

# LEGAL UPDATE



## Federal Service-Disabled Veterans Set-Aside Program

### Introduction

Federal, state, and local governments have long used preference programs in public procurement—for small businesses, minority-owned businesses, and women-owned businesses—which are particularly visible in the construction industry. The newest procurement preference—the service-disabled veteran-owned small business—is not nearly as widely known or understood.

The Veterans Benefit Act of 2003 creates a preference for small businesses owned and controlled by service-disabled veterans. The preference creates set-asides for service-disabled veteran-owned small business concerns (“SDVO SBCs”), and sets a goal to annually award at least 3% of federal agency procurement dollars to SDVO SBCs. As such, there is an increasing incentive to form a SDVO SBC or to partner with a SDVO SBC. In forming a SDVO SBC, it is important to ensure that your business complies with all program requirements and to recognize when competitors may be improperly claiming SDVO SBC status to cash in on the program preference.

### I. Formation of a Service-Disabled Veteran-Owned Small Business

Strict eligibility requirements must be met to qualify as a SDVO SBC, as set forth by the Small Business Association (“SBA”). The two key requirements are that the business must be both owned and controlled by a service-disabled veteran. A SDVO SBC must be “at least 51% unconditionally and directly owned by one or more service-disabled veterans.” The 51% requirement applies regardless of whether the business is a partnership, limited liability company, or corporation. Significantly, even if a service-disabled veteran owns a majority of the company, the company may be found to not be owned and controlled by a service-disabled veteran if the service-disabled veteran’s control is too limited. The power to control the business must be exclusive and cannot be shared or ambiguous. For this reason, it is crucial to consult with an attorney when forming a SDVO SBC.

Additionally, the “management and daily business operations of the concern must be controlled by one or more service-disabled veterans.” More specifically, both long-term decision making and day-to-day management

and administration of the business must be carried out by service-disabled veterans. A service-disabled veteran must hold the highest officer position in the business, such as President, and must have managerial experience necessary to run the business.

In analyzing whether a service-disabled veteran “controls” the company, the service-disabled veteran’s duties, position, and experience are taken into account. The following additional factors may also be considered: the service disabled-veteran’s ability to sign contracts or labor agreements binding the company, the authority to withdraw funds from the company’s bank accounts without additional approval, and whether written consent of other members is required to take actions on the company’s behalf. The duties and experience of others in the company may be scrutinized as well. Even if the service-disabled veteran holds the highest officer position of the company and possesses the necessary experience to run the business, if he needs additional consent before taking action on behalf of the company, the company will not be deemed to be a qualified SDVO SBC.

For example, in *Matter of KDV, Inc.*, SBA No. VET-189 (2010), the service-disabled veteran who owned 51% of the company and served as its president only had experience as a hair stylist and as an automobile dealership service manager. In contrast, the service-disabled veteran’s business partners had a combined total of over 50 years of experience in general contracting and commercial and industrial construction. Additionally, the claimed SDVO SBC operated out of the same location and utilized the same support resources as a larger company owned entirely by the experienced contractor who owned 49% of the claimed SDVO SBC. The SBA reviewing the protest rejected the company’s claim that a former hair stylist and automotive service manager was running the daily operations of the company.

### II. Protest of SDVO SBC Eligibility

Either Government Contracting Officers accepting bids for government projects or competing bidders may protest a business’ SDVO SBC eligibility. This becomes particularly acute in situations where the SDVO SBC is either joint venturing or teaming with a non-SDVO SBC in pursuit of contract awards. Any hint of control by the non-SDVO SBC entity in the joint ven-

ture operation, teaming agreement, subcontractor agreement, or sale agreement may subject the “team” to further scrutiny.

A protest must be in writing, must specify all grounds on which the protest is based, and must be timely submitted, or it risks being dismissed for lack of evidence. A SDVO SBC protest determination must be appealed within 10 business days after the determination is made.

Given the fact-intensive nature of protests and the short timeframes in which protests and appeals can be filed, it is important to seek legal assistance as soon as possible if you suspect a winning bidder has improperly claimed SDVO SBC status.

The attorneys at Brown & Ruprecht, PC can help set up or review the documents governing a service-disabled veteran-owned business, and can assist with filing a protest against a competing business that improperly claims this status.

**It is important to consult with an attorney to determine whether your business is eligible as a Service-Disabled Veteran-Owned small business.**

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