Statement
of
Vietnam Veterans of America

Presented by

Joe Wynn
Special Advisor

Before the

House Small Business Subcommittee on Contracting and the Workforce and the House Veterans Affairs Subcommittee on Oversight and Investigations

Regarding

"Challenges Facing Small Businesses Owned and Controlled by Service-Disabled Veterans Seeking Federal Contracts using both the SBA and VA contracting programs"

Tuesday, March 19, 2013
Rayburn House Office Building
Room 2360

EXECUTIVE SUMMARY

During these difficult economic times in our Nation, some of those most impacted have been our military veterans and their families. The unemployment rate among veterans is high and among younger veterans and those in the National Guard and Reserves since 9/11 it's higher than the national average. The U.S. Veterans Employment Initiative is an aggressive plan to put veterans back to work.

Over the next 5 years, over one million more service members are projected to leave the military. The goal of this initiative is to ensure that work is available, accessible and in demand for our veterans and that these service members leave the military with the proper training and preparation they need to transition back into the civilian workforce.
But now that we have fallen over the 'fiscal cliff' due to sequestration, federal agencies will be faced with significant budget cuts which will also impact the hiring of new employees. So we will have to turn to the small business and corporate sectors to help pick up the slack.

In a recent report from the President's Interagency Taskforce on Veterans Small Business Development, it was stated that 'Two of America's greatest assets are the service of our returning veterans and the economic dynamism of our small businesses.' We recognize that entrepreneurs and small businesses are the engines of American innovation and economic prosperity. SBA reports that our nation's 28 million small firms employ 60 million Americans, or half of the private sector workforce, and they are responsible for creating 2 out of 3 net new private sector jobs across the country.

Already, veterans own about 2.4 million businesses or 9 percent of all of America's businesses. These businesses generate about $1.2 trillion in receipts and employ nearly 5.8 million Americans. As highly trained professionals and leaders with experience in challenging environments, veterans' potential for successful entrepreneurship and small business ownership will not be fully achieved if the VA's regulations for verifying them as veteran business owners is allowed to become the standard throughout the federal marketplace.

You would not think that the federal agency, the Department of Veterans Affairs, the very one created for ***'those who have borne the battle, their widows and their orphans,'*** would be the very agency that creates the greatest barriers and obstacles for thousands of veterans and veteran business owners. Since the end of the Vietnam War, the VA has wrongfully denied thousands of veterans their claims for compensation for their service connected injuries and now since 2008, the VA has once again been denying thousands of veteran business owners contracting opportunities due to their ***'Consistently Inconsistent'*** interpretations of VA and SBA contracting regulations.

The Vietnam Veterans of America call on Congress to direct the VA's Secretary, Deputy Secretary and Chief of Staff to **STOP** administering regulations, policies and procedures that are overly burdensome, far too restrictive, and discriminatory towards veteran and service disabled veteran business owners. Our Veterans deserve far better support for their service.

INTRO:

Good morning, Chairman Hanna, (HSBC - SCW), Chairman Coffman (HVAC - SOI), members of the subcommittees, and fellow veterans. On behalf of VVA National President John Rowan and all of our officers and members we thank you for the opportunity for Vietnam Veterans of America (VVA) to appear before you today to share our views on the **"Challenges Facing Small Businesses Owned and Controlled by Service-Disabled Veterans Seeking Federal Contracts using both the SBA and VA contracting programs."** I ask that you enter our full statement in the record, and I will briefly summarize the most important points of our statement.

Though my time of service was many years ago, as a veteran of the US Air Force with the 66th Strategic Missile Squadron, I still have very vivid memories of my military experience. And having served as an Advisor to the Vietnam Veterans of America and Legislative Liaison for the National Association for Black Veterans for the past 12 years, I also remember quite well the history of the Veterans Federal Small Business Development Movement in America from 1999 to today.

We all know that Congress passed Public Law (PL) 109-461, the Veterans Benefits, Health Care, and Information Technology Act of 2006 which included Title V, Sections 502 and 503 that authorized a unique "Veterans First" approach to VA contracting. This approach changed the priorities for contracting preferences within the Department of Veterans Affairs (VA), by placing Service-Disabled Veteran Owned Small Businesses (SDVOSBs) and Veteran Owned Small Businesses (VOSBs) first and second, respectively, in satisfying VA's acquisition requirements.

Those 2 sections of the law, which many if not all of our Veteran Service Organizations (VSOs) advocated for, has been hailed as a great accomplishment for the veteran community. But the subsequent regulation (38 CFR 74) that was published to guide implementation of the law has now adversely affected thousands of veterans business owners.

Over the past 2 years, the VA has reported that of the more than 20,000 veteran business owners that have applied for verification through CVE, only 5,520 are now approved. From previous Congressional hearings, GAO reports, and statements from the VA Small Business Director, we have been told that less than 2% of those denied were for reasons of fraud or intentional misrepresentation. Instead, the greatest percentage of denials were due to CVE's narrow interpretation of the regulation's sections pertaining to ownership and control.

History of the Movement

It was Public Law 106-50, the Veterans Entrepreneurship and Small Business Development Act of 1999 that laid the foundation for veterans interested in starting or expanding their own small businesses to get federal assistance. Congress even stated in its findings of PL 106-50 that America had not done nearly enough to 'assist veterans,

particularly service-disabled veterans, in playing a greater role in the economy of the United States by forming and expanding small business enterprises.'

PL 106-50 called for the creation of new entities and the restructuring of existing ones in order to assist veterans in pursuit of entrepreneurship. Under this law, the Office of Veterans Business Development (under SBA), the Center for Veterans Enterprise (under VA), and the National Veterans Business Development Corporation (quasi independent), were created. It also established a 3% procurement goal for federal agencies and large Prime contractors to purchase goods and services from service-disabled veteran owned businesses. But agencies did not pay much attention until 2003 when Public Law 108-183 made the 3% minimum **MANDATORY.**

And even then, it took a Presidential Executive Order (13-360) in October 2004 to really get agencies to carry out the law. Under the Order, agencies were instructed to designate a senior-level official to be held accountable for submitting a strategic plan showing how and when they would achieve the 3% contracting goal for service-disabled veteran owned businesses. But with no oversight and penalties associated with non-compliance, after a few years the effort diminished.

So Congress took another direction in 2006 and passed Public Law 109-461 which authorized ONLY the VA to implement a unique "Veterans First" approach to VA contracting. This approach would change the priorities for contracting preferences within the Department of Veterans Affairs (VA), by placing Service-Disabled Veteran Owned Small Businesses (SDVOSBs) and Veteran Owned Small Businesses (VOSBs) first and second, respectively, in satisfying VA's acquisition requirements.

Since federal agencies choose not to follow the guidance provided in EO 13-360, veterans advocates called upon leaders of the House Veterans Affairs Committee, to use the Dept. of Veterans Affairs as the model agency to show the rest of the federal government could really increase contracting opportunities to Veteran and Service Disabled Veteran Owned Businesses. Afterall, the VA is the primary federal agency created to provide support and assistance to veterans.

So Congress passed Public Law (PL) 109-461, the Veterans Benefits, Health Care, and Information Technology Act of 2006. While this legislation provided a number of benefits for veterans; what's of particular importance for the purposes of this hearing today, is that Title V, Sections 502 and 503 of this legislation, authorized a unique "Veterans First" approach to VA contracting. This approach changed the priorities for contracting preferences within the Department of Veterans Affairs (VA), by placing Service-Disabled Veteran Owned Small Businesses (SDVOSBs) and Veteran Owned Small Businesses (VOSBs) first and second, respectively, in satisfying VA's acquisition requirements.

Public Law (PL 109-461) was implemented in two regulations:

(1) 48 **Code of Federal Regulations** (CFR) Parts 802, 804, 808, 810, 813, 815, 817, 819, 828 and 852 amended on December 8, 2009 to define the acquisition rules for the program within the VA; and

(2) 38 **Code of Federal Regulations** (CFR) Part 74, published on February 8, 2010 and clarified on January 19, 2011 to define the requirements for verification as a Veteran or Service Disabled Veteran Owned Business.

These regulations require that certain conditions must be met. All SDVOSBs and VOSBs, must register in the VA's Vendor Information Pages (VIP), aka **Veterans Small Business Database**, available at www.VetBiz.gov, and be 'VERIFIED' by the VA's Center for Veterans Enterprise (CVE), to be eligible for award of a contract exclusively within the Department of Veterans Affairs. Once registered in the database, the veterans' status, ownership, and control would be verified and penalties would be assessed for misrepresentation.

Unfortunately, it's this regulation **38 CFR 74 and CVE's subsequent interpretations within their Verification Process established by the VA** that is being used to determine a Veteran's status, ownership and control of their company that is literally causing thousands of veteran and service-disabled veteran business owners to be deprived of millions of dollars in contracting opportunities that could benefit them, their families, veterans seeking employment and other members of our communities.

HERE'S THE MAJOR ISSUES

First many VOBs/SDVOBs do not fully understand how they can be legally allowed to do business with other federal agencies but not with the VA. Representatives of the VA have now taken the position that their VA regulations are nearly identical to the SBA's regulations. If that in fact is true, then VA's interpretation of the rules must be much different than SBA's or either SBA is not doing it right. In the past 3 years, no other small business preference program participants (8a, Hubzone, WOSB, SDB) have exhibited public dissatisfaction to the extent where there have been repeated Congressional hearings, GAO reports and IG investigations of those programs.

According to SBA regulations, a veteran owned business is allowed to 'Self Certify' as a VOB or SDVOB. However, such businesses must still be legally formed and the majority owner(s) must be veteran(s) or service disabled veteran(s). Owners of such businesses may be required to submit specific documentation to verify their status and ownership.

Second, some applicants have problems with the CVE verification process, but that doesn't mean they are ignorant. As a VA-CVE Volunteer Verification Assistance Counselor, I have been participating in the verification process training workshops. And even though CVE has provided a great deal of information via its website on how to

navigate the application process, it still requires an extensive amount of time to even review all of the preliminary information and sample scenarios. It is expected that those applicants who take the time to review all of the verification information, utilize the assistance of the veterans verification counselors, and are willing to make the necessary changes to their organizing documents are far more likely to be approved after 90 days.

Third, Veterans are Subjected to Multiple Contracting Program Rules. Both the SBA and the VA operate procurement programs for SDVOSBs. The SBA program applies to procurements at all agencies other than VA, whereas the VA program applies only to VA contracts. While both programs apply nearly identical statutory definitions of a SDVOSB, the same veteran business owner may be eligible to compete for contracts at other federal agencies except the VA. And now some federal agency departments are denying veteran business owners contracting opportunities if they have not been verified by the VA, which is contrary to the PL 108-183.

Fourth, an applicant may still be denied by the CVE reviewer based on their interpretation of sections of the regulation (38CFR74) and/or of the documents submitted by the applicant. I will identify the reasons for denial by the VA that have been most problematic below:

I. The Verification Criteria - Determining Veteran Status, Ownership and Control

Veterans Status. Verifying the status of the veteran seems to be the easiest part; particularly since the VA already maintains or has access to the records of veteran and service disabled veterans. The documents needed are to verify that the business owner is a veteran who was discharged under conditions other than dishonorable or is a service disabled veteran who possesses either a disability rating letter issued by DOD or the VA.

Additional documents are needed to establish if the veteran(s) or service disabled veteran(s), or in the case of a veteran with a permanent or severe disability, the spouse or permanent caregiver of such veteran, meet the majority Ownership requirement, and that they have Control of the company and participate in the Day-to-Day operations.

Verifying Ownership. Verifying Ownership is somewhat more challenging because CVE must verify if the Ownership is direct and unconditional (74.3). Not hard to verify if the type of Ownership is that of a Partnership, Limited Liability Company, or a Corporation; and if stock is involved, it must verify the stock options' effect on the Ownership. But there's the matter of Transfer Restrictions and determining Ownership interests when an owner resides in any of the community property States or territories of the United States.

Verifying Control (where the real issues come out). According to **38 CFR 74.4 Control is not the same as Ownership, even though both may reside in the same person**. Control means management of the Day-to-Day operations and long-term decision making authority. CVE must verify that the service disabled veteran or veteran business owner has both. But where this gets more involved, is when control is

sometimes contingent on who has the expertise or licenses to run the operation. An owner who is a computer engineer may not be the best CEO. But according to CVE's verification requirements, the owner must hold the highest officer position in the company.

Then there is also the somewhat conflicting view that owners need not work in the company full-time but must show sustained and significant time invested in the business. There is also the requirement that one or more veteran or service disabled veterans who manage the company must devote full-time to the business during normal working hours. And even though the veteran owner has an unexercised right to cause a change in the management quickly or easily, use of a non-veteran manager may disqualify the company as being controlled by the majority veteran owner.

In addition, all of these control issues have to be verified in the context of the type of company – Partnership, Limited Liability Company, or Corporation. And it must be determined to what extent do non-veterans have the power to influence or control the company – either directly or indirectly via critical financial or bonding support, Board actions, office or equipment leases, or private loans, etc.

II. Verification of Only One Company per Owner. A number of veterans have questioned CVE's position to verify only one company per veteran business owner. This ruling is not clearly listed in 38 CFR Part 74. All throughout the Nation, there are people who own more than one company. It seems to be CVE's view that **verifying only one company per owner would prevent the VA from potential harm that could be caused by a veteran or service disabled veteran business under performing or defaulting on a contract**.

III. Misperception of CVE's 'VERIFIED' status. Many if not all federal agency contracting personnel believe that SDVOSBs and VOSBs must or soon will have to first be registered in the VA's Veteran Small Business Database and produce a document stamped with a "VERIFIED' seal of approval by CVE in order to be recognized as a genuine SDVOSB or VOSB. And it's not hard to determine how this misperception came about.

For several years now, CVE, other organizations, including the VET-Force, have been encouraging veteran business owners to register in the Veterans Small Business Database and for federal agencies and Large Primes to use the Veterans Small Business Database as the 'Authoritative Place' to locate capable and qualified veteran business owners. However, this was before PL 111-275 directed the VA through CVE to enhance their verification standards and procedures.

According to Public Law 108-183, the Veterans Federal Procurement Program, a veteran is only required to SELF-CERTIFY as a SDVOSB, in order to do business under this small business preference group. There is no formal certification by SBA or any other entity required. However, under Public Law 109-461, in order to do business with the VA, a veteran or service disabled veteran owned business must successfully complete

VA's verification process and register in the same database that's open for use by all federal agencies, Large Primes, and the public.

IV. Community Property Rights Issue - Section 74.3f

If a veteran business owner resides in any of the community property states, CVE considers applicable State community property laws. What this means to CVE is that all property or income acquired by either spouse during marriage is considered equally owned by both spouses for purposes of the division of the property **upon death or divorce** or for purposes of business transacted by either spouse. A transfer or relinquishment of interest by the non-veteran spouse may be necessary in some cases to establish eligibility.

So according to CVE, in the event of a divorce, a non-Veteran spouse would be entitled to half of the Veteran owner's interest in the company. Therefore, the veteran who is the majority business owner according to the business' organizing documents cannot pass the test of unconditional ownership. However, there is a work-around to this dilemma if the non-veteran spouse will agree to transfer at least 2% of their property rights to the veteran business owner. This solution is still contrary to CVE's view that the non-veteran spouse must transfer all of their property rights.

V. Top 10 Reasons for Denials at VA

While the issues listed above are some of the major ones creating controversy about the VA's Veterans Verification Process, there are others considered to be equally as important. **Here's a list of the top 10 Reasons for Denial in Jan 2013:**

1. Quorum Restriction - Unconditional Ownership

2. Transfer Restriction - Unconditional Ownership

    a. Right of First Refusal

    Right of First Refusal - Should not prevent a veteran business owner from doing business with the VA. See recent US Court of Federal Claims recent decision in the case of Miles Construction wherein the judge found that the current VA rules do not prohibit transfer restrictions that are a 'normal commercial practice."

    b. Community Property Laws (see narrative above)

3. Weighted Voting Requirement

4. Dependence with Other Entities

5. Control of Strategic Policy

6. 51% of Annual Distributions

7. Management of Daily Business -

8. Higher Officer Position

9. Day to Day Management

10. Managerial Experience

VI. Not all Veteran Business Owners are Women or Socially and Economically Disadvantaged

VA has now taken the position that its regulations used for verifying VOBs/SDVOBs are not much different from SBA's small business regulations. This appears to be true when looking at the regulations for SBA's 8(a) business development program and the Women Owned Small Business Program (WOSB). In fact, many of the sections of 38CFR74 for VA Veterans Small Business Verification are nearly identical to sections of SBA's 13CFR124 for Disadvantaged Small Businesses and 13CFR127 for the Women-Owned Small Business Federal Contract Assistance Procedures. However, it should be noted that the 8a and WOSB programs have different statutory purposes than the SDVOSB program administered by the VA.

VII. 8(a) Business Development Program - Socially Disadvantaged and Economically Disadvantaged Based on Income

In order to help small, disadvantaged businesses with limited income compete in the marketplace, the SBA created the 8(a) Business Development Program that offers a broad scope of assistance to firms that are owned and controlled at least 51% by socially and economically disadvantaged individuals.

The 8(a) Program is an essential instrument for helping socially and economically disadvantaged entrepreneurs gain access to the economic mainstream of American society. The program helps thousands of aspiring entrepreneurs to gain a foothold in government contracting.

The 8a Program, uses objective criteria to determine economic disadvantage based on personal income and total assets. Applicants to the program must demonstrate economic disadvantage based on the following criteria:

- **Adjusted Net Worth** must not exceed $250,000 for initial eligibility or $750,000 for continuing eligibility.

- **Personal Income** must not exceed $250,000 (averaged over three years) for initial eligibility or $350,000 for continuing eligibility.

- **Total Assets** must not exceed $4 million for initial eligibility and $6 million for continued eligibility (allows for growth during the 9-year term).

Other unique features of the 8a Program: (1) 9-year Limit of Participation; (2) Certain types of Joint Ventures without violating the Affiliation Rule; (3) Opportunity to participate in SBA Mentor-Protege Program.

See comparative language from the 8a and VA's program regulations below:

Section 124.106: Control is not the same as ownership, although both may reside in the same person. **SBA** regards control as including both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations.

Section 74.4: Control is not the same as ownership, although both may reside in the same person. **CVE** regards control as including both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations.

Section 124.106: An applicant or Participant's management and daily business operations must be conducted by one or more **disadvantaged** individuals.

Section 74.4: An applicant or Participant's management and daily business operations must be conducted by one or more **veterans or service disabled veterans**.

Section 124.106: Disadvantaged individuals managing the concern must have managerial experience of the extent and complexity needed to run the concern.

Section 74.4: Veteran or service disabled veteran individuals managing the concern must have managerial experience of the extent and complexity needed to run the concern.

Section 124.106: A **disadvantaged** individual need not have the technical expertise or possess a required license to be found to control an applicant or Participant if he or she can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.

Section 74.4: A **veteran or service disabled veteran** individual need not have the technical expertise or possess a required license to be found to control an applicant or Participant if he or she can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.

Section 124.106: However, where a critical license is held by a **non-disadvantaged** individual having an equity interest in the applicant or Participant firm, the non-disadvantaged individual may be found to control the firm.

Section 74.4: However, where a critical license is held by a **veteran or service disabled veteran** individual having an equity interest in the applicant or Participant firm, the non-veteran individual may be found to control the firm.

Section 124.106: An applicant or Participant must be managed on a full-time basis by one or more **disadvantaged** individuals who possess requisite management capabilities.

Section 74.4: An applicant or Participant must be managed on a full-time basis by one or more **veteran or service disabled veteran** individuals who possess requisite management capabilities.

Section 124.106: A **disadvantaged** full-time manager must hold the highest officer position (usually President or Chief Executive Officer) in the applicant or Participant.

Section 74.4: A **veteran or service disabled veteran** full-time manager must hold the highest officer position (usually President or Chief Executive Officer) in the applicant or Participant.

Section 124.106: One or more **disadvantaged** individuals who manage 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. **(Note: Any outside employment will have to be approved by SBA prior to employment.)**

Section 74.4: One or more **veteran or service disabled veteran** individuals who manage 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. **(Note: Any outside employment will have to be explained and justified to CVE.)**

VIII. Women Owned Small Business Program and Economically Disadvantaged Women Owned Small Business Program

The WOSB Program is a program that authorizes contracting officers to specifically limit, or set aside, certain requirements for competition solely amongst women-owned small businesses (WOSBs) or economically disadvantaged women-owned small businesses (EDWOSBs).

IX. Intent of the laws

(PL 109-461)

To increase contracting opportunities for Veteran and Service Disabled Veteran Owned Businesses within the VA by granting VA contracting officials the authority to use contracting mechanisms to meet or exceed the VA Secretary's established contracting goals for these types of businesses.

It was not intended to discriminate against legitimate, capable and qualified veteran business owners nor to subject them to overly burdensome and excessive procedures in an attempt to prevent the VA from being embarrassed by approving one or two non-qualified business owners.

(PL 108-183)

PL 108-183 created a program to increase contracting opportunities for Service Disabled Veteran Owned Businesses within the federal marketplace by granting federal agency contracting officials the authority to use contracting mechanisms to meet or exceed the federal contracting goals for these types of businesses.

Neither of the laws that created contracting programs for veteran business owners in the VA nor the Federal Marketplace called for asset, net worth, or personal income limitations.

X. Recommendations to Address the Major Issues

1. Congress should amend 38CFR74 in such a way that will eliminate multiple interpretations of any sections. Each section of the regulation should be explicit.

2. Veterans should not be denied the opportunity to participate in the Vets First Contracting program based on the following reasons:

   a. Failure to participate in the Day-to-Day Operations;
   b. Failure to devote full-time to the business;
   c. Majority owner, married and resident of a community property state;
   d. Failure to be the highest paid employee;
   e. Failure to have the requisite managerial experience;
   f. Making substantial loans from non-veterans;
   g. Utilizing equipment, property, or office space from a non-veteran

3. Stick to a verification process only and not certification. **Verify Veteran Status Only** and continue Self-Certification of Ownership as allowed under Public Laws 106-50 and PL 108-183. Once the status has been verified, it does not have to be re-verified ever. The status will likely not change.

4. Verification of Control should only be to the extent necessary to support the Ownership and to ensure that the company is not being used as a 'Rent-A-Vet' or a pass through company.

5. Allow the verification of more than one company owned by the same veteran(s). Entrepreneurship should not be stifled for the sake of convenience. Each company should be evaluated and verified on its own merit. Any agency will always have the right to determine the select criteria to satisfy contract requirements.

6. Immediately direct the SBA and the VA to conduct promotional campaigns to inform all federal agencies, including all military departments, Large Primes, and the public about the VA's Verification Process being exclusively for contracting with the VA.

7. Congress should not consider extending the provisions of 38CFR74 to all Federal agencies and the DOD military departments until a thorough comparative analysis has been done between all SBA small business certified programs, i.e. 8a, Hubzone, SDB, WOSB.

8. Congress should direct the VA to stop discriminating against Veteran Business Owners by imposing a different set of criteria on veteran owned businesses than is used to verify other types of small business owners. After determining the status of the owner as 8a, Hubzone, WOSB, SDB, etc, the rules regarding control should be applied the same to all small businesses.

9. Congress should direct a study to determine how many legitimate small businesses would be denied if they were all verified using CVE's interpretations of control as referenced in 38CFR74.

10. Congress should direct the VA to revise its overly burdensome and intrusive verification process.

This concludes my statement.

VIETNAM VETERANS OF AMERICA
Funding Statement
March 7, 2013

The national organization Vietnam Veterans of America (VVA) is a non-profit veterans' membership organization registered as a 501(c)(19) with the Internal Revenue Service. VVA is also appropriately registered with the Secretary of the Senate and the Clerk of the House of Representatives in compliance with the Lobbying Disclosure Act of 1995.

VVA is not currently in receipt of any federal grant or contract, other than the routine allocation of office space and associated resources in VA Regional Offices for outreach and direct services through its Veterans Benefits Program (Service Representatives). This is also true of the previous two fiscal years.

For Further Information, Contact:
Executive Director for Policy and Government Affairs
(301) 585-4000 extension 127