

BENIGN NEGLECT: VETERAN-OWNED SMALL BUSINESS IN FEDERAL PROCUREMENT TODAY

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INTRODUCTION

“Two of America’s greatest assets are the service of our returning veterans and the economic dynamism of our small businesses.” – INTERAGENCY TASK FORCE ON VETERANS SMALL BUSINESS DEVELOPMENT²

Managing the tension between noncompetitive procurement initiatives empowering Americans to “start, build and grow businesses” and the expense of favoring a “relatively tiny number of small businesses at the expense of the vast majority” that do not receive government assistance is critical during periods of economic uncertainty.³ Government procurement, or the process of obtaining goods and services from the private sector, typically equates to 10-15% of any developed nation’s gross domestic product.⁴ According to the George Washington University Government Procurement Law Program, the U.S. Federal Government’s “acquisition of services, supplies, and construction accounts for [over] \$500 billion” in annual spending.⁵

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² Letter from Karen Mills, Administrator, U.S. Small Bus. Admin., to President Barack Obama (Nov. 2012) (on file with the Interagency Task Force on Veterans Small Business Development and author) [hereinafter Mills Letter].

³ *Mission Statement*, U.S. SMALL BUS. ADMIN. (Apr. 19, 2013, 10:50 AM), <http://www.sba.gov/content/mission-statement>. Veronique de Rugy & Tad DeHaven, *Terminating the Small Business Administration*, CATO INSTITUTE (Apr. 19, 2013), <http://www.downsizinggovernment.org/sba>.

⁴ *Government Procurement*, OFFICE OF U.S. TRADE REP., <http://www.ustr.gov/trade-topics/government-procurement> (last visited July 22, 2013).

⁵ The George Washington Univ., *Government Procurement Law at GW*, GW LAW (last

Within the vast body of government contract law regulating procurement, there exists a well-established, albeit controversial, favoritism for “small” business.⁶ The current statutory framework requires at least 23% of all federal procurement dollars be awarded to small businesses (“small business concerns”).⁷ More specifically, within that 23% Congress has designated four specific types of small business concerns requiring esoteric treatment (“top four”). These top four are: small disadvantaged businesses (8(a)), service-disabled veteran-owned small businesses (SDVOSBs), small businesses located in historically underutilized business zones (HUBZone), and women-owned small businesses (WOSBs). It is firm and settled that Congress is committed to ensuring these four small business concerns receive premium access to the government’s contracting dollars.⁸ This paper focuses on a fifth small business concern, veteran-owned small businesses (VOSBs), which are treated uniquely in government contract law.

Giving preference to VOSBs is traditionally considered to be a measure designed to reward veterans for the sacrifice of military service, encourage patriotic service amongst civilians,

visited July 22, 2013), <http://www.law.gwu.edu/Academics/FocusAreas/govcon/Pages/default.aspx>. The government obligated \$537 billion in 2011, with over \$100 billion going to small business. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-873, GOVERNMENT CONTRACTING, FEDERAL EFFORTS TO ASSIST SMALL MINORITY BUSINESS I (Sept. 2012).

⁶ See *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/table-small-business-size-standards> (last visited Nov. 23, 2013) (defining “small”); see also 48 C.F.R. § 19.102 (2012); CHARLES TIEFER & WILLIAM A. SHOOK, GOVERNMENT CONTRACT LAW IN THE TWENTY-FIRST CENTURY 351-52 (2012) (explaining “small” according to the SBA).

⁷ See 15 U.S.C. § 644(g)(1)(A)(i) (2006).

⁸ See Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504; see also *Mission Critical Solutions v. U.S.*, 104 Fed. Cl. 18, 20-21 (2012) (discussing order of precedence among the 23% federal procurement dollars awarded to small businesses (“small business concerns”)); 48 C.F.R. § 19.203 (establishing that set-asides have priority over open competition and that there is no order of precedence among the designated four specific types of small businesses requiring esoteric treatment (“top four”).

and ease the transition from military service to civilian life.⁹ This storied sentiment still glimmers in government contract law today, although it is mostly limited to the single context where VOSBs are treated comparably to the top four. Moreover, VOSBs, and veteran entrepreneurship interests in general, are oftentimes neglected by the predominant statutes and regulations.

Part I of this Note will provide a brief overview of the history of veterans preference leading up to the current statutory framework. Part II will explain the posture of VOSBs against the top four and explain how treatment of VOSBs is problematic. It will also provide recommendations to improve treatment of VOSBs.

I. HISTORY OF VETERANS PREFERENCE

“Veterans’ preference is but a partial recognition of the great debt of gratitude that the country owes to those who have served in the Armed Forces.” – RONALD REAGAN¹⁰

Government care for veterans in the Americas is traceable to 1636, when the Pilgrims of Plymouth Colony, along with Native American allies, defeated the Pequot Indians of New England and a law was passed to provide colony support to the disabled soldiers.¹¹ During the Revolutionary War, land grants were made to military members who fought through the end of the War. Additionally, the Revolutionary War era is acknowledged as marking the first instance of national pension laws.¹² Later, in the Civil War era, military veterans first began receiving limited business preferences.¹³ Preference was given as recognition for sacrifices

⁹ Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 265 (1979).

¹⁰ Proclamation No. 5217, 49 Fed. Reg. 27,919 (Jul. 5, 1984).

¹¹ *About VA, History – VA History*, U.S. DEP’T OF VETERANS AFFAIRS (Apr. 19, 2013, 12:05 PM), http://www.va.gov/about_va/vahistory.asp [hereinafter VA History].

¹² See *id.* (noting that the Continental Congress encouraged enlistments by providing pension for disabled soldiers).

¹³ See *Veterans Put in Office: The Law Giving Preference to Soldiers and Sailors*, N.Y.

made and targeted at accommodating potential economic loss or setback as a direct or indirect result of military service.¹⁴

Congress invigorated the system of veteran benefits when the United States deployed to Europe during the First World War (WWI).¹⁵ In the WWI era, the evolving American commitment to provide assistance to its military veterans specifically focused on veterans reentering the workforce and those with entrepreneurial aspirations, to include empowering veterans to start businesses.¹⁶ In that course, the Smith-Sears Vocational Rehabilitation Act of 1918 was passed to support honorably discharged veterans as they returned to civilian employment.¹⁷ Shortly thereafter, the Deficiency Appropriation Act of July 11, 1919 signified a new-fashioned progression in the approach to providing for the nation's veterans care, as service-connected disability was no longer the consequential factor in determining entitlement to benefits.¹⁸

TIMES, July 4, 1882, <http://query.nytimes.com/mem/archive-free/pdf?res=FB0913FA3C5910738DDDAD0894DF405B8284F0D3>; *see also* VetGuide, U.S. OFFICE OF PERS. MGMT. (Sept. 28, 2013, 11:55 AM), <http://www.opm.gov/policy-data-oversight/veterans-services/vet-guide/> [hereinafter VetGuide].

¹⁴ *Id.*

¹⁵ VA History, *supra* note 11; *see* VetGuide, *supra* note 13 (providing a history of veterans preference). *See generally* National Defense Act of 1916, Pub. L. No. 64–85, § 120, 39 Stat. 166; Smith-Hughes Vocational Education Act, Pub. L. No. 64-347, 39 Stat. 929 (1917); Vocational Rehabilitation Act, Pub. L. No. 65-178, 40 Stat. 617 (1918). At that time, multiple agencies had a hand in administering benefits including the Veterans Bureau and the Interior Department.

¹⁶ VA History, *supra* note 11. The National Defense Act of 1916, Smith-Hughes Vocational Education Act of 1917 and Vocational Rehabilitation Act of 1918 provided vocational training.

¹⁷ *Id.*; Vocational Rehabilitation Act, Pub. L. No. 65-178, 40 Stat. 617 (1918).

¹⁸ As per the “Deficiency Appropriation Act of July 11, 1919, a preference in the matter of appointment to clerical and other positions in the Executive branch of the Government” is afforded to honorably discharged servicemembers over non-servicemembers. Civil Serv.-Military Preference-Reemployment Register., 32 Op. Att’y Gen. 174 (1920); *see also* Vocational Rehabilitation Act, Pub. L. No. 65-178, 40 Stat. 617, 617 (1918) (allowing a board to provide a course of vocational rehabilitation to veterans who are unable to carry on a gainful occupation, resume a former occupation, or enter another occupation).

In 1924, three years after the creation of a consolidated Veterans' Bureau, Congress passed the World War Adjustment Compensation Act to pay servicemembers directly for their time abroad.¹⁹ The Act was an effort to directly compensate a servicemember's lost wages compared with those contemporaries who remained stateside and benefited from the wartime industry.²⁰

Roughly 20 years later in the wake of the Second World War (WWII), Congress dramatically amplified the system of veterans' benefits by passing the Servicemen's Readjustment Act, or "GI Bill of Rights."²¹ The GI Bill of Rights broadened and solidified the presumption that veteran status warranted special consideration in federal hiring and spending initiatives. The GI Bill of Rights expanded veterans benefits to include tuition payment, unemployment compensation, and preferential loan status for homes and small businesses.²² The general foundation of veterans preference as it exists today may be tracked to the 1944 GI Bill of Rights.

More specifically with regard to veteran entrepreneurship, the 1974 Small Business Act signified a transfer of responsibility of veteran small business interests from the Veterans Administration to the Small Business Administration (SBA).²³ However, the relationship between these organizations and the veteran interests they represent has remained fluid with both entities heavily involved in administering veteran preference initiatives.²⁴

¹⁹ See VA History, *supra* note 11; see also World War Adjusted Compensation Act, 43 Stat. 121 (1924).

²⁰ *Id.*

²¹ Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284.

²² 58 Stat. at 287-88, 291-93.

²³ See An Act to Amend the Small Business Act, Pub. L. No. 93-237, § 8, 87 Stat. 1023 (1974) (codified as amended in scattered parts of 15 U.S.C. § 633) (requiring that the Small Business Administration (SBA), when carrying out small business programs, give special consideration to veterans).

²⁴ See generally 15 U.S.C. § 633 (2006 & Supp. 2008) (explaining the administrative duties of the SBA).

In 1999, Congress passed the Veterans Entrepreneurship and Small Business Development Act to strengthen veteran assistance programs.²⁵ This Act prefaced itself upon the ongoing sacrifices made by veterans as well as the Nation's failure to effectively promote veteran business interests.²⁶ Specifically, it sought to assist veterans whose businesses suffered during their service in the Persian Gulf War.²⁷ Leading up to the Act, Congress instructed the SBA to memorialize and define its role in administering assistance programs for veterans.²⁸ Responsive to that mandate, the SBA established the Veterans' Affairs Task Force for Entrepreneurship, which formally recommended that service-disabled veterans receive special consideration.²⁹ The task force specifically called for greater assistance to service-disabled veterans in particular due to their perceived status as a "socially and economically small disadvantaged business group."³⁰ This marked the beginning of the formal, categorical distinction between SDVOSBs and VOSBs.

The final version of the 1999 legislation implemented many of these recommendations to promote veteran entrepreneurship, notably establishing a government-wide goal of awarding 3% of the total value of all contracts to SDVOSBs.³¹ Four years later

²⁵ Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat 233.

²⁶ *Id.* §§ 101, 102, 113 Stat. at 233-34.

²⁷ S. Rep. No. 106-136, at 4 (1999).

²⁸ See 145 Cong. Rec. S10,520-01 (daily ed. Aug. 5, 1999) (statement of Sen. Sam Brownback); see also 145 Cong. Rec. E1448-02 (daily ed. Jun. 29, 1999) (statement of Hon. Eni Faleovaega).

²⁹ See Mills Letter, *supra* note 2.

³⁰ *The Veterans Entrepreneurship and Small Business Development Act of 1999: Hearing Before the H. Comm. on Small Bus.*, 106th Cong. 172 (1999) (report from the Veterans Affairs Task Force for Entrepreneurship).

³¹ See Veterans Entrepreneurship and Small Business Development Act § 502(a)(2). Despite their common interests, the relationship between the SBA and veteran business is oftentimes nuanced. For example, the SBA initially opposed the service-disabled veteran-owned small businesses (SDVOSB) 3% procurement goal, instead lobbying for additional research initiatives. SBA's rationale was in part based on hesitance in allowing in "another constituency group" because it "shrinks the pool." *Veterans Entrepreneurship and Small Business Development Act of 1999: Hearing Before the*

President George W. Bush signed the Veterans Benefits Act of 2003.³² This additional legislation specifically empowered agencies to apply certain solicitation techniques to achieve the 3% award goal for SDVOSBs.³³

Currently, VOSBs (including SDVOSBs) may be eligible for preferential status when competing for government contracts.³⁴ The extent of that preference is primarily dictated by one of two major bodies of law. The first is the predominant Small Business Jobs Act of 2010 and the accompanying Federal Acquisition Regulations (FAR), which govern small business procurement initiatives across the Federal Government. The second is the Veterans Benefits, Health Care, and Information Technology Act of 2006, which the Department of Veterans Affairs (VA) implemented by establishing the “Veterans First Contracting Program,” (VFCP),³⁵ and the accompanying Veterans Administration Acquisition Regulations (VAAR). The VFCP and accompanying VAAR exclusively govern procurement within VA. While both of these bodies of law purport to prioritize veteran-owned businesses, they do so to drastically different ends, neither of which

H. Comm. on Small Business, 106th Cong. 52 (1999) (statement of Betsy Myers, Assoc. Deputy Adm’r Entrepreneurial Dev., U.S. SBA). The SBA has also expressed skepticism as to whether veterans are in fact disadvantaged in terms of earnings, labeling studies reporting such findings as “inconsistent.” SBA OFFICE OF ADVOCACY, EVALUATING VETERAN BUSINESS OWNER DATA 2 (Dec. 2004), available at <http://www.smallbusinessnotes.com/pdf/rs244tot.pdf>.

³² Pub. L. No. 108-183, 117 Stat. 2651 (2003).

³³ § 308, 117 Stat. at 2662.

³⁴ As of the 2007 census, veterans owned 2.4 million businesses (9% of all nationwide business) generating \$1.2 trillion in receipts and employing close to 5.8 million workers. Further, 8.3% of veteran business owners who responded to the 2007 census survey reported having service-connected disabilities. See Press Release, U.S. Census Bureau, Census Bureau Reports Veteran-Owned Businesses Numbered More Than 2 Million in 2007 (May 17, 2011), available at http://www.census.gov/newsroom/releases/archives/business_ownership/cb11-88.html; *Statistics for Veteran Owners of Respondent Firms by Owner’s Service-Disabled Veteran Status and Gender for the U.S.: 2007*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO_2007_00CSCBO10&prodType=table.

³⁵ *Angelica Textile Services, Inc. v. U.S.*, 95 Fed. Cl. 208, 213 (2010).

is entirely adequate.³⁶

II. VOSBs – OUTSIDE OF THE TOP FOUR AND SUBJECT TO PROBLEMATIC TREATMENT

“The nation which forgets its defenders will be itself forgotten.” – CALVIN COOLIDGE³⁷

A VOSB is defined as a small business that is at least 51% owned by one or more individuals who served on active “military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.”³⁸ In addition to the ownership requirement, the daily operations must also be “controlled” by one or more veterans.³⁹ A SDVOSB is

³⁶ Highlighting the importance of the programs’ integrity, during fiscal year 2012 the Department of Veterans Affairs (VA) awarded \$3.8 billion in contracts to SDVSOB and VOSB. *Consistently Inconsistent: Challenges for Service-Disabled Veteran-Owned Small Businesses: Hearing Before the Subcomm. on Contracting and Workforce (Comm. on Small Bus.)*, 113th Cong. 1 (2013) [hereinafter Hearing] (statement of William B. Shear, Dir. Financial Markets and Cmty. Inv.), available at <http://smallbusiness.house.gov/calendar/eventsingle.aspx?EventID=321248>.

³⁷ *Coolidge’s Acceptance Speech*, N.Y. TIMES, June 28, 1920.

³⁸ Veterans Entrepreneurship & Small Business Development Act of 1999, Pub. L. No. 106–50, § 103, 113 Stat. 233, 234; 38 U.S.C. § 101(2) (2006) (defining “veteran” as a “person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable”); 48 C.F.R. § 2.101 (2012) (defining veteran owned small business concern). A servicemember may be discharged under the following conditions: honorable, general, other than honorable, bad conduct and dishonorable. Discharge under honorable (separation with honor) or general (satisfactory but less than honorable) conditions qualify a veteran for federal benefits. Servicemembers are given dishonorable or bad conduct discharges based upon courtmartial proceedings and do not qualify for federal benefits. VA retains the discretion to allow benefits for those separated under other than honorable conditions (e.g., discharged in lieu of court martial). ARMY REG. 635-200 ¶ 3-4, 3-6, 3-10 (Sept. 6, 2011).

³⁹ Veterans Entrepreneurship & Small Business Development Act, § 103, 113 Stat. at 234. The issue of “control” of SDVOSB is subject to ongoing scrutiny, much of that coming from the Government Accountability Office (GAO), Inspectors General, Congress, and VA itself. See, e.g., Hearing, *supra* note 36; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-697, SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS PROGRAM, VULNERABILITY TO FRAUD AND ABUSE REMAINS (2012) [hereinafter FRAUD AND ABUSE].

precisely the same as a VOSB, except a “service-disabled” veteran must maintain the ownership and control over the business.⁴⁰ Service-disability includes *any* level of disability rating which was “incurred or aggravated” in the “line of duty in the active military, naval, or air service.”⁴¹

A. VOSBs & SDVOSBs under the Small Business Jobs Act of 2010

A functional achievement of the Small Business Jobs Act of 2010 was to clarify the priority of the top four business concerns: 8(a), HUBZone, SDVOSB and WOSB. While the government-wide commitment to elevating the top four above all other small business concerns has remained ostensible for the better part of a decade, recent technical confusion arose over the specific order of precedence.⁴² The current FAR and recent case law establish that there is “no order of precedence among the 8(a) Program (Subpart 19.8), HUBZone Program (Subpart 19.3), Service-Disabled Veteran-Owned Small Business Procurement Program (Subpart 19.14), or the Women-Owned Small Business Program (Subpart 19.15).”⁴³ Ultimately when considering the top four, the contracting authority will look towards the individual agency’s progress in meeting its small business goals in addition to which concern is most “capable of satisfying the agency’s requirement.”⁴⁴

In any event, the top four are elevated above all other small business concerns (including VOSBs) in two distinct capacities. First, the top four enjoy maximum accountability of

⁴⁰ 38 U.S.C. § 657f; 38 U.S.C. § 101(16) (defining “service-connected”).

⁴¹ 38 U.S.C. §§ 1110, 1131; 38 C.F.R. § 74.1 (“Service-disabled veteran is a veteran who possesses either a disability rating letter issued by the Department of Veterans Affairs, establishing a service-connected rating between 0 and 100 percent, or a disability determination from the Department of Defense.”).

⁴² See generally Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504.

⁴³ 48 C.F.R. § 19.203(a); see also *Mission Critical Solutions v. U.S.*, 104 Fed. Cl. 18, 20-21 (2012) (discussing order of precedence among small business concerns).

⁴⁴ 48 C.F.R. § 19.203(d)(1).

the government-wide procurement goals.⁴⁵ Congress mandates individual goals for the percentage of annual contracting dollars that will flow to the top four.⁴⁶ If the goals are not met, Congress holds the SBA accountable.⁴⁷ Second, in an operational capacity, the top four have two mechanisms at their disposal to ensure agencies are capable of meeting the government-wide goals. These mechanisms are sole sourcing of contracts and business set-asides.⁴⁸

Set-asides are restricted competition awards that designate that a contract will be awarded to a specific small business concern (e.g. HUBZone or SDVOSB).⁴⁹ Set-asides function as the primary tool used by agencies to meet the government-wide procurement goals.⁵⁰ The less commonly used “sole source” acquisition refers to a contract that is entered into after “soliciting and negotiating with only one source.”⁵¹ In sum, there is a clear, government-wide commitment to elevating the top four above all other small business concerns, including VOSBs. Concretely, the top four are allocated specific procurement goals and agencies are provided the powerful mechanisms to achieve those goals.⁵² Save one limited context (below), there are no government-wide procurement targets

⁴⁵ See 15 U.S.C. § 644(g) (explaining goals for participation of small business concerns in procurement contracts); see also § 644(h) (explaining reporting requirements on goals for participation of small business concerns in procurement contracts).

⁴⁶ *Id.* § 644(g)(1)(A)(ii)-(v).

⁴⁷ Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1345, 124 Stat. 2504, 2546 (amending the Veterans Benefit Act of 2003 to allow contracting officers to award set-asides and sole source contracts to SDVOSB and requiring the SBA to study and report on veteran-owned business but there are no congressionally mandated VOSB government-wide goals).

⁴⁸ Veterans Benefit Act of 2003, Pub. L. No. 108-183, § 36; 15 U.S.C. § 657f.

⁴⁹ 48 C.F.R. § 19.501.

⁵⁰ *Id.* § 2.101; see also TIEFER & SHOOK, *supra* note 6, at 351 (explaining difference between set-asides and sole sourcing and discussing the requirement that contracts be dealt at “fair market price”).

⁵¹ 48 C.F.R. § 2.101. “[T]he statutory provision creating the [women-owned small businesses] WOSB Program does not authorize sole source awards while the statutory provisions creating the other programs do.” Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 62,258, 62,274 (Oct 7, 2010).

⁵² 15 U.S.C. § 644(g) (2006).

affixed to VOSBs, nor are set-asides or sole sourcing generally available options.⁵³

B. VOSBs & SDVOSBs under the Veterans First Contracting Program

In passing the Veterans Benefits, Health Care, and Information Technology Act of 2006, Congress issued VA a unique regulatory mandate, the purpose of which is to provide contracting assistance to SDVOSBs and VOSBs.⁵⁴ The VFCP is similar to the government-wide small business program in that there are mandatory goals for procurement assigned to individual small business concerns.⁵⁵ The fundamental difference between the government-wide program and the VA program is that, when considering small business concerns, VA will first source its contracts to SDVOSBs, then to VOSBs, and lastly to other small business concerns.⁵⁶ Specifically, the VAAR states that contracting officers shall prioritize SDVOSB, then “VOSB, including but not limited to SDVOSB,” followed by 8(a) and HUBZone, and, lastly “any other small business contracting preference.”⁵⁷

A second key difference between the government-wide and VA programs is that, in the VFCP, sole sourcing and set-asides are available for both SDVOSBs and VOSBs.⁵⁸ The law states that VA “shall award contracts” via competition limited to VOSBs and

⁵³ Compare *id.* (neglecting to include a government-wide procurement goal for VOSB), and 48 C.F.R. § 19.501(c) (distinguishing top four set-asides from other small business concern set-asides), with § 819.7004 (issuing the order of priority for VA contracts), and § 819.7005 (establishing that, for VA contracts, set-asides are available for VOSB).

⁵⁴ 38 U.S.C. § 8127(a); 48 C.F.R. § 819.7004; see also Kingdomware Tech., Inc. v. U.S., 107 Fed. Cl. 226, 232-33 (2012) (“Section 8127(i) of the 2006 Act also prioritizes SDVOSBs and VOSBs for VA contracts over other small business contracting preference.”).

⁵⁵ 38 U.S.C. § 8127.

⁵⁶ 48 C.F.R. § 819.7004.

⁵⁷ *Id.*

⁵⁸ Compare 38 U.S.C. § 8127(c),(d), with 48 C.F.R. §§ 19.000-19.1505 (neglecting to distinguish VOSB).

SDVOSBs if “the contracting officer has a reasonable expectation that two or more” veteran-owned small business concerns will bid and that the award may be “made at a fair and reasonable price that offers best value.”⁵⁹ While there may be differing interpretations as to the extent of the mandate imparted on VA by virtue of the word “shall,” clearly veterans do in fact come first under the VFCP.⁶⁰

In sum, the VFCP provides the lone blueprint where VOSB are competitive with the top four. While the extent of the VFCP’s language and provisions has been contested in recent years, veterans preference remains at its strongest when competing for VA contracts.⁶¹

C. Problems with treatment of VOSBs

There are three main problems presented by the current regulatory scheme that impede advancement of veteran entrepreneurship. First, the government-wide small business program administered by the SBA largely neglects VOSBs. Second, the distinction between (and disparate treatment of) SDVOSBs and VOSBs is inherently problematic and therefore undermines the effectiveness of the legislation intended to promote veteran entrepreneurship. Third, the integrity of SDVOSB program as a whole is suspect because of the program’s vulnerability to administrative deficiencies.

⁵⁹ 38 U.S.C. § 8127(d). This principle is known as the “rule of 2” in government contracting. See TIEFER & SHOOK, *supra* note 6, at 351 (explaining the “rule of 2”).

⁶⁰ See generally Ryan C. Bradel et al., *GAO Will No Longer Consider Protests Challenging Certain Set Asides for Service-Disabled and Veteran-Owned Small Businesses*, NAT’L L. REV. (Dec. 22, 2012), <http://www.natlawreview.com/article/gao-will-no-longer-consider-protests-challenging-certain-set-asides-service-disabled> (discussing the back-and-forth between the GAO and VA over the VA Program’s language).

⁶¹ See *id.* For more specific examples of the ongoing tension within VA procurement, see *Kingdomware Tech., Inc. v. U.S.*, 107 Fed. Cl. 226 (2012); *Aldevra*, 2011 WL 4826148, at *1 (Comptroller Gen., Oct. 11, 2011); *Crosstown Courier Serv., Inc.*, 2012 WL 1405913, at *1 (Comptroller Gen. Apr. 23, 2012).

First, the government-wide small business program (as opposed to the VFCP) neglects VOSBs insofar as VOSBs are ineligible to benefit from the apropos set-asides and sole sourcing mechanisms.⁶² This ineligibility is consistent with the fact that Congress does not designate a government-wide procurement percentage goal for VOSBs, altogether indicative of a lower priority in contract awards to that of the top four.⁶³ To illustrate the importance and symbiotic relationship of the mechanisms and goals, consider first that the 1999 Veterans Entrepreneurship and Small Business Development Act established a goal of at least 3% of all federal agencies' contracting funds go to SDVOSBs.⁶⁴ Four years later in pursuit of that elusive 3% goal, Congress was compelled to pass the Veterans Benefits Act of 2003, thereby affording agencies the use of sole source and set-aside contract mechanisms.⁶⁵ The point being that, even with a government-wide goal, mechanisms are crucial in empowering agencies to meet small business concern procurement targets—VOSBs enjoy neither the goal nor the mechanisms.⁶⁶

In contrast to the government-wide small business landscape, VOSB are treated uniquely favorably under VA's VFCP. In fact, the VFCP requires VA to establish procurement goals for

⁶² Cf. 48 C.F.R. § 19.502-1 (explaining that all small business concerns may qualify for set-aside contracts, independent of any "veteran" ownership interest). In other words, VOSB does not qualify for set-aside or sole sourced contracts by virtue of "veteran" ownership.

⁶³ See 15 U.S.C. § 644(g)(1) (neglecting to include a government-wide procurement goal for VOSB).

⁶⁴ Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233.

⁶⁵ Veterans Benefit Act of 2003, Pub. L. No. 108-183, § 36, 117 Stat. 2651, 2662; see 149 Cong. Rec. E2462-03 (daily ed. Nov 20, 2003) (statement of Hon. Lane Evans).

⁶⁶ *FY 2012 Scorecard Summary by Prime Spend (with Subk and Plan Progress)*, U.S. SMALL BUS. ADMIN. (Apr. 20, 2013, 10:05 AM), http://www.sba.gov/sites/default/files/files/FY2012_Summary_by_Prime_Spend_with_Subk_and_Plan_Progress.pdf [hereinafter Small Business Utilization Scorecard]. Interestingly enough, even with the mechanisms, SDVOSB goals are often unreachd. *Id.* Of the 24 departments and agencies scored by the SBA for fiscal year 2012, only five agencies achieved the government-wide goal of 3% SDVOSB prime and subcontracting awards. *Id.*

SDVOSBs (equal to or above government-wide goals) as well as VOSBs. Additionally, both VOSBs and SDVOSBs are considered ahead of all other small business concerns, and VOSBs are eligible for set-aside and sole source opportunities.⁶⁷ That said, the fundamental preface limiting the VFCP only to VA procurement is ill-advised.

If any government agency may be relied on to embody the discretionary language of the applicable statutes, specifically the loose provisions that require VOSBs and SDVOSBs to be used to the “maximum” extent possible, it is VA. In fact, VA’s mission is to fulfill President Lincoln’s promise “to care for him who shall have borne the battle.”⁶⁸ Even before the VFCP, VA regularly surpassed internal VOSB and SDVOSB prime contract procurement goals.⁶⁹ To the extent VA is predisposed to promote veteran entrepreneurship to the maximum extent possible, the decision to restrict the VFCP to VA is dubious. Seemingly, it would be more appropriate to require veteran priority at an agency that failed to meet internal and government-wide SDVOSB contracting goals.⁷⁰ In the alternative, perhaps the Department of Defense (DoD) would be as fitting a home as VA for a program requiring procurement priority for veterans, considering that DoD has a vast contracting budget along with firsthand knowledge of veteran sacrifice and skill-sets. Further, DoD’s livelihood depends on encouraging military service from future veterans; preferential treatment for veteran entrepreneurship is one method to encourage service.⁷¹

⁶⁷ 48 C.F.R. § 819.7004.

⁶⁸ *About VA*, U.S. DEP’T OF VETERANS AFFAIRS, http://www.va.gov/about_va/mission.asp (last updated Mar. 14, 2013).

⁶⁹ From 2007 to 2009, the VA nearly doubled its VOSB prime contracting procurement goals. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-673T, PRELIMINARY OBSERVATIONS ON ISSUES RELATED TO CONTRACTING OPPORTUNITIES FOR VETERAN-OWNED SMALL BUSINESSES 4-5 (Apr. 2010).

⁷⁰ Small Business Utilization Scorecard, *supra* note 66. Of the 11 departments or agencies who failed to meet the 2012 SDVOSB prime contracting and subcontracting goals, 4 were awarded the grade “A” for overall annual performance. *Id.*

⁷¹ *Id.* Even the Department of Defense (DoD) has come up short in pursuing SDVOSB

Moreover, government agencies as a whole exist because of the sacrifices of veterans; therefore, the charge to ensure small business contracting opportunities to veterans should be borne by all agencies.⁷² Analogously, the current scheme is no different to limiting HUBZone priority to contracts issued by the Department of Housing and Urban Development or limiting 8(a) priority to contracts issued by the Minority Business Development Agency.⁷³ Congress enacted the Veterans Benefits, Health Care, and Information Technology Act of 2006 to recognize the sacrifices of veterans and account for failures to adequately care for veterans;⁷⁴ however, this recognition and failure to care can hardly be limited to a single agency or department. Accordingly, limitation of the VFCP to VA is ill-advised. The debt owed to veterans is government-wide and the burden of adequately prioritizing veteran entrepreneurship should be shared rather than compartmentalized.

Second, categorically separating SDVOSBs from VOSBs requires an inherently problematic differentiation, the ramifications of which are inconsistent with the national commitment to

goals. In 2012, DoD awarded 2.33% of prime contract awards to SDVSOBs and 1.9% of subcontracting awards to SDVOSBs—both increases from 2009 awards. *Id.* See OFFICE OF THE UNDER SEC'Y OF DEF. (COMPTROLLER)/CFO, 2013 FISCAL YEAR BUDGET REQUEST OVERVIEW 1-1 (2012) (summarizing DoD's FY 2013 budget).

⁷² Rick Maze, *Lawmaker: Agencies Must Obey Law to Help Vet-owned Businesses*, AIR FORCE TIMES, Apr. 16, 2013, available at <http://www.airforcetimes.com/article/20130416/NEWS/304160013/Lawmaker-Agencies-must-obey-law-help-vet-owned-businesses> (predicting the challenges which would potentially accompany such a shift, Rep. Sam Graves, Chairman of the House Small Business Committee recently suspected most, if not all, government agencies (including VA) of failing to conform to changes in the 2012 National Defense Authorization Act which requires agencies to make veteran-owned and other small businesses a priority by appointing an individual to work “exclusively” on such issues).

⁷³ 13 C.F.R. § 126 (2012) (historically underutilized business zones (HUBZone) program); 13 C.F.R. § 124 (8a Business Development program). More simply, the current scheme provides that VOSB are only given significant preferential treatment when vying for VA contracts. The analogy is intended to draw attention to the dubious containment.

⁷⁴ See 152 Cong. Rec. S11,854-01 (daily ed. Dec 27, 2006) (statement of Sen. Daniel Akaka).

advancing the interests of veteran entrepreneurship.⁷⁵ Underlying this issue are concerns for the overall effectiveness of all SDVOSB and VOSB initiatives, which are critical given the multiple small business concerns competing for a finite number of federal contracting opportunities.⁷⁶ In sum, initiatives dedicated to advancing veteran entrepreneurship are undermined when “service-disability” is applied as a sole, threshold differentiator between SDVOSBs and VOSBs.

In government procurement the consequences of distinguishing, and ultimately favoring, SDVOSBs over VOSBs unintentionally undermines the overall effectiveness of veteran preference procurement initiatives. Reliance on a certified “service-disability” to categorically separate veteran-owned small businesses is an oversimplified attempt at dissecting and classifying a dynamic and evolving class of individuals. The resulting categorization pigeonholes veteran small business entrepreneurs into those deserving of special “top four” preference (SDVOSBs) and those whose need is less compelling (VOSBs). At first blush, service-connected disability appears to be only a single issue to resolve, but the concept is nuanced in its complexity.

Assuming flawless administration of the SDVOSB and VOSB certification process, the distinction between the small business concerns is problematic for two reasons. To begin with, certification of a “service-connected disability” is in actuality, only verification that an individual chooses to, and successfully navigates VA’s benefit system.⁷⁷ In large part, certification as an SDVOSB merely requires that a servicemember adequately establish their disability is service-connected, typically to receive a

⁷⁵ As discussed above, government action in this realm is largely rehabilitative. That said, rehabilitative efforts have traditionally focused on mitigating lost opportunities in addition to compensating for physical disabilities incurred. *See, e.g.*, Servicemen’s Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284.

⁷⁶ *See* FRAUD AND ABUSE, *supra* note 39.

⁷⁷ *See generally* Hearing, *supra* note 36 (discussing the challenges associated with certification).

monthly federal stipend.⁷⁸

Discriminating against VOSBs because of the failure to secure a disability rating potentially freezes out veterans who may, in actuality, be disabled due to an event that occurred during service. One can easily surmise instances in which a service-disabled veteran's business would be certified VOSB rather than SDVOSB. For example: a service-disabled veteran who is not inclined to apply for a government subsidy or a service-disabled veteran who is uncomfortable with the stigma attached to being labeled "disabled." Perhaps more concerning are circumstances in which a veteran's disability is misdiagnosed or in which a veteran is not yet aware of his or her disability and thus is unable to establish that they are service-disabled.⁷⁹ Similarly, service-disabled veterans often encounter difficulty in navigating VA processes for securing a disability rating, and are potentially inclined to certify as a VOSB in the interim.⁸⁰ Moreover, even if veterans were afforded interim SDVOSB status while they navigated the certification process, it is unclear whether such a remedy would be compelling with regard to the perceived stigmas and application process aversions discussed above.

Assuming arguendo, if all service-disabled veterans were guaranteed a timely and accurate disability rating, quantitative concerns still exist over the minimum disability level required to qualify as an SDVOSB. For example, service-disabled veterans

⁷⁸ See generally *Compensation – Disability Compensation*, U.S. DEP'T OF VETERANS AFFAIRS (Oct. 5, 2013, 2:05 PM), <http://www.benefits.va.gov/COMPENSATION/types-disability.asp>.

⁷⁹ Hearing, *supra* note 36 (statement of Davy Leghorn, Assistant Dir. Econ. Div., The American Legion) (testifying that applying for verification as an SDVOSB includes the potential for "severe lags in the time that is required for the initial verification application to get processed," and the "task of gathering and formatting the substantial amount of documentation" is "cumbersome and intrusive").

⁸⁰ *Id.* (testimony of Jonathan T. Williams, Partner, PilieroMazza, PLLC) (declaring that the "deny first and ask questions later" approach to the SDVOSB verification process has created numerous avoidable denials, as well as time consuming and costly reconsideration requests).

are eligible to receive a numerical disability rating from VA, determined on a scale of 0%-100% (0% being asymptomatic and 100% being totally disabled).⁸¹ Because any degree of certified disability qualifies a veteran as “service-disabled” for purposes of SDVOSB classifications, veterans with a 10% disability rating are considered akin to totally disabled veterans.⁸² By the numbers, a veteran with a disability rating under 50% would be more akin to a non-disabled veteran than to a totally disabled veteran.

Furthermore, the FAR definition of a “qualified disabled veteran” is arguably paradoxical. Within the SDVOSB context, a “qualified disabled veteran” refers to a “disabled veteran who has the ability to perform the essential functions of the employment positions with or without reasonable accommodation.”⁸³ The definition suggests the individual must be “disabled,” but not too impaired in that they would be unable to perform sufficiently. In other words the veteran must be disabled, but not be *too* disabled. Consider *Smith v. Director of Civil Service*,⁸⁴ where the Massachusetts Supreme Judicial Court upheld a state hiring preference for service-disabled veterans over non-service-disabled veterans, provided certification “that their disability is not such as to prevent the efficient performance of the duties of the position to which they are eligible.”⁸⁵ The resulting conundrum is that while a “qualified service-disabled veteran” deserves consideration over other veterans, a veteran who is *too* disabled may be found

⁸¹ 38 U.S.C. § 1155 (2006); 38 C.F.R. Part 4 (2012). Veterans may be given a 0-percent rating, which typically signifies the VA identifies a service-connected disability that does not rise to the level of being compensable. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/HEHS-97-9, VA DISABILITY COMPENSATION, DISABILITY RATINGS MAY NOT REFLECT VETERANS ECONOMIC LOSSES 6 (Jan. 1997), available at <http://www.gao.gov/archive/1997/he97009.pdf> [hereinafter Disability Ratings]. In certain cases compensation may be available for a 0-percent disability rating. *Id.*

⁸² See *The IRS Contracts with Strong Castle, Inc.: Hearing Before the Comm. on Oversight and Gov’t Reform*, 113th Cong. 1 (2013) (statement of Rep. Tammy Duckworth), available at <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg82275/html/CHRG-113hhrg82275.htm>.

⁸³ See 48 C.F.R. § 22.1301.

⁸⁴ 87 N.E.2d 196 (1949).

⁸⁵ *Id.* at 198.

unqualified. Alternatively stated, those in most need of a head start and most deserving of recognition for their sacrifice are potentially excluded altogether from the very category created to assist them.⁸⁶

Third, the integrity of the SDVOSB program as a whole is suspect because of the program's vulnerability to administrative deficiencies.⁸⁷ Perhaps the most blatant administrative shortcoming involves the program's susceptibility to fraud and abuse. While stakeholders have pointed to difficulties and challenges associated with the verification of ownership and control of SDVOSBs, there is a more pressing issue of businesses falsely holding themselves out to be, or *self-certifying* as SDVOSBs and subsequently securing SDVOSB contracts.⁸⁸ For example, the GAO recently pointed out

⁸⁶ 13 C.F.R. §§ 125.8(g)(2), 125.10(b). That said an SDVOSB, "in the case of a service-disabled veteran with permanent and severe disability," might be controlled by the spouse or permanent caregiver of such veteran.

⁸⁷ According to Rep. Richard Hanna, Chairman of the Subcommittee on Contracting and Workforce, interpretations of SBA and VA contracting regulations are "[c]onsistently [i]nconsistent," resulting in thousands of missed opportunities for SDVSOB and VOSB. Hearing, *supra* note 36. Pointedly, Joe Wynn, a special advisor for Vietnam Veterans of America, stated that over the past three years "no other small business preference program participants (8(a), HUBZone, WOSB, SDVOB) have exhibited public dissatisfaction to the extent where there have been repeated Congressional hearings, GAO reports and IG investigations of those programs." *Id.*

⁸⁸ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-89, VETERANS' DISABILITY BENEFITS, TIMELY PROCESSING REMAINS A DAUNTING CHALLENGE (Dec. 2012) [hereinafter TIMELY PROCESSING]. The regulation provides:

To be eligible for award as a small business, an offeror must represent in good faith that it is a small business at the time of its written representation. An offeror may represent that it is a small business concern in connection with a specific solicitation if it meets the definition of a small business concern applicable to the solicitation and has not been determined by the Small Business Administration (SBA) to be other than a small business.

48 C.F.R. § 19.301. The SBA Office of Advocacy has concluded that most veteran-owned businesses are self declared, and the markers used in the Federal Procurement Data System to identify contracts to firms owned by veterans and by service-disabled veterans is "spotty and is probably inaccurate." SBA OFFICE OF ADVOCACY, EVALUATING VETERAN BUSINESS OWNER DATA 57 (Dec. 2004), available at <http://www.smallbusinessnotes.com/pdf/rs244tot.pdf>. The GAO has stated "the only process in place to detect fraud in the government-wide SDVSOB program" was a formal

five cases where unqualified companies secured approximately \$190 million in SDVOSB contracts.⁸⁹ Although stakeholders disagree over the assignment of blame between the SBA and VA, the consensus suggests that opportunities for fraud arise both from the nationwide scope of the initiative as well as the difference between the two programs (Veterans First and SBA government-wide program).⁹⁰

Additionally, the nature of the SDVOSB program is reactive insofar as the program relies on disability ratings, which are designed to estimate loss of earning capacity.⁹¹ While ratings are still based on calculations made in 1945 in concert with the GI Bill of Rights, VA has updated many portions of the rating schedule since that time to implement current medical criteria and terminology.⁹² For example, in recent years, regulations have been amended to allow benefits for several diseases tied to Agent Orange exposure, resulting in the adjudication of 260,000 previously denied claims.⁹³

Further, if the task of adjudicating veteran disability claims was not daunting enough, future complications may be anticipated

bid-protest process at SBA. FRAUD AND ABUSE, *supra* note 39, at 21. See generally 48 C.F.R. § 19.307 (proscribing how to protest a firm's status as a SDVOSB concern).

⁸⁹ FRAUD AND ABUSE, *supra* note 39, at 20-21. While the VA continues to take action to prevent fraud, the SBA has not, nor are they statutorily obligated to take meaningful steps to verify SDVOSB status. *Id.*

⁹⁰ Hearing, *supra* note 36. SBA officials have asserted that they only have "limited responsibility" for the SDVOSB program outside of tracking other agencies progress toward achieving procurement goals. FRAUD AND ABUSE, *supra* note 39, at 21.

⁹¹ 38 U.S.C. § 1155 (2006); 38 C.F.R. § 4.1.

⁹² See Disability Ratings, *supra* note 81, at 2 (small caps omitted). "The disability ratings in VA's current schedule are still primarily based on assessments made by physicians' and lawyers' judgments made in 1945 about the effect of service-connected conditions had on the average individual's ability to perform jobs requiring manual or physical labor." See, e.g., 73 Fed. Reg. 54,693 (Sept. 23, 2008) (providing updated and amended criteria for rating traumatic brain injury).

⁹³ TIMELY PROCESSING, *supra* note 88, at 11-12. See *Nehmer v. U.S. Veterans' Admin.*, 284 F.3d 1158, 1161 (N.D. Cal. 2002) (finding that VA shall readjudicate all claims for any disease voided by the Court's May 1989 Order after a new rule is issued regarding service connection based on dioxin exposure).

given that the complexity of claims continues to grow. VA has observed a trend that recently submitted claims are often more complex than in previous years, this occurring in addition to a “system wide” challenge in obtaining full and adequate medical records from claimants.⁹⁴ For example, “VA notes that it is receiving more claims for complex disabilities related to combat and deployments overseas, including those based on environmental and infectious disease risks and traumatic brain injuries.”⁹⁵

Compounding these concerns are the additional one million servicemembers projected to leave the military over the next several years in the midst of a challenging economic environment.⁹⁶ The average length of time during which a claim remains pending has already risen significantly even since 2009, when it took an average of 4 months to complete a claim.⁹⁷ VA has set a goal of closing claims within 125 days by 2015, although the GAO concluded that the extent to which VA is positioned to meet this goal remains uncertain.⁹⁸

D. Recommendation

The threshold distinction between SDVOSBs and VOSBs should be eliminated and replaced with an all-inclusive VOSB category. Every business in the inclusive VOSB category would then be eligible for contract set-asides and sole sourcing opportunities. Accordingly, the 3% government-wide SDVOSB procurement goal would be raised and applied to the larger combined VOSB category. Specifically within VA, the combined

⁹⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-213, VETERANS DISABILITY BENEFITS, FURTHER EVALUATION OF ONGOING INITIATIVES COULD HELP IDENTIFY EFFECTIVE APPROACHES FOR IMPROVING CLAIMS PROCESSING 12 (Jan. 2010), *available at* <http://www.gao.gov/products/GAO-10-213>.

⁹⁵ *Id.*

⁹⁶ TIMELY PROCESSING, *supra* note 88, at 12 (noting that VA has identified a number of factors giving rise to the increasing number of claims, including the drawdown of operations in Iraq and Afghanistan and a challenging economic environment).

⁹⁷ *Id.* at 9.

⁹⁸ *Id.* at 28-29.

VOSB category would remain atop the small business concern hierarchy in accordance with the VFPCP. Ideally, similar legislation would be enacted to elevate veteran priority when vying for DoD contracts as well as contracts put out by agencies where veterans have been traditionally underrepresented.

These measures would help align the treatment of all VOSBs with the Nation's commitment to honoring military service by affording a genuine competitive edge to those who served. That is not to say the VFPCP would not benefit from other more specific refinements. For example, while no military member would ever choose to be service-disabled, once they fit into that definition, it is entirely the prerogative of the legislature to decide that the "public interest is served by additionally preferring those who have incurred disability in the course of their service."⁹⁹ In that regard, perhaps it would be appropriate to incorporate a disability "point" system within the VOSB category, similar to federal hiring practices.¹⁰⁰ A point system would avoid barring *non-disabled* veterans yet would acknowledge the additional sacrifices made by service-disabled veterans. A point system might also be applied depending on the specific scope of work for any particular contract, the idea being avoidance of the conundrum expressed above, i.e., "disabled, but not *too* disabled." To that end, consideration for the type of discharge a service member receives from DoD may be deemed appropriate in limited circumstances where the nature of the scope of work is particularly sensitive. In other words, in awarding contracts that implicate the public trust, it may be appropriate to first consider the veteran who served honorably before the veteran whose service was satisfactory or, in some cases, less than satisfactory.¹⁰¹

⁹⁹ *Hutcheson v. Dir. of Civil Serv.*, 281 N.E.2d 53, 56 (Mass. 1972).

¹⁰⁰ See 5 C.F.R. § 211.102(c) (2012).

¹⁰¹ 38 C.F.R. § 3.203(a) (describing service records as evidence of service and character of discharge). That said, there are instances where "other than honorable" discharges are given for unsavory behavior that has not reached the level requiring dishonorable discharge, in which case VA retains discretion to award SDVSOB certification. See, e.g., Martha Mendoza, *Records: Army Allowed Police Shooter to Resign*, ARMY TIMES, Apr.

Furthermore, if “persons who have reasonable expectation of fair treatment” from the government will “compete more vigorously” for government contracts, refining the means and methods to advance VOSBs assumedly fosters a more competitive marketplace, specifically amongst veteran entrepreneurs.¹⁰² Tangentially, the increase in veteran business would allow agencies a larger pool of potential contractors to consider when issuing restricted competition solicitations. More simply put, agencies would be likely to find “two or more” businesses that could provide the sought after goods or services at a reasonable price to the government. In addition, empirical evidence shows that VA and the SBA have struggled to accurately and efficiently certify SDVOSB under existing guidelines.¹⁰³ Assumedly, efforts to streamline or simplify the certification process would alleviate some integrity challenges associated with administering the SDVOSB. The author believes that removing the service-connected disability component of certification would reduce a significant certification burden.¹⁰⁴

17, 2013, available at <http://www.armytimes.com/article/20130417/NEWS/304170013/Records-Army-allowed-police-shooter-resign>; Ann McAdams, *Army Recommends Discharge for Sgt. Accused of Bigamy*, WECT-6 (Apr. 4, 2013), <http://www.wect.com/story/21882669/update-army-recommends-discharge-for-sgt-accused-of-bigamy>; Ashley Kelly, *Scars Remain for Survivors of Fatal Wrong-Way Wreck*, DAILY PRESS, Mar. 31, 2013, available at http://articles.dailypress.com/2013-03-31/news/dp-nws-cnu-evans-impact-20130331_1_kimberley-brin-emani-wade-jesse-evans-jr.

¹⁰² TIEFER & SHOOK, *supra* note 6, at 51. Research suggests that federal contracting opportunities for veteran-owned businesses are “concentrated” inasmuch as a few agencies and small percentage of the total qualified veteran-owned businesses execute a disproportionately large proportion of contracts. See SBA OFFICE OF ADVOCACY, NO. 239, CHARACTERISTICS OF FEDERAL GOVERNMENT PROCUREMENT SPENDING WITH VETERAN-OWNED BUSINESSES FY 2000-FY 2003 (3Q) 2 (Eagle Eye Pub. June 2004).

¹⁰³ Hearing, *supra* note 36, at 3 (statement of William Shear) (noting that despite significant efforts to improve verification processes and procedures, VA has difficulty maintaining an “efficient program to verify firms on a timely and consistent basis.” See generally *DooleyMack Gov’t Contracting, LLC*, SBA No. VET-159 (2009); 2009 WL 3126296 (illustrating the difficulty in resolving SDVSOB ownership and control disputes); Hearing, *supra* note 36 (statement of Davy Leghorn) (discussing problems with the SDVOSB verification process).

¹⁰⁴ VA VOSB Verification Lacks Strategic Planning and Sufficient Data System, GAO Finds, 55 No. 3 GOV’T CONTRACTOR ¶ 21, Jan. 23, 2013 (“To sustain high levels of VOSB contracting and ensure the integrity of Veterans First, VA must verify eligible

While unlikely to eliminate all abuse, limiting verification efforts to issues of name, controlling interest, and service record may ultimately make the process more manageable and less susceptible to fraud. Specifically, such a change would lessen the amount of verifiable data required to establish the preference and potentially simplify the process.

Programs benefiting small business concerns through procurement preference inevitably do so at the cost of limiting competition and reducing the advantages of open market bidding. Awarding a contract based on any particular “status” may be construed as unfair, inasmuch as merit should determine which parties are afforded the opportunity to provide products or services to the government at the expense of the taxpayer.¹⁰⁵ As for the degree of public scrutiny that might follow the drawdown of operations in Iraq and Afghanistan, courts have observed, that “after a war, such laws have been enacted without opposition. During peacetime, they inevitabl[y] have come to be viewed in many quarters as undemocratic and unwise. . . . [Preferences] have always been subject to the objection that they give the veteran more than a square deal.”¹⁰⁶ So as “peacetime” looms on the heels of a federal sequestration, efficient use of preference initiatives for VSOBs is critical.

firms while correctly disqualifying ineligible firms.”); *see also* Hearing, *supra* note 36 (statement of Rep. Hanna) (concluding that verifying “veteran status” is the “easiest part,” also noting that “additional documents” are required to establish disability status).

¹⁰⁵ *See* Andrew George Sakallaris, *Questioning the Sacred Cow: Reexamining the Justifications for Small Business Set Asides*, 36 PUB. CONT. L.J. 685, 689 (2007) (“[T]he Government is allowed, and in some cases required, to pay a premium price to contract with a small business. That premium is passed on to the American taxpayer.”)

¹⁰⁶ *Personnel Adm’r of Mass v. Feeney*, 442 U.S. 256, 280-81 (1979) (citing *Hearings on Veterans’ Preference Oversight before the Subcomm. on Civil Serv. of the H. Post Office & Civil Serv. Comm.*, 95th Cong. (1977); U.S. GEN. ACCOUNTING OFC., REPORT OF COMPTROLLER GENERAL, CONFLICTING CONGRESSIONAL POLICIES: VETERANS’ PREFERENCE AND APPORTIONMENT VS. EQUAL EMPLOYMENT OPPORTUNITY (Sept. 29, 1977)).

CONCLUSION

“It is absolutely impossible to take millions of our young men out of their normal pursuits for the purpose of fighting to preserve the Nation, and then expect them to resume their normal activities without having any special consideration shown them.”

– FRANKLIN DELANO ROOSEVELT¹⁰⁷

While the current small business regulatory scheme purports to value the importance of advancing the interests of veterans in government procurement, it withholds the concrete goals and measures available from all but the top four. As a result, VOSBs stand mostly on discretionary language in statutory provisions. Lloyd Chapman, president of the American Small Business League, once compared small business concerns to boxing, “where you have a middleweight and a heavyweight class, Congress knew the average small business couldn’t compete head-to-head with General Motors.”¹⁰⁸ However, with only a finite number of contracting opportunities available, small business concerns are also unavoidably pitted against one another in “classes” of their own assigned by the government.

It has long been held that “in war, there are no unwounded soldiers.”¹⁰⁹ Broad concerns as to the impact of the drawdown of troops in Iraq and Afghanistan and the size of the federal deficit have loomed over Washington for the better part of the last decade. Government officials incessantly try to brace the American public for across-the-board reduction of government spending. In

¹⁰⁷ H.R. 1289, 78th Cong. (1944).

¹⁰⁸ Lenora Chu, *Preferential Contracting Made Easy*, CNN MONEY (Mar. 17, 2008), http://money.cnn.com/2008/03/14/smbusiness/sba_set_asides.fsb.

¹⁰⁹ Jose Narosky, NAT’L CENTER FOR VETERANS ANALYSIS AND STATISTICS, DEP’T OF VETERANS AFFAIRS, STATISTICS AT A GLANCE 4 (Aug 2012) (citing VA Office of the Actuary, Veteran Population Projection Model 2007), available at www.va.gov/vetdata/docs/quickfacts/Homepage-slideshow.pdf. There are over eight and half million veterans already enrolled in the VA health care system. *Id.*

fact, DoD and, subsequently, the private defense industry, have already begun adjusting business practices to accommodate a shrinking defense budget with fewer contracting opportunities.¹¹⁰ In addition to the reduction, the number of returning veterans transitioning into civilian capacity will continue to rise. So as a Nation committed to caring for its veterans, we must prepare to absorb and adjust to these dynamics. To that end, best practice governance inescapably carries with it questions over the efficiency of the current approach to promoting veteran-owned businesses in federal procurement.

¹¹⁰ See Lisa Rein, *Defense Department Reduces Furlough Days to 14*, WASH. POST (Mar. 28, 2013, 8:33AM), <http://www.washingtonpost.com/blogs/federal-eye/wp/2013/03/28/defense-department-to-reduce-furlough-days-to-14/>; Kedar Pavgi, *Lockheed Martin Fears \$825 Million Hit From Sequestration*, GOV'T EXEC. (Apr. 23, 2013), <http://www.govexec.com/contracting/2013/04/lockheed-martin-fears-825-million-hit-sequestration/62719/>; see generally Neil S. Whiteman & Edward C. Patterson, *Sequestration Mechanics Under the BCA*, in 7 GOVERNMENT CONTRACT COSTS, PRICING, & ACCOUNTING REPORT ¶ 50 (Thompson Reuters 2012) (explaining the mechanics of the sequestration and the government's option to reduce and terminate certain contracts).