified by CVE, the verification should be applied to the joint venture. Such an interpretation would be consistent with how the SBA approaches SDVOSB joint ventures and would make it easier for SDVOSBs to take advantage of joint ventures for VA procurements.

The VA and the SBA could change their interpretation of some of these rules, or modify their rules, to create more harmony between the two programs and thereby decrease SDVOSB confusion and increase government efficiency. But we question the utility of creating two identical sets of regulations for two distinct programs. As long as two programs exist, there will be an element of inefficiency that cannot be eliminated since there are two agencies essentially doing the same thing, but in different ways and with different interpretations.

#### **4. Several VA Rules Infringe the SBA’s Role as the Arbiter of Small Business Status**

The VA’s rules allow the VA to find that a veteran does not control his company if “[b]usiness relationships exist with non-veterans or entities which cause such dependence that the applicant or participant cannot exercise independent business judgment without great economic risk.” 38 C.F.R. § 74.4(i)(4). There is no similar regulation for the SBA’s SDVOSB program. Recently, we have seen an increase in the number of cases where the VA has questioned an SDVOSB’s eligibility based on this regulation. The problem, in our view, is that the regulation draws on principles of affiliation and small business status that are the SBA’s exclusive purview under 13 C.F.R. § 121.103. In several cases, the VA has appeared to use concerns about affiliation to find that a veteran does not control his company. Affiliation concerns should be addressed by the SBA, not the VA.

In fact, OHA has found that the standard for veteran control under the SBA’s SDVOSB regulations is not the same as the standard for control under the SBA’s small business affiliation rules. In DooleyMack Gov’t Contracting, LLC, SBA No. VET-159 (2009), the SBA had concluded that a veteran did not control his company because “business relationships exist which cause such dependence that [the veteran] cannot exercise independent business judgment without economic risk.” This SBA conclusion, which OHA rejected, is nearly identical to the VA’s regulation at 38 C.F.R. § 74.4(i)(4). OHA overturned the SBA’s analysis because the judge found that the SBA had confused the affiliation control principles under 13 C.F.R. § 121.103 with the veteran control principles under 13 C.F.R. § 125.10. That same confusion is evidenced in 38 C.F.R. § 74.4(i)(4), which ostensibly addresses veteran control but reads like an SBA affiliation rule from 13 C.F.R. § 121.103.

The VA’s regulations also provide that the CVE will determine affiliation by applying the SBA’s affiliation rules (38 C.F.R. § 74.5). Another VA rule allows the CVE to deny an application if the CVE determines that a concern does not qualify as small, even if the SBA has not issued a size ruling for that firm (38 C.F.R. § 74.13(d)). Under this rule, a firm whose application is denied because of a size ruling by the CVE may subsequently request a formal size

determination from the SBA, but the firm would have to file a new application with the CVE after receiving a size determination from the SBA. In these ways, the CVE is able to perform size and affiliation analyses that should be left to the SBA.

Allowing the CVE to make size and affiliation determinations when reviewing an SDVOSB application appears to be inconsistent with the VA's statutory mandate, which indicates that small business status for the VA's SDVOSB program is determined based on the Small Business Act, which the SBA is entrusted to implement. Furthermore, the VA's Acquisition Regulation § 819.307(a) recognizes that all protests pertaining to the size of an SDVOSB must be sent to the SBA for a size determination. Since the VA understood that questions about size issues in a post-award protest should be sent to the SBA, it is unclear why the VA determined that it could decide size issues on its own for SDVOSB applications.

## **B. Suggestions to Improve the SDVOSB Programs**

To improve the VA's verification process, the VA should engage in more back-and-forth with applicants, including sending them questions or concerns, so that potential denial issues could be flagged and corrected as early in the process as possible. An initial screening stage to notify veterans about potential issues with their corporate documents would likely avoid a significant number of reconsideration requests. The VA could put the application on hold for a certain amount of time while waiting for the applicant to respond to the concerns. The increased back-and-forth should be modeled on the SBA's processing of 8(a) applications, which generally results in more communication between the agency and the applicant while the application is pending. Recently, the VA proposed implementing steps very similar to these, which is a positive development and should improve the efficiency of the application process.

More back-and-forth with applicants would also help the VA to lessen the number of cases that require multiple reconsideration requests. The VA should strive to provide all bases for denial in the initial denial letter. And in the rare cases when this is not possible, the VA should consider providing an expedited review process for all reconsideration requests that may be necessary after the first one.

The application process would also improve with a philosophical shift toward being more applicant-friendly. Many veterans tell us they feel like the VA personnel are looking for a reason to keep them out, as opposed to trying to help them get in. A priority has rightfully been given to ferret out fronts, fraud, and abuse. But in the extreme, this leads to an approach toward applicants that can come across as hostile, which is counterproductive to the effective operation of the program. Standards that make it too difficult or costly for eligible firms to get into the program are no less problematic than standards that make it too easy for ineligible firms to get in. Although perhaps easier said than done, the goal should be to shift the pendulum closer to the middle.

More outreach to veterans, including workshops to help them understand the requirements for corporate documents and governance, would also improve the program. Again, the VA has recently indicated that it is moving in this direction, which is good news for the veteran community. However, without publicly-available appeal decisions, veterans will continue to be at a disadvantage in trying to understand how the VA is interpreting and applying its regulations. The SBA has published its standard operating procedures ("SOP") for the 8(a)

Program, which is a useful tool for firms and practitioners to understand the inner workings of the 8(a) Program. A similar SOP for the VA's SDVOSB program would help to lessen the confusion many firms experience in seeking to understand and use the program.

To address the regulatory challenges in the short term, the SBA and the VA can positively impact veterans by revisiting their interpretations of transfer restrictions, joint venture verification requirements, and related issues that could be interpreted in a more business-friendly way. Specifically, the VA should not appeal the Miles Construction decision and should instruct the CVE to begin allowing reasonable transfer restrictions on veteran ownership. OHA should revisit its prior decisions on transfer restrictions in light of Miles Construction. The VA should permit joint ventures to qualify as SDVOSBs without needing to undergo a second CVE verification application. The VA should send all questions about size and affiliation to the SBA for review.

As a longer-term goal, the regulatory inconsistencies and inefficiencies would be best resolved by consolidating the two sets of rules into one. The SBA's rules currently are more business friendly and may be the better starting point. There should also be an administrative appeal process like the current SBA OHA process. The SBA will continue to handle size issues, and it has already spent a number of years refining its application and protest processes, so it may be the more appropriate of the two agencies for the consolidation.

If the programs are consolidated with the SBA, there should be a government-wide prime contracting program for Veteran-Owned Small Businesses ("VOSBs"). The Small Business Act already contains subcontracting goals for VOSBs, and the VA's program has prime contract goals for VOSBs. A consolidated, government-wide program should have prime contract goals and set-aside procedures for VOSBs.

Some thought should be given to whether an upfront certification process is the most efficient way to get firms into the program and prevent fraud and abuse. If and when the two SDVOSB programs are consolidated, it may work better to pattern the new program after the Woman-Owned Small Business ("WOSB") Program. Rather than going through an upfront application process, WOSBs are required to upload documents verifying their eligibility to an online repository, to be checked in the event of a protest.

If the two SDVOSB programs were consolidated with the VA, we agree with the GAO's recent report that this should not happen until the VA is better able to handle its existing case load. Furthermore, there should be an interim rule that allows firms to self-certify while the changes are underway; otherwise, the VA-verified firms would have a significant advantage for SDVOSB contracts over those firms that currently self-certify their SDVOSB status and would then need to be verified before they could compete for SDVOSB contracts.

Finally, more should be done to expedite the protest and verification processes so that SDVOSBs will not lose valuable contract opportunities while waiting for an initial decision or to overturn an administrative error. Some form of temporary stay of contract award pending the outcome of an expedited protest and appeal process would be beneficial, similar to what is provided for in the SBA's rules. Recently, a proposal was issued to modify FAR § 19.302 to provide that, when a post-award appeal from an SBA protest determination is filed with OHA, the procuring agency's contracting officer shall consider suspending contract performance until

OHA decides the appeal. A similar provision in the VAAR would provide some protection against the loss of valuable contracts based on an administrative error in the CVE verification process. The VA could also implement an expedited reconsideration or appeal process in the event of a pending contract award so veterans awarded an SDVOSB contract would have a chance to contest an adverse eligibility determination before the VA withdraws the contract. In short, more can be done to balance the need to expeditiously move forward with new contracts against the importance of ensuring that eligible firms do not lose valuable contract awards due to administrative errors in the verification process.

## **CONCLUSION**

PilieroMazza and I are strong supporters of veterans and the federal procurement programs for SDVOSBs. From working with many veteran-owned firms, we see first-hand the benefits that veterans can obtain from the SDVOSB programs offered through the VA and the SBA. We also see the areas in which these programs can be improved to make the verification process and regulations simpler and more efficient. With some changes, more of our veterans will be able to derive the benefits intended for them under the programs. “To care for him who shall have borne the battle,” we owe our veterans that much.

Thank you again for the opportunity to submit this testimony.