

aptac

Association of
Procurement
Technical
Assistance
Centers

Connection

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Message from APTAC Immediate Past President Jane Dowgwillo



Dear APTAC Members,

For those that attended the APTAC Spring Conference in Jacksonville a month ago, I had the opportunity during the Awards Dinner, to thank you for your support and guidance during my time as APTAC President over the last year. I also want to extend that gratitude to those of you who could not attend.

While it was a challenging year in some aspects, I do want to focus on the highlights and successes that happened during the year. This could not have been achieved without the support and hard work of the Board and Committees. This would be a very long article if I named everyone individually and all the volunteer duties you took on, on top of already busy full time positions, but you have my full appreciation and respect.

- With the unexpected passing of our Executive Director, Becky Peterson, we did our best to cover all the “behind the scenes” duties Becky did so well and transitioned the association management to a new entity, Stones River Event Management. A special thank you to John Erdmann, Bill Peterson and Mary McGovern of Stones River Event Management for keeping things going through this difficult period.
- In the NDAA there is now language that makes it clear that we may provide SBIR / STTR assistance at all stages. This is important, as it clarifies how we can connect our business clients to bring their technology initiatives to agencies through these vehicles.
- Also in the NDAA it specifies that PTACs may carry over a certain % of program income for up to 12 months. This inclusion will provide greater budget flexibility for many of our PTACs.
- The first report of the Section 809 Panel into DoD acquisition reform, which is a Congressional Directive, is a great win for the PTACs around the country, and raises our profile nationally. The recommendations for our funding growth and reach are promising.
- Many volunteers are contributing to our ongoing efforts to build Stakeholder relationships and continued agency recognition of our reach and expertise.

(continued on next page)

APTAC BOARD OF DIRECTORS

President: Tiffany Scroggs
Pres-elect: James Gerraughty
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Secretary: Gary Moore
Treasurer: Rick Evans
Past Pres: Jane Dowgwillo

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Region 9: Chuck Spence
Region 10: Kathy Cocus
Region 11: Mary Walks Over Ice

APTAC'S MISSION

The Association of Procurement Technical Assistance Centers (APTAC) is a membership organization comprised of and supporting Procurement Technical Assistance Centers (PTACs) and the professionals who work for them. APTAC's mission is to support the PTACs in their efforts to provide the very highest levels of government contracting assistance, thereby increasing and improving the supplier base which serves our armed forces and our government as a whole.

APTAC's function is to provide a national forum for training and to facilitate the exchange of information and ideas, to provide a national voice for the PTACs, and to otherwise work toward strengthening the PTAP and the level of services it provides.

Are you “following” APTAC? APTAC's Social Media effort is buzzing! If you're not doing so already, follow us (and “like” us!)



Tell your clients to follow us, too - and to tell their friends!

As you'll see, great procurement news is being posted all the time. It's another benefit for your clients - and it'll help spread the word about the power of the PTACs!

Cover Photo: Marine Corps Lance Cpl. Marc Mercado carries an M240B machine gun during a casualty evacuation drill at Kahuku Training Area, Hawaii, May 1, 2018. Marine Corps photo by Sgt. Aaron S. Patterson

Letter from Jane Dowgwillo, cont.

I am always inspired by how our members' relationships and outreach efforts and events strengthen the PTACs' reach. This is a testament to your integral part in the economic development landscape of your local, regional and statewide areas. Importantly, we continue to have legislative support for our program because of your educational efforts.



The results from the recent impact survey shows total contract dollars reported stand at over \$18 billion—already surpassing our 2016 numbers! The importance of these figures is in demonstrating the value and results that we bring to the small business community, and the collective PTAC impact supports our efforts for continued host funding and legislative support. You should each be very proud of yourself. Your hard work and dedication day in and day out is what makes this happen.

It's a really nice coincidence that my last APTAC conference as President was held in Jacksonville in my home state of Florida. I never would have thought I would be APTAC President when I attended my very first APTAC conference in Spring 2011, which was also held in Florida in Fort Lauderdale.

Over the years, I've met so many wonderful people and made many friends through the association. I really hope our new members will have the same positive experiences as I have had. While the past year have been extremely busy and, at times, stressful, I will look back on this year and remember how incredibly rewarding the experience has been.

You are in great hands with Tiffany Scroggs as our new President, and as Immediate Past President, I will continue to work on ongoing initiatives and issues so that the influence of our association continues to grow, and interests of our members are addressed. Thank you, everyone!

A handwritten signature in black ink that reads "Jane Dowgwillo".

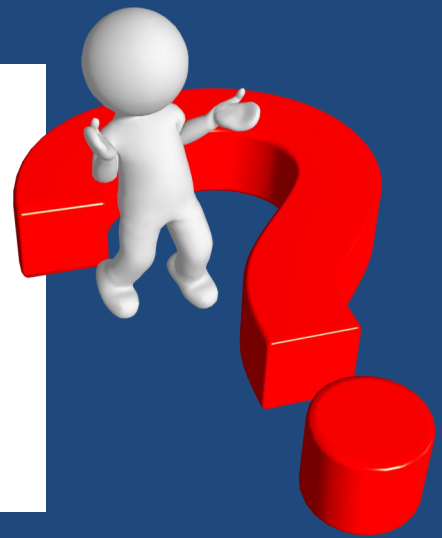
Jane Dowgwillo



Above: Jane with APTAC Past President Rich Mihalic (left), President Tiffany Scroggs, and President-elect James Gerraughty



Left: Jane relaxing with Art Humphries (NM PTAC) and Leonarda Steward (VT PTAC)



Important SAM Updates

APTAC and GSA are working closely throughout the current SAM crisis

In the wake of the System for Award Management data breach in late March, APTAC has been in close communication with GSA officials in an effort to answer PTAC questions, raise PTAC concerns, and ensure that information on how to best meet new SAM registration/update requirements gets out to the PTACs—and their clients—as quickly as possible. GSA recently responded to a list of questions APTAC submitted. Please see this important information below.

Regarding the submission of notarized letters:

Q: Should entities expect an email or a letter that confirms receipt?

A: There is no email to confirm receipt of the letter. Once the letter is received, it is opened and sent forward for processing. An email is sent once the letter is processed (an FSD ticket is created when the letter has been reviewed). The email will contain information about whether the letter is accepted or rejected. If rejected, the letter will include the reason for rejection and instructions to resolve the issue.

Q: Should entities mail their letter via Certified Mail, Return Receipt Requested?

A: Incoming letters are handled in the order received. Entities may send the letter using certified mail to get the return receipt or use an express mail service if they wish to track the physical receipt of the letter.

Q: How will entities be notified once their letter is accepted or rejected?

A: The entity administrator will receive an email after the review is completed. The email will contain information about whether the letter is accepted or rejected. If rejected, the letter will include the reason for rejection and instructions to resolve the issue.

Q: What is the estimated processing time?

A: The processing time is dependent on the volume of letters received, whether the letter is accepted/rejected, and the additional impact of including existing entities who are renewing or updating their registrations. As the data normalizes, GSA will provide updates to APTAC.

Regarding the submission of notarized letters (cont.):

Q: While waiting on a response, should entities log-in to SAM to check the status or update?

A: The last step of the notarized letter review process is for the Federal Service Desk representative to indicate in SAM the approved letter is on file. If the registration is in submitted status and has passed all other external validations, it should be active within the hour. SAM will also send an acknowledgement when the registration is active. Entities may use the Check Status tab in the SAM main navigation bar to see where their registration is in the review process.

In the event that an entity is facing an imminent contract award while awaiting approval of their notarized letter, is there a way to:

Q: Receive a provisional approval or request expedited processing/approval of their notarized letter?

A: All entities must complete the process in its entirety. Entities are unable to request an expedited review of their notarized letters. When the Government determines a need, the Government contracting officer may submit a request for escalation to their designated IAE Change Control Board member, who will be able to submit the request to GSA for escalation. *(Note: APTAC has asked GSA to elaborate on how contracting officers can identify their IAE Change Control Board member. Once GSA provides this information, APTAC will pass it along to all members.)*

Q: Request communication from GSA or FSD to the contracting officer, explaining the entity's status?

A: The contracting officer can track the status of the registration through the status tracker on SAM. If the registrant has cleared the CAGE review process and the notarized letter is approved, the registration will be activated. If a notarized letter is received and approved prior to completion of the CAGE approval, the file will be flagged so the registration can move forward to activation immediately after CAGE approval.

Q: Otherwise protect the entity awaiting the processing of their letter from contract disqualification?

A: Entities are required to be registered in SAM prior to award in accordance with FAR Subpart 4.11 requirements. The notarized letter is now part of the registration process. GSA cannot exempt entities from registration.

GSA recommends the following to entities submitting notarized letters:

1. **Use one of the templates provided in the FAQs.** Review the applicable instructions for domestic entities or international entities to ensure you select the appropriate template.

2. **Complete all sections of the template to avoid these main causes of rejection:**

- ◇ Failure to include a statement clarifying your account administration preference. The template directs you to select one of two choices for who can administer your account, either self administration confirmation or third party agent designation. Your letter must indicate one or the other.
- ◇ Information not matching. Double check that the appointed Entity Administrator's email address and phone number, as well as the entity physical address, match the information contained in the SAM registration. Take the extra time to ensure all information is accurate and complete or you will be required to submit another hard copy notarized letter.
- ◇ Missing digits in the DUNS Number. Include all nine digits of your DUNS Number. Do not ignore leading and ending zeros. Double check the DUNS Number for accuracy against your SAM registration.

GSA is working to develop alternatives to the requirement for the original signed, notarized letter and will post updates to SAM.gov and FSD.gov as they become available. No timeline has been provided.



SBA Mentor-Protégé Program and Joint Ventures: Myths vs. Realities

by Steven Koprince, Koprince Law LLC

*Many common misconceptions—I call them myths—pervade these programs.
Let's debunk them, shall we?*

As federal government contracts attorneys, my colleagues and I work on joint venture and mentor-protégé agreements every week. And make no mistake: for large and small contractors alike, mentor-protégé agreements and joint ventures can offer tremendous opportunities and advantages.

Unfortunately, many common misconceptions—I call them myths—pervade these programs. Many of our clients (and undoubtedly, many PTAC clients) misunderstand what mentor-protégé and joint venture agreements are and how they work.

Let's debunk some of those common myths, shall we?

Myth # 1: A Mentor-Protégé Agreement is a Team

Many companies have approached us with a request: “we want to mentor-protégé for an upcoming solicitation.”

Putting aside the questionable verb usage, a “mentor-protégé” isn't a team! A mentor-protégé agreement is an agency-sponsored business development agreement, under which one company (typically a larger, more experienced contractor) provides specific assistance to help another company (typically a smaller, less experienced contractor) take the next steps in its development.

That's it.

When the SBA, or another sponsoring agency, approves a mentor-protégé agreement, it has approved a business development arrangement, not a team. The “mentor-protégé” cannot bid on work, although the

members can *separately* form joint ventures or prime/subcontractor teams to pursue contracts.

Most mentor-protégé pairs want to pursue work together, which may explain why “mentor-protégé” has been conflated with “team” in the public consciousness. But mentor-protégé ain’t a team!

Myth #2: The SBA Must Pre-Approve All Mentor-Protégé Joint Ventures

After contractors untangle the differences between mentor-protégé agreements and joint ventures, they often ask how to submit their joint venture to the SBA for approval. Some contractors even attempt to submit their joint venture agreements to the SBA’s All Small Mentor-Protégé Program office.

They don’t need to.

Contrary to common misconception, the SBA only pre-approves joint ventures pursuing 8(a) contracts. For non-8(a) contracts, the SBA cannot, and does not, preapprove joint ventures. This includes small business, SDVOSB, HUBZone and WOSB/EDWOSB contracts.

Make no mistake: just because there is no SBA preapproval for many joint ventures doesn’t mean that the joint venturers can ignore the SBA’s mandatory requirements for joint venture agreements. After the award is announced, if there

is a protest, the SBA will review the joint venture agreement at that time—and if the agreement is deficient in any way, the contract goes away. If anything, it’s even more important to get the joint venture agreement right when the SBA won’t preapprove.

Finally, if the joint venture will pursue VA SDVOSB or VOSB contracts, the VA CVE must verify the joint venture before submission of its first proposal.

Myth #3: The Protégé Can “Use” the Mentor’s Past Performance

Mentor and protégé companies often team up to pursue work together, but when the protégé bids work without the mentor, it’s very common for the protégé to believe it can “use” its mentor’s past performance on those projects, too.

Nope.

Under the SBA’s regulations, a procuring agency must consider the past performance of both joint venture partners. And under FAR 15.305, an agency “should” consider the past performance of a major or critical subcontractor.

When a mentor is a JV partner or subcontractor, these rules apply to a mentor, too. But a mentor-protégé relationship, standing alone, doesn’t allow a protégé to claim its mentor’s past performance as its own.



Looking for more reading on Mentor-Protégé programs?

Check out these Koprince articles:

- * [*DoD Mentor-Protégé Program: Major Changes Finalized*](#) (March 26, 2018)
- * [*5 Things You Should Know: All Small Mentor-Protégé Program*](#) (September 20, 2017)
- * [*SBA All Small Mentor-Protégé Program: Annual Evaluation Forms Now Available*](#) (August 10, 2017)

- * [*27 Percent of DoD Mentor-Protégé Agreements Are Deficient, GAO Says*](#) (April 13, 2017)

Myth #4: Two Contractors Cannot Win More Than Three Contracts as JV Partners

Perhaps no joint venture rule causes as much confusion as the SBA’s “three-in-two” rule. Many (perhaps most) contractors believe that it places a hard limit on how much work two companies can be awarded as joint venture partners.

Not so.

The rule isn’t all that artfully drafted, although if you’d like to take a look, it’s in [13 C.F.R. 121.103 \(h\)](#). Here’s a breakdown of what it says:

After a joint venture is awarded its first contract, two things happen:

- (1) A two-year window opens under which the joint venture can submit new proposals. After that two-year window closes, if the joint venture submits additional proposals, the SBA may deem the joint venture members generally affiliated.
- (2) Even within that two-year window, if, on the date the joint venture submits a new proposal, the joint venture has already been awarded three or more contracts, the SBA may find the joint venture members generally affiliated.

The three-in-two rule isn’t a hard limit on bids or awards. It’s an affiliation rule—violate it and the SBA may (but need not) deem the joint venture members generally affiliated.

Of course, no one wants to be affiliated, so it’s not a terrible idea to essentially treat the rule as a hard cap on joint venture awards. But what if the companies want to joint venture for more than three contracts, or for longer than two years?

They can!

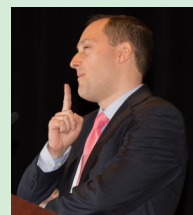
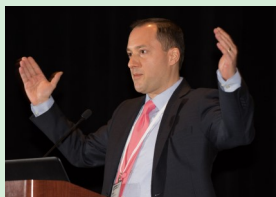
The three-in-two rule is very easily circumvented by simply forming a new joint venture. That’s the second myth—that the rule applies to the joint venturers, not the joint venture. Remember that a joint venture is a legal entity: it has an EIN, DUNS, CAGE and SAM. These days, most joint ventures are formal legal entities created with state governments, usually limited liability companies. The three-in-two rule applies to the joint venture, not its members. Once the joint venturers hit either of the two limits discussed above, they can reset the clock to zero simply by forming a new joint venture.

Want an example? In a 2014 SBA Office of Hearings and Appeals case, *Size Appeal of Quality Services International*, SBA No. SIZ-5599 (2014), a mentor and protégé were awarded 15 contracts over four years. But the companies were smart—they won those jobs using eight different joint ventures. The result? No violation of the three-in-two rule and no affiliation.

PTAC Tip: For more information on the significance of “affiliation”, [click here](#).



Steve Koprince—founder of Koprince Law LLC in Lawrence, Kansas—is a regular presenter at APTAC and PTAC conferences and events. His [SmallGovCon blog](#) is a terrific resource for the latest news on legal and regulatory government contracting issues.





Changes on the Horizon: SBA and VA Overhaul VOSB/ SDVOSB Eligibility Requirements

by Maria L. Panichelli and Michael A. Richards,
Cohen Seglias Pallas Greenhall and Furman PC

Attention all PTAC Counselors:

Veteran-owned business eligibility requirements are about to change.

In January of this year, both the Department of Veterans Affairs (VA) and the Small Business Administration (SBA) issued proposed rules that would completely overhaul the regulations governing eligibility of veteran-owned small businesses (VOSB) and service-disabled veteran-owned small businesses (SDVOSB).

Background

To fully understand the revisions being made by the SBA and VA, it is important to know the full history and context of the VOSB and SDVOSB rules. Originally, the eligibility of SDVOSB companies was decided by the SBA—and the SBA alone. However, around 2010, the VA initiated its own VOSB and SDVOSB verification process in connection with its own (separate) “Vets First” veteran-owned small business program. The driving force behind the VA’s “Vets First” Program was to increase opportunities for VOSBs and SDVOSBs—a great and noble purpose, at least in theory. In reality, these dual-VOSB programs caused a great deal of confusion and inconsistency.



Growing Inconsistency Between SBA and VA Veteran Owned Small Business Programs

What made the fact of having two programs problematic? A number of things. As a threshold matter, while the VA program included both SDVOSBs and VOSBs, the SBA program provided only for SDVOSBs (also known in the SBA regulations as SDVO SBCs). Moreover, the VA program covered set-asides issued and

PTAC Alert: On May 21, 2018 [CVE will suspend incoming case applications](#) to facilitate the transition to the new case VIP interface. The suspension of incoming cases will last for approximately thirty 30 days and include both new applications and reverifications . [Click to read more.](#)

administered by the VA, while the SBA program covered set-asides issued and administered by all other agencies. As a result, contractors who performed work for both the VA and other agencies had to worry about two different certification/verification processes and two different sets of regulations.

Take, for example, an SDVOSB construction contractor who regularly performs work for the U.S. Army Corps of Engineers (USACE), the General Services Administration (GSA), and the VA. There has been no consolidated or uniform way to be eligible for SDVOSB set-asides issued by all three agencies.

To be eligible for the set-asides issued by USACE and GSA, the contractor would self-certify as an SDVOSB in, for instance, the System for Award Management (SAM) and the SBA’s Dynamic Small Business Search (DSBS) as an SDVOSB. That eligibility would be governed by the SBA regulations located at [13 C.F.R. part 125](#). To be eligible for SDVOSB set-aside contracts issued by the VA, the contractor would have to apply to the VA—specifically, the VA’s Center for Verification and Evaluation (CVE)—seeking verification and

inclusion the VA’s Vendor Information Pages (VIP) or “VetBiz” database. This database has served as a repository of all VA-verified companies eligible to compete for VA-issued VOSB/SDVOSB set-aside contracts. VetBiz eligibility was governed by the VA small business regulations found at [38 C.F.R. part 74](#).

Both the VA and SBA required a business to be unconditionally owned and controlled by one or more service-disabled veterans to qualify as an SDVOSB. However, under this dual-regulatory framework, the question of whether a service-disabled veteran “owned” or “controlled” his or her business depended on two different, competing definitions. The VA defined unconditional ownership as follows:

[O]wnership must not be subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms *follow normal commercial practices* and the owner retains control absent violations of the terms.—*38 C.F.R. § 74.3(b)* (emphasis added)

The SBA regulations, in contrast, included no definition of “unconditional” ownership. (This may have been an oversight when drafting the regulations; there is a definition of unconditional ownership for both women owned small business (WOSBs) and 8(a) companies—two other small business programs run by the SBA).



U.S. Small Business Administration

As if this wasn’t confusing enough, these different eligibility regulations—[13 C.F.R. part 125](#) for the SBA program and [38 C.F.R. part 74](#) for VA program—were interpreted differently in different cases, leading to significant inconsistencies. For example, because the SBA had no regulatory definition concerning ownership, when presented with a legal dispute requiring the agency to determine the meaning of “unconditional,” it created the following demanding framework:

[U]nconditional necessarily means there are no conditions or limitations upon an individual’s present or immediate right to exercise full control and ownership of the concern. Nor can there be any impediment to the exercise of the full range of ownership rights. Thus, a service-disabled veteran: (1) Must immediately and fully own the company (or stock) without having to wait for future events; (2) Must be able to convey or transfer interest in his ownership interest or stock whenever and to whomever they choose; and (3) Upon departure, resignation, retirement, or death, still own their stock and do with it as they choose. In sum, service-disabled veterans must immediately have an absolute right to do anything they want with their ownership interest or stock, whenever they want.—*The Wexford Group Int’l, Inc., SBA No. SDV-105 (June 29, 2006)*

Many years later, in [Miles Construction LLC. v. United States](#) (a case that our firm [Cohen Sigleas] successfully litigated), the Court of Federal Claims handed down a much more liberal interpretation of unconditional, albeit in the context of the VA regulations relating to SDVOSB ownership. There, the Court found that certain “right of first refusal” language in the contractor’s corporate governance documents did not render the veteran’s ownership of the company to be “conditional.” The [court](#)





commercial practice” and did “not affect the veteran’s unconditional ownership.” Thereafter, [the VA actually changed its policy](#) on how its regulations were interpreted; the VA took the position that transfer restrictions on ownership that are part of normal commercial dealings, such as the right of first refusal, do not materially affect the ability of a veteran to unconditionally own or control his or her business. In other words, according to the cases interpreting the VA’s regulations, transfer restrictions no longer rendered an owner’s control

“conditional” or nullified the owner’s VOSB/SDVOSB eligibility. This all seemed like good news for veteran contractors. Some contractors assumed that this new line of reasoning would apply to all VOSB/SDVOSB eligibility determinations. But then came the decision in [Veterans Contracting Group](#).

This case involved a status protest filed against Veterans Contracting Group, Inc. (VCGI), challenging the company’s eligibility for a SDVOSB set-aside issued and administered by USACE. As noted above, eligibility for SDVOSBs administered by agencies other than the VA falls within the purview of the SBA, ruled by SBA’s regulations. When interpreting those regulations in the Veterans Contracting Group case, the SBA found that Ronald Montano, the veteran owner of VCGI, did not have unconditional ownership of the company because the company’s Shareholders Agreement provided that upon Mr. Montano’s death, incapacity, or insolvency, all of his shares would be purchased by VCGI at a predetermined price. In other words, Mr. Montano’s heirs could not freely convey or transfer the stock. The SBA believed that these provisions constituted “significant restrictions” on Mr. Montano’s ability to transfer his shares and, further, that these restrictions therefore rendered his ownership of the company conditional. VCGI disagreed. It argued that these provisions were “normal commercial practice,” which were part of regular commercial dealings, and, as such, did not materially affect the ability of Mr. Montano to unconditionally own or control the company. Accordingly, VCGI argued that the SBA’s decision appeared to be inconsistent with the ruling in Miles, as well as the ruling in [AmBuild Co., LLC v. United States](#), a similar case.



Not surprisingly, the case ended up before the Court of Federal Claims—two times, in fact, each in a different context. The Court ultimately found that the SBA had not erred in concluding that Mr. Montano did not unconditionally own the company because—while it was (arguably) inconsistent with the decisions interpreting the VA’s SDVOSB regulations—the conclusion was consistent with the SBA’s SDVOSB regulations. The Court noted that the dual-SDVOSB system was comprised of “complex and divergent regulatory frameworks,” and, further,

that such a dual system sometimes gave rise to “harsh” results. The Court made it clear that while Miles and AmBuild were instructive in the context of the VA’s SDVOSB regulations, they were “irrelevant” for purposes of analyzing eligibility under the SBA’s regulations. The Court called this outcome “perverse and draconian” but stipulated that it had no choice but to rule in favor of the SBA, denying VCGI eligibility.

Veterans Contracting Group made it glaringly obvious that the dual-eligibility system was causing a number of serious problems: a contractor could be found eligible for one program, while being excluded from the other; regulations were interpreted in wildly different ways depending on what agency was involved and who was



interpreting the regulations; interpretations could, at times, seem somewhat arbitrary and capricious; and, perhaps most importantly, contractors had no way to know what they could or could not do without risking the loss of their VOSB/SDVOSB status. In short, the whole system created confusion, frustration, and uncertainty. The situation was not good for anyone, let alone the veteran contractors who the Vets First Program was designed to help in the first place.

Congress Aims to Fix the Problem

Recognizing the problems inherent with the existing regulatory framework, Congress decided it had to act. As part of the National Defense Authorization Act of 2017 (NDAA 2017), Congress attempted to remedy the problem by providing a statutory definition of ownership and control to be used for all SDVOSBs. NDAA 2017 § 1832 amends the SBA's charter, the Small Business Act, to include the following definitions (see below).



Senators Carl Levin and John Warner,
US Senate Armed Services Committee

The NDAA also included businesses owned and controlled by the surviving spouse of a deceased service disabled veteran as a third category of SDVOSBs under certain circumstances. The NDAA further mandated that the SBA be responsible for the enforcement of these new

definitions and making ultimate determinations about whether an SDVOSB met the new definition of unconditional ownership and control for both agencies, although the VA would retain its power to verify SDVOSB status.

NDAA 2017 made it clear that the VA should no longer issue regulations related to the status of a concern as a small business concern or the ownership and control of such small business concern. Instead, the terms “small business concern owned and controlled by veterans” and “small business owned and controlled by service-disabled veterans” would be governed by the definitions provided in the Small Business Act (including the new definition outlined above at § 1832). Further, NDAA directed that the companies included in the VIP database must be verified using the procedures and regulations issued by the SBA. In short, all definitions concerning size, ownership, and control—as well as all decisions relating to eligibility of companies in connection with same—were to fall under the authority of the SBA.

That brings us up to the present.

NDAA 2017 § 1832

The term ‘small business concern owned and controlled by service-disabled veterans’ means any of the following:

- (A) A small business concern—
 - (i) not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock (not including any stock owned by an ESOP) of which is owned by one or more service-disabled veterans; and
 - (ii) the management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.
- (B) A small business concern—
 - (i) not less than 51 percent of which is owned by one or more service-disabled veterans with a disability that is rated by the Secretary of Veterans Affairs as a permanent and total disability who are unable to manage the daily business operations of such concern; or
 - (ii) in the case of a publicly owned business, not less than 51 percent of the stock (not including any stock owned by an ESOP) of which is owned by one or more such veterans.

VA and SBA Issue Proposed Regulations

In January 2018, both the VA and the SBA issued proposed rules relating to the NDAA's statutory requirements, aimed at adopting the uniform definition for VOSBs/SDVOSBs. Unfortunately, it appears that the VA's and SBA's proposed rules could actually make it harder for a SDVOSBs to achieve and maintain status as a verified SDVOSB in certain circumstances.

The VA's proposed rule came first. Consistent with the NDAA 2017, the VA specified that the regulations relating to and clarifying ownership and control are no longer their responsibility. The proposed rule would eliminate the sections of the VA regulations dealing with VOSB/SDVOSB ownership and control (i.e. 38 C.F.R. 74.1, 38 C.F.R. 74.3 and 38 C.F.R. 74.4); in the future, these issues would be governed by SBA regulations and definitions.

The VA appears to be removing all references to its competing definition of ownership and control, as required by the statute, and ceding authority to the SBA to review its decisions on whether businesses qualify as an SDVOSB. However, the VA seeks to amend a number of provisions in a manner that may actually make it more difficult to become verified. First, it proposes expanding its requirement that a veteran show "good character" in 38 C.F.R. 74.2(b). Already an amorphous requirement that could be interpreted broadly to exclude business owners arbitrarily, it has now been expanded to specifically exclude parolees, probationers, felons or anyone who has committed a crime "involving business integrity." In addition, the VA proposes to amend the requirements of 38 C.F.R. 74.2 (c) to state that any misrepresentation in the materials submitted - even a misrepresentation that is not material to the verification decision - is grounds to deny verification, while amending 38 C.F.R. 74.2(d) to prevent verification of any business owner that fails to pay financial obligations to federal or state authorities. The language is so broad in this latter provision that arguably someone who is in arrears on a federally guaranteed student loan would not qualify for verification as an SDVOSB. Any of these changes could make it much harder for an SDVOSB to be verified going forward.

The SBA's proposed rule was issued shortly after the VA's. It makes clear that it is, pursuant to the directives in NDAA 2017, proposing to issue regulations that provide "one definition of ownership and control for [VOSB/SDVOSB] concerns, which will apply to the Department of Veterans Affairs in its verification and Vets First Contracting Program procurements and all other government acquisitions which require self-certification." Consistent with this goal, the SBA proposes to revise 13 C.F.R. § 125.12 relating to ownership and 13 C.F.R. § 125.13 relating to control.

256 APTAC Members are CVE Certified Verification Counselors!

Not yet certified by the CVE as a Verification Assistance Counselor? Simply:

1. Send email to verificationcounselor@va.gov requesting the verification certification DVD course.
2. Provide:
 - a. Name
 - b. Physical mailing address
 - c. Phone number
 - d. Email address
3. The Verification Certification DVD Course is self-paced. CVE would like the course completed and certificate of completion emailed back to CVE within 30 days of receiving the DVD.
4. After CVE receives the Verification Certificate of Completion:
 - a. A welcome letter and another certificate is signed by the Chief and emailed to the newly certified counselor.
 - b. Contact information is posted to the U.S. Department of Veterans Affairs (VA) Office of Small & Disadvantaged Business Utilization (OSDBU) website.
 - c. The newly certified counselor is placed on the Verification Support email mailing List.
 - d. The newly certified counselor will have access to the Verification Counselor Liaison when regulatory clarification support or any other support is required.

We cannot go into detail about every single change to the regulations here, as this article would grow to be the length of a book. The critical take-away is that once the regulations are finalized, all VOSB/SDVOSB entities should carefully review them and analyze whether they are still in compliance and can fairly be classified as a VOSB/SDVOSB. If not, these companies will need to consult a legal expert to make the necessary changes.

As a whole, we view the new, consolidated/uniform definitions as being closer to the VA's more liberal definitions of ownership and control. Indeed, the proposed regulations are more consistent with the ideas outlined in Miles and AmBuild, rather than the SBA's former draconian definition articulated in Wexford and reluctantly accepted and applied by the Court in Veterans Contracting Group. However, there are still aspects of the new definitions which could arguably make it harder for legitimate VOSBs/SDVOSBs to establish the ownership and control necessary for eligibility.

For example, the SBA has added to 38 C.F.R. § 125.13(k) a rebuttable presumption that if the service-disabled veteran is not able to work for the firm during normal business hours then he or she does not control the business. Obviously, this calls into question owners who might work a late shift or work multiple jobs to keep their business on its feet. While this concept is consistent with prior case law, its actual inclusion in the regulations is new and could limit which SDVOSBs are eligible. The SBA has also added another rebuttable presumption to 38 C.F.R. § 125.13(l) that a service-disabled veteran who does not live within commuting distance to the firm's headquarters is not in control of the business. This is arguably inconsistent with certain case law dealing with

telecommuters. Moreover, it discounts the nature of government contracting, which often calls for businesses to maintain personnel in far-flung locations that may not be near company headquarters. For example, a business owner who moves temporarily to another state to help with proposals on federal work in that state could theoretically be presumed to not be in control of his or her company.

Conclusion

The comment periods for both proposed rules are now over, but we won't see a final regulation from either agency before the summer. When the final regulations are released, it will be important for all VOSB/SDVOSB companies - and the PTACs that assist them - to familiarize themselves with the new regulations. While it is likely that the problem of draconian disqualifications under the old SBA definition of ownership and control is a thing of the past, some of the proposed changes indicate that the SBA and the VA may continue to make it harder to achieve and maintain status as an SDVOSB. In any event, it will certainly be different and therefore critically important for veteran owned companies and the people who advise them to understand the differences and *nuances created by the new regulations*. If you have any questions about them - or their potential consequences - consult a legal professional.

Stay tuned:

APTAC will keep you updated when the final rules are published!



Maria Panichelli is a Partner in Cohen Seglias's federal contracting and construction groups, representing a national client base of prime and subcontractors with a focus on federal construction contracting and small business procurement issues. She was a presenter at APTAC's 2017 Fall Training Conference and is an regular instructor for Govology.



Michael Richard is an Associate in Cohen Seglias's federal contracting group and focuses his practice on government contracts litigation, in particular on drafting, negotiating, and litigating claims under the Contract Disputes Act.

PTAC: The Gift that Keeps on Giving

By Cate Taylor, Washington State PTAC



Even though the holidays are off in the distant future or forgotten past, PTACs give businesses subject matter expertise all year long. How do you fill your own wish list of professional development? What have you done for yourself since the APTAC conference? Where do you want to be before the next APTAC conference?



What's Your Plan?

We tell clients to make a plan for how to succeed in the government market. What's your plan to reach your PTAC goals? Have you incorporated into your intake or counseling sessions showing your goal dashboard to your clients? Have you requested your transcript from APTAC to see where you are in relation to your APP or CPP certifications?

Stretch Your Mind

You can stretch your mind by reading a chapter in Stephen Koprince's [*The Small Business Guide to Government Contracts*](#). Or how about writing an article or blog sharing PTAC knowledge with clients or colleagues? If you focus purely on how many new clients, events, and clients counseled/week you have, you will never become a subject matter expert in government contracting. The body of knowledge we engage with is just too diverse for us to fully understand or do a "deep dive" into a specific APTAC Body of Knowledge topic, the FAR, federal contracts, industry specifics, or counseling strategies—unless you make a firm commitment to professional development. When you schedule just a little time into your busy day for learning you are better equipped to guide, support and encourage business owners to grow their awareness, knowledge, and revenue.



Finding Answers

Part of learning is figuring out who to ask, how to research, and when to phone a PTAC friend. Schedule an hour or two a week for this kind of exploration. For example, thanks to Idaho PTAC's Gary Moore, I (Cate Taylor) was able to get an updated list of DLA Small Business Office contacts for clients. APTAC is a great source for asking questions and finding resources.

FPDS-NG Training Videos

[Topic 1: FPDS Navigation - Useful Links](#)

[Topic 2: ezSearch](#)

[Topic 3: Standard Reports](#)

[Topic 4: Ad-Hoc Reports](#)

[Topic 5: Bundled Contract](#)

[Topic 6: Consolidated Contract Phase 1](#)

[Topic 7: Subcontracting Plan Phase 1](#)

V1.5 Training Videos

[Topic 1: IGF Field](#)

[Topic 2: Women-Owned Credits](#)

[Topic 3: Legislative Mandates](#)

[Topic 4: Additional Reporting](#)

[Topic 5: Dollar Fields](#)

[Topic 6: Commercial Item Test Program](#)

[Topic 7: Consolidated Contract](#)

[Topic 8: Cage Code](#)

[Topic 9: Subcontracting Plan](#)

[Topic 10: Close Out](#)

[Topic 11: IDV Data Ele](#)

Don't Forget YouTube (and other Videos)

YouTube videos are rich learning tools for government contracting—as a quick search will quickly demonstrate. A few examples:

- ⇒ [Government Contracting Weekly](#), although discontinued a few years ago, has episodes covering a wide range of contracting issues.
- ⇒ [Govology has a free 17 minute overview](#) of how to use FPDS-NG for market research.
- ⇒ The National Archives has a terrific [video on Controlled Unclassified Information \(CUI\)](#) as it relates to cybersecurity issues.
- ⇒ Many agency websites have video tutorials about their programs and/or how to use their tools. If you want to get a view from the

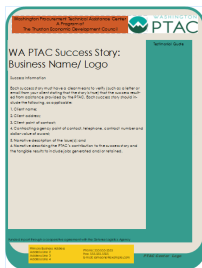
agency/admin perspective, [FPDS-NG offers 18 brief training videos](#) on specific topics (see the left sidebar).

⇒ APTAC has webinar recording (videos), including a [3 part series on DLA's Internet Bid Board System \(DIBBS\)](#) and a [3 part series on Military Packaging](#).



Social Media Resources

Did you know APTAC has a [Facebook page](#) and a [LinkedIn group](#)? LinkedIn is also utilized in many ways by federal agencies. Just do a search in LinkedIn (“company” not “people”) to learn more about the agency your client is interested in contracting with (see [DLA's LinkedIn page](#) for example). It's a great market research tool for clients and an effective way to connect with the other PTACers.



Capturing Success

Have you captured your client success stories in a format that provides your center with a marketing tool? [I have added one as an APTAC resource](#); if you need more let me know. Another idea is to create a Google Alert to learn about local companies that have won or might be interested in government contracting and need to learn about PTAC services.

What tools do you have to share with other PTAC? What tools would you like to have provided through APTAC resources? Do you have an idea you want to share, explore or get support? Start today to utilize, create and gain resources that will bring jobs to your community.



Cate Taylor, CPP, is a Counselor with Government Contracting Assistance at Economic Alliance Snohomish County (part of the Washington State PTAC). She was a presenter at APTAC's 2018 Spring Training Conference and generously contributes resources for her APTAC colleagues to use and learn from.

Celebrating Achievement: APTAC Award Winners

Recognizing the innovative and outstanding work being done by PTACs across the country is the highlight of every APTAC Spring Conference.

APTAC Awards showcase individuals, projects and centers that have made exceptional contributions to benefit their clients, their communities, APTAC and our profession. Take a few moments to read about this year's winners; there are terrific ideas and best practices that we can all learn from and be inspired by.

Outstanding Project Award: GA Tech Procurement



Assistance Center's Cybersecurity

Training Project: GTPAC produced a high-quality video that provides step-by-step guidance for achieving compliance with the cybersecurity requirements

outlined in DFARS 252.204-7012, as well as a 127-page template for creating required documentation, including a "System Security Plan" and "Plan of Action." The video and resources have been published free of charge [on the GTPAC website](#)—an invaluable resource for PTACs and their clients.

Economic Impact Award: Idaho PTAC for their work with Winspear Construction



PTAC's Lee Velten's intensive help navigating registrations and certification through targeted marketing and bid proposals, Winspear Construction—an SDVOSB founded in 2014—has

had tremendous success, winning contracts with 4 different agencies totaling \$14 million. Vice President Karen Winspear wrote: "We continue to learn valuable things from you about this wise, old, ever changing giant, that federal contracting is. Thank you for all your patience over the last year and all the help you have given us."



Becky Peterson Human Impact Award: Doug Bolender, Montana PTAC

- Since joining the PTAC in 1999, Doug has dedicated himself to building expertise and providing

assistance to small firms essential to wildfire fighting. He has helped hundreds of companies across the state win contracts with the National Park Service, Forest Service, Bureau of Land Management and the Montana Department of Natural Resources and Conservation to the tune of \$76 million dollars—to the benefit not only of these firms but to the countless communities they have kept safe from fire.

Betty McDonald Outstanding Member Achievement Award: Dave Pease, New Hampshire PTAC and Chair



of APTAC's Professional Review Committee (PRC).

Dave has brought vision, integrity, commitment to collaboration, and a rare combination of patience and perseverance to not only overhauling

our certification program, but continuing to expand and improve it, working to make sure all APTAC members have the resources to achieve certification. His leadership has helped us to all be smarter, better trained and better able to help our clients.

APTAC Fellow: Terri Bennett, Kansas PTAC and APTAC Past President.



The Fellow

Award is bestowed on an individual who has gone above and beyond for APTAC and our Members. Terri has served in numerous leadership

positions, including the 3-year commitment as President-elect/President/Immediate Past President—twice! She is a quiet but passionate behind the scenes proponent for all PTACs: diplomatically astute, fearless, and committed to doing what is right for the program nationwide. She is a true leader.

Celebrating Achievement: APTAC Certificants

Congratulations to our newly minted Certified Procurement Professionals (CPPs)!



Joni Anderson, Utah PTAC



Matthew Burrell, Monroe Co.
Fingerlakes PTAC



Keith Christiansen, Utah PTAC



Sheila Edmondson, DC PTAC



Rita Haake, Illinois PTAC



James Haddan, Indiana PTAC



Diana Hunter, Indiana PTAC



Sue LaCroix, Oregon PTAC



Rich Lyles, Wyoming PTAC



Kristen Moyer, SEDA-COG PTAC
(PA)



Dave Pinkosky, Southwest PA
Commission PTAC



Jeff Ulrich, NW Louisiana
PTAC



Don Zavesky, Florida PTAC

APTAC can now boast of:

66 CPPs representing
42 PTACs in **31 states/territories**

It is APTAC's goal that at least 25% of all PTAC counselors qualify as CPPs with at least one in every state & territory.

PTACs: Making a Difference (2017)

32,062 new clients
(up 10.9%)

48,039 active clients
(up 9.5%)

4,835 events
(up 12.5%)

186,534 contracts awarded (total)
(up 118%)

\$19,994,493,273 awards (total)
(up 23.3%)

164,634 contracts to small businesses
(up 110.8%)

\$14,116,795,724 awards to SBs
(up 17%)



Serving PTACs in Support of Industry, Government and Community

Association of Procurement Technical Assistance Centers
360 Sunset Island Trail, Gallatin, TN 37066
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