July 25, 2022

Background

The Small Business Administration has issued a proposed rule that, if finalized, would establish a federal governmentwide certification program for Veteran-Owned Small Business Concerns (VO SBCs) and Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs). The rule proposes the implementation of Section 862 of the National Defense Authorization Act for Fiscal Year 2021 (NDAA FY21) and requires, among other changes, the transfer of the Department of Veterans Affairs (VA) Vets First Verification Program to the SBA. The SBA is also proposing to implement the Veterans Certification Program under a new 13 Code of Federal Regulations Part 128. Comments on the proposed rule are due to the SBA on or before August 5, 2022.

The VO and SDVO small business programs, set forth in 38 US Code 8127, authorize federal contracting officers to restrict competition to eligible VO and SDVO SBCs for VA contracts. To be eligible for VA contracts, VO and SDVO SBCs must be verified by VA's Center for Verification and Evaluation in accordance with 38 USC 8127. There is currently no governmentwide SDVO SBC certification program, and firms seeking SDVO SBC sole source or set-aside contracts with federal agencies other than the VA only need to self-certify their status as SDVO SBCs.

Mechanics of the proposed rule

Section 862 of the NDAA FY21 transfers responsibility for certifying VO and SDVO SBCs to the SBA starting January 1, 2023. It also creates an SBA certification requirement for SDVO SBCs seeking sole source and set-aside contracts across the federal government. Section 862 provides a one-year grace period after the January 1 transfer date for currently self-certifying businesses to file an application for SDVO SBC certification. Self-certified SDVO SBCs that apply within the one-year grace period will maintain eligibility until the SBA makes a final eligibility decision.

Firms already verified by the Center for Verification and Evaluation before January 1 transfer date will be deemed eligible for VA set-aside contracts for VO and SDVO SBCs during the time that remains in the firm's three-year term of eligibility. To remain SBA-certified after the transfer date, firms must meet all conditions of eligibility as described in the SBA's regulations.

Though not required by Section 862, the SBA also is proposing to grant reciprocity to businesses participating in its 8(a) Business Development and Women-Owned Small Business (WOSB) programs that are owned and controlled by one or more veterans or, in the case of SDVO SBCs, service-disabled veterans. Both the 8(a) and WOSB programs require applicants to demonstrate ownership and control to be eligible for certification. According to the SBA, the ownership and control requirements for the 8(a) and WOSB programs are "basically the same as those set forth in this proposed rule for VO SBCs and SDVO SBCs." Given this, the proposed rule provides an expedited application and review process for 8(a) and WOSB-certified firms seeking VO or SDVO SBC certification. In such cases, the SBA would confirm the identified individual's eligibility as a veteran or service-disabled veteran before granting certification. The SBA believes reciprocity between its certification programs will create program administration efficiencies while reducing processing time for applicants.

If you have any questions about the SBA's proposed changes, please contact one of the lawyers listed below.

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Key Contacts

David Fletcher Washington, DC	dfletcher@cooley.com +1 202 728 7046

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