

**STATEMENT OF THOMAS J. LENEY
EXECUTIVE DIRECTOR
OFFICE OF SMALL AND DISADVANTAGED BUSINESS UTILIZATION (OSDBU)
DEPARTMENT OF VETERANS AFFAIRS
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
HOUSE COMMITTEE ON VETERANS' AFFAIRS,
AND THE
SUBCOMMITTEE ON INVESTIGATIONS, OVERSIGHT, AND REGULATIONS,
HOUSE COMMITTEE ON SMALL BUSINESS**

JULY 17, 2018

Chairman Bergman, Chairman Kelly, Ranking Member Kuster, Ranking Member Adams, and Members of the Subcommittees, thank you for inviting me to testify on the status of our efforts to implement a uniform standard for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) in Federal contracting. In my capacity as Executive Director for VA's Small and Veteran Business Programs, I oversee the Center for Verification and Evaluation (CVE), which verifies the Veteran ownership and control of small business participating in VA's Veterans First Contracting Program. This program directs VA to prioritize SDVOSBs first, and Veteran-Owned Small Businesses (VOSBs) second, when VA seeks to buy goods and services.

CVE continues to carry out its mission to verify SDVOSBs and VOSBs, in order to fulfill the statutory mandate set forth in 38 U.S.C. 8127 that requires the Secretary of Veterans Affairs (or his designee) only awards contracts under the program to verified firms. This means participation in the program is limited to those firms which CVE has verified and included in the database. As the database represents the potential universe of eligible firms, it also serves as a helpful starting point for market research for contracting officers evaluating whether a Veterans First set-aside is appropriate, since they can readily identify eligible firms from which they can then determine those with the requisite capability.

These factors, combined with the heightened attention on our program following the *Kingdomware Technologies v. United States* decision of the Supreme Court in June 2016, have fostered significantly higher workload for CVE. New applications, measured as initial applications created in our system by the Veteran entrepreneur, rose slightly to 10,194 applications in the first three quarters of Fiscal Year 2018. This followed nearly 30 percent growth during the same period of 2017, compared to 2016. New applications also result in increased workload at subsequent stages, as those applications, and those carried over from 2017, move through our review process. Through June 30, 4,009 applications were approved, 85 were denied, 1,346 were withdrawn by the applicant, and 5,823 were administratively removed by CVE from further processing for reasons such as for failure to respond to a document request. All told, as of June 30, CVE had 14,084 verified firms, including both VOSBs and SDVOSBs, in the database. Increasingly, the range of available firms makes VA more and more likely to use the Veterans First program as its principal means to provide access for small business.

This makes the Veterans First Contracting Program an essential priority for both VA, in recognition of our Veteran-centric mission, and our partners in the Small Business Administration (SBA), responsible for Government-wide programs to enhance small business access. Together, we have made great progress carrying out the Congressional mandate, contained in the National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017), to create uniform standards for the VA and SBA programs for contracting with SDVOSBs. Congress enacted a single uniform definition, and placed it in the Small Business Act, to ensure such firms are not held to two different standards depending on which agency they were dealing with. In addition, VA and SBA were directed to come up with a joint regulation for determining ownership and control. The outcome of this process will be reduced frustration for our SDVOSB participants, so they can go about what they do best: delivering the goods and services VA and all Federal agencies need to get our work done.

Removing barriers to entry is a critical part of maintaining and enhancing small business participation in Government contracting. The proliferation of varying standards

and multiple certifications is a disincentive to the small businesses that would need to commit time and resources to research and understand those requirements, and submit to multiple approval processes. These should be burdens we can avoid imposing, and I am grateful to your Committees for your helpful direction in this area.

For similar reasons, I was pleased to see this matter addressed in the Administration's proposal for reorganizing the Executive Branch, "Delivering Government Solutions in the 21st Century." The proposal recommends consolidating all the small business contracting programs into SBA's Office of Government Contracting and Business Development. Exceptions would be made for programs requiring some kind of industry-specific expertise at a different agency, in which case that agency's program would be the Government-wide standard and others would yield to it.

Thanks to your legislation and our implementing efforts on the SDVOSB and VOSB programs, we are ahead of the curve in this effort. I'm sure we will be glad to make our experiences and "lessons learned" available to other programs where that would be beneficial. We look forward to our continued partnership with SBA.

Let me provide a little more detail on where we are with our implementation efforts.

Uniform Definition of SDVOSB

Section 1832 of the NDAA 2017 created a single uniform definition of Service-Disabled Veteran-Owned Small Business, by combining the definitions in the Small Business Act and in 38 U.S.C. 8127. In effect, any SDVOSB that was eligible under one of the previous definitions would remain eligible under the revised, combined definition. The NDAA 2017 placed the combined definition in section 3(q) of the Small Business Act, and replaced the VA definition with a cross-reference to it. The law then directed SBA and VA to develop a joint rule to implement the change, after which VA will no longer use its own separate rule to verify the ownership and control of SDVOSBs.

Jointly developing a single standard for ownership and control necessitated two proposed rules, one to revise the SBA regulations, and one to delete ownership and control matters from the VA rule. After extensive SBA-VA collaboration, these efforts

are approaching completion. VA published a proposed rule on January 10, 2018 (83 Federal Register 1203), and SBA published its proposed rule on January 29, 2018 (83 Federal Register 4005). The comment periods for both proposed rules expired in March. The final remaining step is to publish final rules addressing the public comments received. This is not a trivial exercise, but we anticipate completing it before the end of Fiscal Year 2018.

Generally, the ownership and control requirements seek to ensure that one or more service-disabled Veterans is in fact the true beneficiary of the contracting programs, and that non-Veterans are not able to abuse these programs to gain benefits not intended for them. For this reason, the regulations extensively discuss what it means for one or more service-disabled Veterans to own a firm unconditionally, and what it means for the Veteran(s) to control the management and daily business operations of the small business.

We have learned a lot over the years about what this means in particularly complex cases involving small businesses that are incorporated. Do the service-disabled Veteran owners in fact own 51% of the stock, and is that ownership unconditional? How is control exercised in the presence of a Board of Directors, or in some cases by an Executive Committee of the Board of Directors? These arrangements can enable non-Veterans to participate in the business but must not be structured in such a way that the non-Veterans can exercise effective control at the expense of the Veteran. Supermajority rules for certain business decisions can mean the Veteran requires concurrence from non-Veterans to take certain actions, and therefore is not the effective decisionmaker. In a complex economy the size of the United States, businesses can be structured according to a wide variety of legitimate arrangements, and our rules must allow flexibility while preserving the integrity of the program as directed by Congress. The revised joint rule captures many insights gained through experience by both VA and SBA.

Some observers thought the outcome of this process would mean the complete elimination of 38 CFR part 74, the VA regulation on verification. While we did eliminate matters relating to ownership and control, as directed by the NDAA 2017, some materials in this regulation continue to be necessary. Many of these remaining

provisions are procedural. For example, VA requires that a verified firm has a continuing obligation to notify us within 30 days of any material change that affects its eligibility. SBA has no comparable provision that we could use instead of this provision, because SBA's SDVOSB program is based upon self-representation rather than SBA certification. Accordingly, we retained this provision, and others that deal with the verification process, in 38 C.F.R. part 74. We also retained other provisions touching on verification of VOSBs, which have no counterpart at SBA.

Appeals and Protests to the SBA Office of Hearings and Appeals

Section 1832(f) of the NDAA 2017 amended the statutory language governing VA's administration of the database of verified SDVOSBs and VOSBs, to provide an appeal right for denied applicants to SBA's Office of Hearings and Appeals (OHA). The legislation also directed that protests by an interested party be heard by OHA; these could include protests from a competing offeror on an SDVOSB set-aside, as well as CVE-initiated processes to review a firm for potential cancellation, not connected to any particular acquisition. These replaced appeal and protest processes formerly conducted within my office.

SBA published a final rule amending the OHA rules at 13 CFR part 134 on March 30, 2018 (83 Federal Register 13626). This piece of the implementation is complete and the new rules take effect October 1, 2018. In addition, SBA and VA have reached an interagency agreement to cover OHA's costs for deciding these matters.

Moving these processes to SBA will make them more formal and ensure more procedural safeguards for firms under review. This comes with a trade-off, however, of removing informal resolution processes. For example, a firm that applied for verification and was denied would previously have submitted a request for reconsideration to my office, and could include new information to bolster its case. The new process means a denied firm would have only the formal appeal to OHA, which does not have the capacity to engage in gathering and reviewing new evidence and instead makes its decision based on the administrative record it receives. This is consistent with OHA's role as an appellate body.

Next Steps

As mentioned previously, we have learned much from the effort to make uniform standards across the VA and SBA programs for SDVOSBs. As the Administration's proposal for reorganizing the Executive Branch proposes, we likely will apply many of these lessons in further streamlining other Government contracting programs and centralizing responsibilities at SBA where appropriate. As previously mentioned, we have already identified one challenge in this area as CVE has quite a heavy workload of interested SDVOSBs and VOSBs, and the annual number of applicants far exceeds those in the 8(a) and HUBZone programs combined. Ensuring SBA is properly organized to manage these obligations will be a challenge, but one worth tackling for the benefit of our small business program participants. We will work with SBA to develop appropriate implementing legislation.

Mr. Chairman, I will be pleased to answer any questions you or other Members may have.