



# FIRST CALL

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## AS WE FALL INTO OCTOBER

*A message from NVSBC Executive Director, Scott Denniston*



Another fall is upon us in the D.C. area, and the weather is turning cool and the leaves are changing. Great time to be alive, in spite of our “interesting” election coming up. No matter what way you lean, please vote on November 8.<sup>th</sup> It is important that every voice be heard!

We continue to be busy with the effects of *Kingdomware* decision and how it is being addressed at VA. Frankly, there is still confusion regarding the requirements - on the part of the VOSB/SDVOSB community as well as the VA. It continues to be important that you contact me when you believe there is an issue with implementation.

Because of the generosity of all who attended VETS 16 in Norfolk in June, the NVSBC scholarship program will begin accepting applications in January. One of the requirements will be a letter of recommendation from an NVSBC member, so start thinking of a fresh start-up VOSB/SDVOSB who could benefit from attending VETS 17. The scholarship can be used to pay all expenses, and it includes

a one-year membership in the NVSBC.

As relayed, VETS 17 will again be in Norfolk, VA (June 12-15, 2017). The Board will begin to plan the agenda, so if you have suggestions, please email me at [scott.denniston@nvsbc.org](mailto:scott.denniston@nvsbc.org). The registration website will also go live after the first of the year.

We are still looking for both coaches and “coachees” for our coaching program. There is not a lot of time required to give back to a younger start-up VOSB. We all got to where we are by standing on the shoulders of those who have gone before.

If you are attending the VA’s NVSBE event in Minneapolis on November 1-3, please stop by the NVSBC booth (Booth 125). Also, on November 1<sup>st</sup> the NVSBC, CA Technologies, and Liberty IT Solutions invite you to a reception from 6:00-8:00 PM at Hell’s Kitchen. For each attendee, CA Technologies will make a \$5 contribution to the National Disabled Veteran’s Winter Sports Clinic. Hope to see you there!

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*NVSBC’s purpose is to transition veterans into business owners servicing the federal government.*

### *SBA Launches New Website For Small Businesses*

On October 7, the SBA issued a proposed rule that would allow contractors to file “Petitions for Reconsideration of Size Standards” at the SBA’s Office of Hearings and Appeals (OHA). This would allow any “adversely affected” party to petition OHA to hear a challenge to SBA final rules that revise, modify, or establish a size standard. Comments are due by December 6, 2016. The proposed rule can be accessed here.

## CASE LAW LESSONS (WE HOPE OUR MEMBERS NEVER USE)



These are two bid protests that offer not only colorful reads, but also important lessons for our members:

In [Bryan Concrete & Excavation, Inc.](#), the Civilian Board of Contract Appeals (CBCA) held that an SDVOSB set-aside contract was void and unenforceable because the prime contractor had entered into an illegal “pass-through” arrangement with a non-SDVOSB subcontractor. CBCA 2882 (August 26, 2016). Because the contract was obtained by misrepresenting the concern’s eligibility for the set-aside contract, it was invalid from its inception and the contractor had no recourse against the government when it was later terminated for default.

The lesson: if a contract is voided by fraud, a contractor cannot convert a termination for default into a termination for convenience.

In [Matter of Jamaica Bearings Co.](#), the appellant appealed an SBA area office determination that it was not an eligible SDVOSB for purposes of a set-aside. A disappointed offeror had lodged a status protest, and the awardee had failed to respond to the SBA's request for information. Consequently, the SBA area office found the awardee ineligible. Here's the twist: the protest itself was insufficient because it contained non-specific allegations. (See 13 CFR 125.125(b)). As such, the SBA Office of Hearings and Appeals (OHA) ruled that the status protest should have been dismissed for lack of specificity, and reversed the determination of ineligibility.

The appellant got lucky. The SBA OHA was clear the appellant could not introduce new evidence on appeal, so if the protest *had* been sufficient, the appellant would have lost for lack of response. The lesson: don't hope to get lucky. Respond!

## PRISON SENTENCES HANDED DOWN IN SDVOSB/8(A) FRAUD CASE

A North Carolina couple is heading to prison after being convicted of defrauding the SDVOSB and 8(a) Programs.

According to the DOJ press release, Ricky Lanier was the former owner of an 8(a) company. When his company graduated from the 8(a) program in 2008, Mr. Lanier helped form a new company, Kylee Construction, which supposedly was owned and managed by a service-disabled veteran. In fact, the veteran (a friend of Mr. Lanier) was working for a government contractor in Afghanistan, and wasn't involved in Kylee's daily management and business operations.



The Laniers also used JMR Investments, a business owned by Mr. Lanier's college roommate, to obtain 8(a) set-aside contracts. As was the case with Kylee, the Laniers misrepresented the former roommate's level of involvement in the daily management and business operations of JMR. They also subcontracted out much of the work in violation of limitations on subcontracting requirements. Over the years, Kylee Construction was awarded \$5 million in government contracts and JMR was awarded \$9 million.

The Laniers themselves received almost \$2 million in financial benefits from their fraudulent scheme. Then Mr. and Mrs. Lanier received a 48-month and 30-month prison sentence, respectively.

## CAN YOU GET YOUR FEES IN A GAO PROTEST?

As a government contractor, at one point or another you've probably encountered a bid protest. Maybe you missed out on an award and felt that the Government didn't properly apply the terms of the solicitation. Maybe someone protested your status (such as if the contract was an SDVOSB set-aside). Or maybe *you* protested someone you suspected was ineligible.

No one wants to be involved in a protest. They are, however, sometimes necessary, which is unfortunate given the time and money it would save if the government always properly evaluated proposals and only awarded contracts to eligible contractors.

One question often raised is whether someone who brings a bid protest at the Government Accountability Office ("GAO") can recover costs if they prevail. After all, if the *government* errs in evaluating a proposal, resulting in the time and money required to hire an attorney to pursue a contract, why should *the contractor* be penalized?

Long story short, the answer is a protestor is usually out the costs of protesting to the GAO. The bar is high, because the protestor has to show two

things: *one*, that the protest was "clearly meritorious;" and *two*, that the agency unduly delayed in taking corrective action to remedy its mistake.

A recent GAO decision illustrates this principle: in *Cape Environmental Management, Inc.*, a protestor unsuccessfully attempted to recover its costs after an agency took corrective action. (B-412046.3, September 30, 2016). The GAO noted that a "clearly meritorious" protest is one where the issue is "not a close question" and the government has "no defensible legal position." Because the GAO found that the protestor had not established this element, it didn't reach the second element of undue delay. (As a note, there is generally no entitlement to fees if the agency takes corrective action prior to the due date of its agency report).

Basically, if you are considering protesting a lost contract to the GAO, know that it will involve a monetary investment. Absent extraordinary circumstances, you won't recover your filing fees.

As such, consider whether "going after the prize" is worth it to your business.

Access the case here.

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## YOUR D.C. CHAPTER UPDATE

The D.C. Metro Chapter of NVSBC held our first two monthly dinner meetings of this season. ***Our September 14th meeting*** was our first sold out event and featured a special presentation by Tom Leney, Director of the VA OSDDBU discussing the implementation of the Supreme Court *Kingdomware* decision. ***Our October 12th*** meeting was also well attended and featured a presentation by Vice Admiral Lou Crenshaw (Ret.) entitled "Ten Minutes Over Baghdad: Lessons for Leaders." Lou provided insights on business leadership based on his extensive military career and his consulting practice, Crenshaw Consulting Associates LLC ([www.crenshawconsultingassociates.com](http://www.crenshawconsultingassociates.com)). Stephanie Alexander, Vice President of the D.C. Metro Chapter Match Making program, provided updates on the latest matches with large primes and the schedule for upcoming MM activities including events with Boeing, GDIT, Harris, Raytheon, L3 and Northrop Grumman.



D.C. Chapter Board of Directors Member Judy Brant, VP Training & Education, previewed the outstanding programs for this season of programs. Boot Camp programs are offered each month at 4-5:30 PM prior to the monthly dinner meetings. The D.C. NVSBC Chapter meets monthly on the 2nd Wednesday of each month from September through June at the Key Bridge Marriot in Arlington, VA. If you would like your email to be added to our list, email Heather Hayes at [heather.hayes@nvsbc.org](mailto:heather.hayes@nvsbc.org).

## PROTEST ATTEMPTS TO APPLY KINGDOMWARE TO ALL AGENCIES

The Government Accountability Office's ("GAO") October 6 decision in *Aldevra-Reconsideration*, suggests that the *Kingdomware* Supreme Court decision could have repercussions for other agencies buying through the Federal Supply Schedule (B-411752.2). In its motion, Aldevra asked the GAO to reconsider the denial of its challenge to an FSS solicitation, which it believed should have been set aside for small businesses. The request for reconsideration was denied on a technicality - under black letter law, Supreme Court precedent cannot be retroactively applied. In so doing, the GAO did not address Aldevra's central argument: that *Kingdomware* should also apply to the Small Business Act to render set-aside procedures for FSS contracts mandatory for all agency procurements (not just those issued by the VA).

Here, Aldevra was relying on the Small Business Act (which contains language similar to the Veterans Benefits, Healthcare, and Information of Technology Act - the statute at issue in *Kingdomware*), to argue that the "rule of two" applied to procurements greater than \$3,000 but no more than \$150,000. In the earlier denial, the GAO found that under the Small Business Act, an agency's use of set-aside procedures for FSS contracts was discretionary. The GAO further explained that the SBA's regulations give contracting officers discretion - but do not command them - to set aside orders under multiple-award contracts. Once the *Kingdomware* decision was handed down, Aldevra jumped on the chance to

see if the GAO would expand the Supreme Court's interpretation of the "rule of two" to non-VA procurements (given that the Small Business Act also contains the same "shall" language that was pivotal in the Supreme Court decision). This shouldn't be a surprising move given that Aldevra was the very first business to challenge the VA's failure to follow the Rule of Two, which ultimately led to the *Kingdomware* decision.

Aldevra's case may have been dismissed on a technicality, but it's only a matter of time before another opportunity presents itself for a ruling on the merits - given the similar language that applies to SBA procurements compared with VA procurements, are all contracting agencies required to set-aside FSS contracts for veteran-owned small businesses when the "rule of two" is met?

Access the October 6 *Aldevra* GAO case here.

### *Thinking of Attending NVSBE?*

As we informed you before, the VA's annual National Veteran Small Business Engagement will be held in Minneapolis this year, from November 1-3. Unfortunately, advance online registration ended on September 23, but you can still register online through October 31 and not be hit with additional fees for registering onsite. If you are a veteran small business owner, the current cost is \$600. Access the VA's site here.

## FIRST CALL

The NVSBC is pleased to offer "First Call" to its members. In our active duty careers, "first call" was the notice to get up and get moving to usher in a new day. We will provide you with all the important information you need to get up and moving to success in the federal marketplace. This publication is prepared by veteran advocate and attorney, Sarah Schauerte. Access her company website and blog at: <http://www.legalmeetspractical.com>.



### Ideas?

If you have ideas for future content for First Call, or how to maximize the benefit NVSBC offers to its members, we always welcome input. Please contact Scott Dennison with your comments at: [scott.denniston@nvsbc.org](mailto:scott.denniston@nvsbc.org).