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PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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Editorial Office
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GAO Recommends Improvements to Subcontracting Under VA's Veterans First Program

*By Mitchell A. Bashur and Vijaya S. Surampudi**

The Government Accountability Office recently published a report on the U.S. Department of Veteran Affairs' implementation of the Veterans First Program. This article discusses the report, which outlines several key issues with the Department's current program.

The Government Accountability Office ("GAO") recently published a report on the U.S. Department of Veteran Affairs' ("VA") implementation of the Veterans First Program. This congressionally-mandated program requires the VA to set-aside contracts for Service-Disabled Veteran-Owned Small Businesses ("SDVOSBs") or, alternatively, to Veteran-Owned Small Businesses ("VOSBs") where: (1) the contracting officer ("CO") reasonably expects that at least two such businesses will submit offers; and (2) the award can be made at a fair and reasonable price.

This two-part test is commonly known as The VA Rule of Two. This program was challenged in *Kingdomware v. United States*,¹ but the U.S. Supreme Court upheld the legality of the program and found the VA was not setting aside contracts consistent with the two-part test. Congress subsequently requested that GAO conduct an investigation to review the measures taken by the VA to remedy this failure and provide recommendations for improvement. While the VA implemented several improvements, GAO found that the program requires significant change to ensure the agency meets its statutory requirements. This report outlines several key issues with the VA's current program.

LACK OF TRAINING

GAO identified inconsistent training provided to COs in making set-aside determinations as a core problem. Even though the VA provided additional training, per its revised 2016 Veterans First policy guidance, the agency made

* Mitchell A. Bashur is an associate at Holland & Knight LLP who focuses his practice on government contracts, including small and disadvantaged business issues, claims and disputes, domestic preference programs, as well as compliance issues. Vijaya S. Surampudi is a litigation associate at the firm who focuses her practice on government contracts. The authors may be reached at mitchell.bashur@hkllaw.com and vijaya.surampudi@hkllaw.com, respectively.

¹ 136 S. Ct. 1969 (2016).

CO attendance optional, as opposed to mandatory. Additionally, this training did not address the most challenging aspects of the two-part test, including making a fair and reasonable price determination. VA's Acting Chief Acquisition Officer acknowledged that contracting officers' confusion remains, especially regarding fair and reasonable price determinations. As a result, many COs received insufficient training in determining when to apply the VA Rule of Two.

Further, COs expressed a lack of confidence when applying the Veterans First policy, in part because of pressure—real or perceived—from leadership and others to set-aside contracts due to negative scrutiny from the leadership on decisions not to set-aside. Decisions not to set-aside were privy to extensive review adding time into the procurement cycle for much needed products and services.

FAILURE TO INCLUDE THE CURRENT LIMITATIONS ON SUBCONTRACTING CLAUSE

GAO further found that, in many cases, the VA did not include the requisite clauses to allow for the agency to ensure that contractors comply with the SBA's subcontracting limitations in performance of set-aside contracts and orders. COs are required to include two different clauses when issuing solicitations for SD/VOSB set-asides.

First, they must include a clause that requires compliance with the SBA's limitations on subcontracting regulations.² This regulation limits the percentage of the amount paid by the government that may be subcontracted to companies that are not in the same socioeconomic category.

Second, COs must include a clause that enables the VA to access contractor's information to monitor compliance with subcontracting limitations.³

The VA updated its standard set-aside clauses in July 2016, to include references to SBA's revised limitations on subcontracting regulations. However, 11 out of 29 set-aside contracts GAO reviewed did not contain this revised clause. In those cases, the revised clause was either missing entirely or contained an outdated version of the subcontracting limitation clause.

Similarly, 22 out of the 29 set-aside contracts reviewed did not contain the monitoring clause that provided the VA access to information that enabled it to monitor compliance. Without the inclusion of this monitoring clause, the VA would face challenges in attempting to obtain information needed to monitor compliance.

² See Veterans Affairs Acquisition Regulation ("VAAR") § 852.219-10; see also VAAR § 852.219-11.

³ See VAAR § 852.219-74.

FAILURE TO MONITOR COMPLIANCE WITH THE LIMITATIONS ON SUBCONTRACTING CLAUSE

GAO further noted that, even if COs had included the proper clauses in each contract, their inclusion would not ensure enforcement of those clauses. Instead, the VA found that COs conducted little oversight to ensure contractor compliance with the requisite limitations on subcontracting clauses. For the 29 set-aside contracts reviewed, GAO found little evidence that the VA was monitoring contractor compliance.

In response, the COs explained that there were several barriers to executing their monitoring responsibilities, including a focus on administrating contracts, a high workload, and uncertainty on how to conduct monitoring. Senior VA Procurement officials acknowledged that such monitoring was not a high priority and that COs have limited time available to conduct the monitoring. Finally, several COs improperly relied on contracting officers' representative to monitor compliance, even though the monitoring responsibility actually remained with the COs. This is not a recent problem. A September 2016 SBA report similarly found no evidence of limitations on subcontracting monitoring.

GAO reminded the VA of the importance of ensuring contractors were complying with these limitations on subcontracting clauses and directed the Secretary of Veterans Affairs to ensure that the VA's Director of the Office for Acquisition and Logistics provide more training, update clauses, and conduct a fraud risk assessment of current contracts. Given that the recommendations in GAO's report focus on training and oversight for VA contracting personnel, contractors should expect more scrutiny in the performance of these set-aside contracts.