



# BETRAYED!

## *VA “Interim Rule” Sets Stage for Death of PL 109-461*

(SDVOSB News Services, April 3, Washington, DC) -- The Veterans Administration issued an ‘Interim Rule’ in the procurement priority of Service Disabled Veterans Owned Business (SDVOSB), placing them behind the Federal Supply Schedule (FSS) and Ability One in small business set-asides. The interim rule will take effect immediately after White House approval. A Final Rule for public comment will then be published. VA sent the Interim Rule to the White House on January 18.

This rule for priority among set-asides is in direct conflict with a 2006 mandate that gives SDVOSB and VOSB priority for set-aside contracts within the VA procurement system. The Veterans Benefits, Health Care, and Information Technology Act of 2006 (PL 109-461), directs the VA to conduct market research to determine if two or more SDVOSB can complete the terms of the contract *before contracting with any other vendor*.

The Javits-Wagner-O’Day Act (JWOD or ‘Ability One’), gives priority to blind and severely disabled business concerns in federal procurements. Express language in PL 109-461, however, indicates that SDVOSB preference ‘shall’ be awarded ‘regardless of any other provision of law.’

“I’ve got nothing against the government helping the blind, but there’s a law that says SDVOSB are supposed to be considered first at the VA,” Chet McLendon, president of Pierce First Medical of Phoenixville, Pennsylvania, said in an interview with Bloomberg. McLendon, 41, is an Air Force veteran who has had two back surgeries because of service-related injuries.

In addition, the ‘Interim Rule’ finalizes the priority of FSS vendors over SDVOSB. VA spent \$3.26 billion last year with FSS vendors, a group of preselected companies that often provide bulk purchasing discounts, according to an October 2010 VA report. Competition with FSS virtually assures that SDVOSB cannot compete in the VA procurement market.

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Tom Leney: Interim Rule “not an OSDDBU issue.” See Editorial, page 6

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## Featured Interview

### Mr. Bob Filner, Ranking Member, House Committee on Veterans Affairs



At a November 30, 2011 hearing of the House Veterans Affairs Oversight and Investigations Subcommittee, GAO officials testified about recommendations that GAO issued in response to a protest of a solicitation by the VA. GAO recommended that VA re-issue the solicitation as a set-aside for service disabled veteran small business (SDVOSB). The VA ignored the GAO and issued an agency-wide memorandum to ensure that VA contracting officers did not follow GAO's guidance.

*VLM: What precedent does this refusal to follow GAO set, if any?*

**Bob Filner:** GAO is not a court of law. It does not issue binding decisions but rather provides recommendations. I am willing to provide VA with the space to act independently and protect the taxpayers' money. But all decisions must make sense and I do not believe this particular decision makes sense.

*VLM: Thank you for introducing HR 3438 to mandate DoD to meet the 3% contracting minimum procurement for SDVOSB. Do you expect bi-partisan support in the House?*

**BF:** Most bills pertaining to veterans issues garner bipartisan support. It is not enough to simply have a good bill; it is important to secure support in the House and from outside groups such as the veterans service organizations and other groups interested in veterans' issues. So I hope everyone who has a stake in this issue will come forward to support this bill.

*VLM: The federal government across the board has failed Veteran owned small business since 1999 by not following laws to award the minimum 3% to SDVOSB. How would your legislation, if passed, compel DoD to award 3% to SDVOSB?*

**BF:** First, if we were to pass this bill it would be a strong signal to DoD that the House, Senate and the President are very serious about DoD meeting the goal. I am looking to strengthening the wording from contracting goal to contracting percent requirement. I think that by using the word goal we have sent the mixed signals that it is more of "let's see if we want to do it." Instead we should send a message that is clear and concise of "you shall meet this contract percent."

*VLM: Why did you introduce HR 3438?*

**BF:** That is very simple. Right now DoD is the largest federal agency, period. It is also the agency that should be able to appreciate the value, leadership, dedication and hard work that veterans bring to the business

**Filner, cont. page 17**

### VA Contracting Flowchart

Below is a graphic rendering of how the Veterans Administration has mutated the *Veterans First* program (109-461). SDVOSB and VOSB that do not have a Federal Supply Schedule (FSS) don't pay the Industrial Funding Fee (IFF) that VA charges all contract awardees. Funds from the IFF are then funneled into the "VA Supply Fund."

Resources from the VA Supply Fund finance important VA programs, such as bonuses and "Holiday Pay" for VA's Senior Executive Service employees. It follows, then, that if capable SDVOSB or VOSB are not on the FSS, they don't pay the IFF, and nothing gets funneled into the VA Supply Fund. If you're not on the FSS, you're on your own. As it stands now, few SDVOSB are on the FSS...and very few SDVOSB are awarded VA contracts.

**Veterans First?  
No way.  
Follow the money!**



Congressional Appropriations to VA for Goods and Services



"VA Supply Fund" pays **executive bonuses, holiday pay, cash allowances**, but few operations vital to the VA mission.



SDVOSB/VOSB

VA buys from businesses with a Federal Supply Schedule (FSS)

IFF "becomes" the VA Supply Fund -



VA Charges FSS Businesses a fee  
*(77% are non-veteran businesses)*

FSS Businesses must pay at least 0.5% of all procurements back to the VA Industrial Funding Fee (IFF)

## Snowe Vs Shinseki

On February 9, 2012, Senator Olympia Snowe (R-ME), the Ranking Member of the Senate Committee on Small Business and Entrepreneurship sent a letter to VA Secretary Eric Shinseki requesting information on the verification process within the VA procurement system and the VA's reaction to the recommendations by the Government Accountability Office (GAO) of November of 2011.

Please find the pdf file here:

<http://tinyurl.com/6vnjvhr>



Secretary Shinseki did respond to Senator Snowe on March 20. Please find his response here:

<http://tinyurl.com/82e5bf3>

General Shinseki's response prompted a clarification from *VetLikeMe* to VA and the Ranking Member.

Mr. Madden (VA)--

I obtained a copy of Secretary Shinseki's responses to Senator Snowe's questions regarding the status of the VA verification program.

Frankly, I'm very, very disturbed by the General's response (or staff lawyers who developed it). It not only paints a misleading picture of the verification program and VA's procurement policies, the statement that VA is "addressing" the issues cited by GAO is not true.

- 1) In response to the November 30 GAO recommendation, the VA issued an internal staff memo to ignore the GAO recommendation. Days later, VA merely canceled the solicitation that was the root of the GAO investigation;
- 2) In response to a second GAO recommendation to a protest by service disabled veteran owned small business (SDVOSB), in which GAO investigated VA's blatant disregard of PL 109-461, VA issued an official memorandum to GAO stating that VA would not follow the recommendation of GAO;
- 3) In a third instance of bold disregard of 109-461, this month VA issued an 'interim rule' in procurement priority for VHA and VA purchases. This 'interim rule' establishes that service disabled veteran owned businesses and veteran owned businesses are LAST in set-aside priority for procurements by both VA and VHA. This will prevent many, many SDVOSB from competing in the VA marketplace and force many completely out of business.



Copied on this email are Congressional staffers, press secretaries, VA and other federal employees, many major media outlets, veteran service organizations, small business advocates, and many SDVOSB.

Congressional staff: Please ensure that the Congressional member you work for sees this email;

I respectfully request that the interim rule be cancelled and an addendum to Shinseki's letter be presented to the Ranking member of the Senate

**Snowe-Shinseki, cont page 8**

## ON THE HILL

### Legislative Update

#### HR 3379: Small Business Growth and Federal Accountability Act

**To penalize federal Departments by 10% of total budget that do not meet the 23% Small Business contracting goal.**

Sponsor: Rep. Bill Owens (D-NY)

Introduced: Jan. 18, 2012

Referred: House Small Business Committee



HR 4048 (see 4048, page 12)

**HR 3438: To require the Department of Defense to meet the annual goal for participation in procurement contracts by small business concerns owned and controlled by veterans with service-connected disabilities.**

Sponsor: Rep. Bob Filner (D-CA)

Introduced: November 17, 2011

Referred: House Armed Services Committee, House Small Business Committee

#### 2011 Proposed Legislation:

#### **S. 1154: Honoring Promises to Service-Disabled Veterans Act of 2011**

Requires transparency for Executive departments in meeting the Government-wide goals for contracting with small business concerns owned and controlled by SDVOSB.

Introduced: June 7, 2011 by Senator Max Baucus (D-MT); co-sponsors: Harkin, Vitter

Referred: Senate Committee on Small Business and Entrepreneurship

#### **S. 1184: To amend title 38, United States Code**

To revise the enforcement penalties for SDVOSB misrepresentation

Introduced: June 13, 2011 by Senator Maria Cantwell (D-WA)

Referred: Senate Committee on Veterans Affairs

Introduced in House of Representatives: April 15, 2011 by Marlin Stutzman (R-IN)

Activity: May 23, 2011: passed in the House by roll call vote

#### **HR 240: To amend title 38, United States Code**

*Requires* (current law authorizes) a Department of Veterans Affairs (VA) contracting officer to award contracts to small businesses owned and controlled by veterans using other than competitive procedures for contracts above the simplified acquisition threshold.

Introduced: Jan 7, 2011 by Rep. Robert Filner (D-CA)

Referred: House Veterans Affairs Committee, hearings held by Subcommittee on Economic Opportunity.

#### **S. 633: Small Business Contracting and Fraud Prevention Act of 2011**

Requires that SDVOSB/VOSB are verified by all federal agencies...ends self-certification...

Introduced: March 17, 2011 by Senator Olympia Snowe (R-ME)

Referred to House Small Business Committee.



## Drinking from a Fire Hydrant

Wow. Balancing all the powerful wind gusts since our last issue has knocked me into a cold, muddy ravine. The SDVOSB community feels the tremors. The past six weeks have been especially treacherous for SDVOSB trying to navigate the political and social influences that will affect our livelihoods. If you ain't got a front row seat and you don't know what's going on, get clued because this is a critically important stretch of time for us.

Run them down...Aldevra, Aldevra redux, Aldevra Trifecta, KingdomWare, the CA SDVOSB Network and the Court of Federal Claims, the FedBid VA cancellation, the FedBid VA Reinstatement, HR 4048, the VA Interim Final Rule (the most devious of all).

We all cheered Aldevra I, and with good reason. GAO ruled that VA should have set this contract solicitation aside for SDVOSB...Jan Frye issues an agency-wide memo that the GAO decision was not to be followed. Instead of having to respond to Congress later in thirty days though, the VA simply canceled the solicitation that Aldevra protested.

In Aldevra II, the VA—with its back to the corner—sneered at GAO when a second Aldevra protest was sustained, only this time, VA added bluster and Tabasco to their middle finger and issued a formal memorandum to GAO stating that they would do their own thing, that they weren't going to pay any attention to GAO, ever.

Who knows how the VA will respond to Congress about Aldevra III; we'll find out in three weeks or less. HR 4048 is an example of cloudy legislation. At a hearing by the VA's Committee on Oversight and Investigations, Rep. Bill Johnson supported the Veterans first mandate, then introduced HR 4048 (see "HR 4048, page 12), a bill that many SDVOSB see as the death of PL 109-461. In reality, though, the legislation would give priority only to SDVOSB who have an FSS schedule, and the application process can cost thousands of dollars. This is not 'Veterans First' in the true spirit of 109-461. Unfortunately, many VSOs support 4048, for reasons unknown.

**According to VA Public Affairs, Mr. Leney “says this rule is not an issue for OSDDBU and he declines an interview.”**

*The proposed Interim Final Rule (IFR) places all SDVOSB last in set-aside priority for VA contracts.*

The IFR needs clearance from the White House before a Final Rule is published...what's the deal on Pennsylvania Avenue? Where are our members of Congress and why are they not all over this with phone calls and back room conferences? Guess where Shinseki is and what he's doing? He's talking with the WH and saying that 'Yep, we put Veterans First. Yep, those vets coming back from the Middle East, we have their interests at heart, by God, they're first in line.' Unfortunately, new startups can't compete in the vast majority of cases.

The Interim Rule signed by Deputy Secretary Gingrich on January 18 was delivered to the WH and has not been finalized by the Office of Management and Budget... Why did the SDVOSB community hear about it April? Paging Tom Leney...why did you not tell us about this in January?

**Editorial, cont, page 8**

## Let's Talk Solutions

An email to SDVOSB leaders on the 'surprise' Interim Rule from **Chet McLendon**:

"Let's identify the problem:

VA believes if they abide with Veterans First, the Supply Fund will be jeopardized and Veterans will cost them more money and time. However, the VA has recently engaged in reverse auction strategies like FedBid. Sales through FedBid do not contribute to the Supply Fund.

### **Possible Solution: Veterans First Supply Schedule (VFSS)**

VFSS is managed by VA, with a designated portion allocated to OSDBU office. I bet the OSDBU office would fight for us if a portion of their operation budget was based on sales through veteran businesses. Our top advocate needs to have their own budget and shouldn't have to beg Contract and Acquisitions for money to support the program that is meant to verify and certify that veteran businesses are legit. VFSS solves that problem or offers up options. Veterans can apply for the VFSS just as they do the FSS.

However, certain requirements must be relaxed, such as the "significant commercial sales" requirement, to allow veterans who do not have significant sales to participate. Veterans who currently have an FSS can either transfer to the program or keep their existing FSS. Also, the VA must be allowed to receive SDVOSB and VOSB credit for purchases via VFSS sales that goes through the VA prime Vendor Program. Veterans should be allowed to insert their items in the VA prime vendor program. This saves the VA money because it will save on distribution costs. Veteran businesses would only have to pay to get products to a Prime Vendor location and not 150+ medical facilities; lower costs are transferred to the VA.

All purchases within Simplified Acquisition Procedures (SAP) solicited on FedBid currently do not consider Veterans First and do not pay into the supply fund. Moving forward all purchases via FedBid or a similar contracting vehicle must consider offers from veterans first. Purchases via this reverse auction capability also pays a percentage of sales to the Supply Fund. If FedBid is truly saving the VA money they can continue to use it, but now it will pay into the Supply Fund only for those purchases via veteran small businesses.

I am sure with the number and capability of veteran firms out there we could find and compete a reverse auction capability amongst veterans only for small businesses. SAP should be only for small businesses. Right now industry dictates to the VA what prices and products are available. If the VA made it clear that when possible purchases are going through veteran owned companies the industry will adapt. Large vendors will figure out how to do business with veterans, become more efficient, and lower costs. The increased competition will force the market to respond. If manufacturer X knows that competitive products are being offered by a veterans representing other companies, manufacturer X will figure out how to become more competitive. Industry will seek out SDVOSB and VOSB concerns to mentor. Mentoring will spurn manufacturing and businesses developed by veterans that solve VA's needs and problems.

Manufacturing and business development creates jobs. This concept can work. Obviously some gaps need to be filled and details worked out, but this approach will save the VA money, converge with the law (38 USC 8127-8128 and the Small Business Act), maintain and increase the supply fund, support CVE, support veteran businesses, spawn manufacturing by veterans, streamline acquisitions, save time, and reconcile VA's concern for the Supply Fund with their obligation to Veterans First. Correct me if I am delusional, but that is a Win/Win/Win/Win/Win/Win/Win/Win/Win situation. Is this a concept you all can get behind? Is this something we can offer to Mr. Shinseki, Mr. Gingrich, and Mr. Frye? We don't have a problem here, we have an OPPORTUNITY to make things happen!"



## Betrayed, from page 1

Based on PL 109-461, the Government Accountability Office (GAO) has sustained protests by SDVOSB several times in the past four months, but the VA issued an internal memorandum to contracting staff that GAO was to be ignored. VA issued a formal letter to GAO in March that indicates the VA is not bound by GAO and would therefore not abide by its determinations.

The Interim Final Rule was submitted to the White House for approval on January 18. The SDVOSB community — to our knowledge — did not become aware of the Interim Rule until early April.

### Interim Final Rule

<http://tinyurl.com/7vtkn57>

Coverage from Bloomberg::

<http://tinyurl.com/6rec4qy>



## Snowe-Shinseki, from page 4

Committee on Small Business and Entrepreneurship. I am certain that the Director of VA's Office of Small and Disadvantaged Business Utilization, Mr. Tom Leney, objected to the attached letter and the interim rule.

And the ultimate irony by the Secretary:  
"I share your concerns about assuring that only eligible SDVOSBs participate in our "Veterans First" program. Doing so will enable them to compete fully and fairly, enabling them to share in the very *American Dream they enable others.*" (emphasis mine)

Thank you for your time and attention.  
Hardy Stone, publisher  
*VetLikeMe*

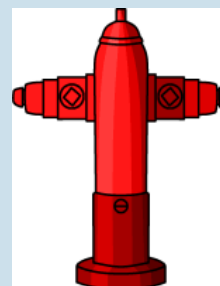


## Editorial, from page 6

**According to VA Public Affairs, Mr. Leney “says this rule is not an issue for OSDBU and he declines an interview.” (with VLM)... Programs within VA had never heard of the Interim Rule, not Public Affairs, not Leney’s Executive Assistant... This seems to be the biggest issue for the VA OSDBU ever.... Where is Tim Foreman? Now is the time we need someone with balls who will stand in the face of the VA traitors and fight for veterans.**

The Interim Rule denies PL 109-461 (“Veterans First”). The VA boasts that the agency has met its SDVOSB contracting goals and can therefore ignore Veterans First. As a result of their magnanimous adherence to these goals, the VA is no longer bound by the law? This is bullshit.

Drinking from a fire hydrant—it’s baffling and painful. Are the holders of the spigot trying to put out the fire? Or bloody our faces and move us out of the way?



## Verification

### CVE Changing of the “Guard?”

A. Michelle "G-I" Gardner-Ince  
 Director  
 Center for Veterans Enterprise  
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### Simplified Verification?

Contractors whose veteran-owned small business status is set to expire will soon see a more simplified process to ensure they can continue competing for contracts set aside by the [Department of Veterans Affairs](#).

That was the word from a high-ranking VA official during a small business forum Tuesday. Veteran-owned small businesses must be verified annually to remain eligible for set-aside contracts from the VA, as required by a policy that kicked off in February 2011 to weed out fraud.

Currently, veteran-owned small businesses facing a renewal deadline need to repeat the onerous process they endured to enter the program in the first place — involving the submission of hundreds of documents, followed by about two months of waiting for an official decision.

Details here from *Washington Business Journal*:

<http://tinyurl.com/7fdw7za>

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## Hank Wilfong

### GSA TO BLAME FOR VA ISSUE?

#### MAYBE...

We wondered and wondered what was behind The VA playing hardball with VETS First. Maybe we got the answer now. Maybe it was GSA bucks.... Big bucks causes folk to do weird things. The GSA fee could have turned VA's head. Here's the way it works.

Businesses pay VA a 1% or 0.5% Industrial Funding Fee for every sale. Money goes to special VA account for executive bonuses, holiday pay, student loan repayment, cash allowances, etc. VA Supply Fund-VA made \$48 million in profit in 2009, with retained amount of \$235 million in non-appropriated funds.

**Is there any wonder then that Secretary Shinseki and his senior acquisition executives mandate all VA facilities to buy from businesses with a Federal Supply Schedule (FSS)?**

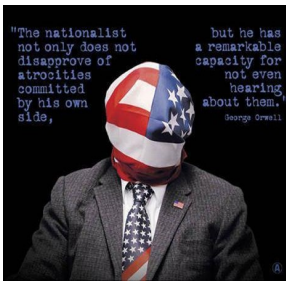
Remember the GAO Decision in the Aldevra Case.

"...We see nothing in the VA Act or the VAAR that provides the agency with discretion to conduct a procurement under FSS procedures without first determining whether the acquisition should be set aside for SDVOSBs. The provisions of both the VA Act and the VAAR are unequivocal; the VA "shall" award contracts on the basis of competition restricted to SDVOSBs where there is a reasonable expectation that two or more SDVOSBs will submit offers and award can be made at a fair and reasonable price. Thus, contrary to the agency's position, the VA Act requires, without limitation, that the agency conduct its acquisitions using SDVOSB set-asides where the necessary conditions are present. 38 U.S.C. sect. 8127-8128."

GAO upheld the protest. But, VA would not submit.

Now, maybe, we have the answer as to why VA would not concede. Maybe the GSA bucks corrupted them.

This foolishness at GSA must be stopped. ~



## Frauds

A popular feature of *VLM*, these fraudulent companies get their just deserts. Everybody likes to catch a

thief.

Fraud in SDVOSB program? No kidding...

GAO Oversight and Investigation holds hearing to address fraud and prevention.

<http://tinyurl.com/7g3c78h>

In Maryland, conspiracy: Theodoros N. Hallas, 39, of Potomac, Md., the former Executive Vice President of Operations for Nova Datacom, LLC, pled guilty in U.S. District Court for the District of Columbia of conspiracy to commit wire fraud.

<http://tinyurl.com/7utha45>

Pass through in Georgia:

<http://tinyurl.com/7auodk8>

...another VA false accusation of fraud....collateral damage? Fallout from 2009 fraud scandal?

<http://tinyurl.com/buhdmqp>

Thief in Atlanta:

<http://tinyurl.com/co3wvxa>



## Short Takes

As the unemployment rate for Iraq- and Afghanistan-era veterans continues to climb, more states and localities are establishing purchasing preferences for veteran-owned businesses (VOBs). Current-war veteran unemployment is more than four percentage points higher than the national average of 8.5 percent.

<http://tinyurl.com/6ql5xyb>

VA Wastes Millions Treating Medicines as 'Prosthetics' while subverting veterans preference:

<http://tinyurl.com/7cmxd2e>

Using GI Bill for startups backed:

<http://tinyurl.com/3hoh3j4>

Dear Mr. Secretary:

Congressman Joe Courtney wrote to Secretary of Defense Leon Panetta to express concern with the Pentagon's effort to set-aside contracts for companies owned by disabled veterans.

<http://tinyurl.com/6rfl97h>

### VA kicks off acquisition training program for wounded vets

The Veterans Affairs department formally launched its new program designed to train wounded vets to become acquisition professionals with a ribbon-cutting ceremony held Jan. 19 at its Frederick, Md., facilities.

<http://tinyurl.com/89jyafm>

...and in New Mexico, a father son team to defraud SDVOSB:

<http://tinyurl.com/7rks42e>



BUFFALO, N.Y. (WIVB) - A man responsible for purchasing items for the VA Hospital in Buffalo is going to prison for accepting illegal gifts from sales agents.

<http://preview.tinyurl.com/72379kc>

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Aaron Bennett, whose firm captured Army Corps of Engineers contracts by questionable means, is now being accused of raiding \$600,000 from corps projects -- a situation that could stall important storm-proofing work on New Orleans' pumping stations. Mr. Bennett has already gotten in trouble when it comes to contracts.

<http://tinyurl.com/7fqls5m>

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**Hiring Veterans: Good for a Company's Bottom Line:**

<http://tinyurl.com/7ohwd9c>

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The DOD IG's disappearing report:

<http://tinyurl.com/86ac8m4>

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Agencies: Stop abusing simplified acquisitions. Reverse Auctions are bad for SDVOSB and all SB. Raul Espinosa

<http://preview.tinyurl.com/8x4tkw9>

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Penalize Federal Executives that don't meet agency SDVOSB goals...now we're talking:

<http://tinyurl.com/7y7zabg>

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New GI Bill Promises Veteran Entrepreneurship And Jobs Creation; Bill Authored By Service Disabled Veteran:

<http://tinyurl.com/6wtmux4>

## *State Activity*

### *Hawaii*

The Hawaii House Republican Caucus is calling upon the State to dedicate three percent of all state purchases, an estimated \$33 million per year, to Hawaii-based veteran-owned businesses. This bill would establish a 4.5% preference for a veteran-owned business and a 5% preference if the veteran was serviced-disabled.

<http://tinyurl.com/89x5e2w>

### *Guam*

Territory contract: 5% preference for SDVOSB:

<http://tinyurl.com/89vnkoj>

### *Delaware*

Introduced new legislation that would help put returning veterans back to work. House Bill 275 would offer companies a maximum \$1,500 annual tax credit for a period of three years for each qualifying veteran they hire.

<http://tinyurl.com/722dr7c>

### *South Carolina*

Veterans get help on city contracts—Council vote gives their businesses preferred status:

<http://tinyurl.com/7z8vklr>

### *Louisiana*

Louisiana Economic Development and the Louisiana Department of Veterans Affairs are celebrating the contributions of Louisiana's military veterans and making both veterans and the general public aware of state business opportunities for veterans.

<http://tinyurl.com/76lcpdz>



## HR 4048—

**Confusion in the Ranks—and Discord**

**From the moment this bill was introduced, HR 4048 became a lightning rod.**

To amend title 38, United States Code, to clarify the contracting goals and preferences of the VA with respect to small business concerns owned and controlled by veterans. H.R. 4048 would require VA to include the value of goods and services procured through the Federal Supply Schedule (FSS) when determining whether they are meeting the goals established for contracting with SDVOSBs.

**Sponsor: Bill Johnson (R-OH)**

**Introduced: February 16, 2012**

**Referred: House Committee on Veterans' Affairs**

Historically, military veteran organizations have seen legislation through disparate binoculars. The Disabled American Veterans, American Legion, Veterans of Foreign Wars, the Iraq and Afghanistan Veterans Organization, Paralyzed Veterans of America have differing agendas—many of which support the interests of their members—but not necessarily the veterans community as a whole. HR 4048 is a perfect example of the discord between VSOs and the members they support. Below are excerpts of official statements by some VSOs with regard to HR 4048:



**Disabled American Veterans:** Although VA as a matter of practice is currently including FSS purchases in its current annual reporting under Section 8127, this legislation would codify this practice for this and future Administrations. DAV does not have a resolution specific to this issue; however, we are not opposed to the passage of this legislation as it could prove beneficial to disabled veteran business owners.

**Paralyzed Veterans of America:**

PVA supports H.R. 4048, the “Improving Contracting Opportunities for Veteran-Owned Small Business Act of 2012.” This legislation would ensure that proper priorities outlined in title 38 U.S.C, §8127 are followed when the VA chooses to initiate a contract under the Federal Supply Schedule. PVA has long been a proponent of contracting preference being provided to service-disabled veteran-owned and veteran-owned small businesses. This preference should be applied in any contracting activity that the VA conducts.

**Iraq and Afghanistan Veterans of America:** IAVA supports H.R. 4048, extending veterans preference to veteran-owned small businesses that wish to list services to the federal government in the GSA catalogue. ... At a time where veteran unemployment is staggering, this bill will provide more opportunities for veteran business owners to offer goods and services to the country that they have fought to protect.

**American Legion:** The barriers to entry for small businesses are numerous: weak policies and rules that limit the effectiveness of tools that are supposed to facilitate contracting opportunities...Action must be taken to remove these barriers and ensure small businesses get access to federal contracts. The American Legion fully understands and supports Title 38 section 8127 and 8128 does not automatically award VA government contracts to SDVOSB / VOSB; however, when qualified SDVOSB / VOSB are being overlooked or ignored by the VA this is cause for great concern.

**Veterans of Foreign Wars:** H.R. 4048 clarifies provisions of the Veterans First Contracting Program (P.L. 109-461) as it pertains to contracts awarded through the Federal Supply Schedule (FSS) for the purpose of meeting the percentage goal for contracting with Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), and the VFW is proud to support this bill.

**HR 4048, cont. page 13**

**HR 4048, from page 12**

Conspicuously absent from comment on 4048: **VetForce**

HR 4048 is not in the best interest of SDVOSB. This bill supports the VA's contracting positions in concept, this bill justifies the VA in breaking PL 109-461. "Veterans First" means just that. This bill brazenly supports the Federal Supply Schedule (FSS) over PL 109-461. If some capitulation is required, 4048 beats the IFR.

**Timothy Barton, President, KingdomWare Technologies:** This Bill may allow more SDVOSBs and VOSBs to get more work at VA, but it will be primarily those SDVOSBs and VOSB's with GSA FSS Schedules. What about the rest of our SDVOSBs and VOSBs? Not only is the letter of PL 109-461 being trampled upon, but its spirit and intent are becoming nothing but hollow promises. Again, Vets First under PL 109-461 says nothing about GSA FSS activity.

**HR 4048 Analysis**

At a hearing on November 30, Bill Johnson, Chairman of the Subcommittee on Oversight and Investigation, House Veterans Affairs Committee asked VA counsel Mr. John Thompson:

"Could you please tell me, tell this Committee how the VA considers itself exempt from the mandates set out in Public Law 109-461?...The government cannot be sued for not meeting goals. The federal government can be sued for not adhering to the law. Why is there such reluctance by the VA to follow the law as interpreted by the GAO?? I disagree, GAO disagrees...is there going to be a review? Because you've been told by the GAO that your interpretation is wrong."

Later in the hearing, Johnson asked Ralph White, GAO's Managing Associate General Counsel for Procurement Law, (referring to the debate over 109-461 and its directive that VA 'shall' put SDVOSB first for Department procurements, Chairman Johnson asked Mr. White a critical question about GAO's recommendations to VA: "What is your interpretation of the word 'shall'?" Mr. White drew laughter from the galleries when he responded: "It certainly isn't 'may.'"

What happened to Chairman Johnson's previous understanding of PL 109-461? Why has he abandoned SDVOSB and the priority we 'have' in VA contracting? Help me understand, or better yet, would someone help the Chairman understand? HR 4048 kills "Veterans First" at VA for those of us that don't have an FSS schedule..

*VLM* has featured unvarnished national news and editorial opinion concerning the SDVOSB community since Nov. 2009. From the beginning we've operated in the red, but this publication will always be free.

We hope *VLM* keeps the SDVOSB community informed so that decision makers are pressured to provide increased federal contracting opportunities for those of us injured while serving our country.

We are pleased to announce our first official sponsor:

**Blackhorse Worldwide, LLC, Overland Park, Kansas**

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## The Mechanics of FedBid

By Bob Hesser

The VA temporarily stopped using FedBid (they have since reinstated it). The other agencies should follow their lead. This is because there are two primary terms and others that are problematic for small business. Second, is the fact that nowhere in FedBid is it evident that a government agency can prove a specific buy saved money. They do not have control of all aspects of the negotiations. Contracting is an inherently government responsibility to be carried out by government personnel.



The first problem is that “Blind Reserve Bids” that are in place before the buy opens and probably include the federal agency’s budget number plus a 3% FedBid fee. These are not flagged and can cause a seller to go **into LAG - Pending Selection** (this means that a Bid is NOT in the lead position once the Reverse eAuction process has ended; and that it may be lagging to competitor Bids and/or an Active Target Price (ATP). Then the seller may keep lowering the price when they are the only bidder. They bid against themselves. They do not have the option to decline an order if they suspect they were tricked by the system.

The second one is the risk of being blacklisted. I cannot understand what a Commercial Credit Reporting Service (Experian) has to do with submitting a bid, but FedBid has woven this into the Performance Alert/Activity Card process.

Many of the terms have to do with keeping the FedBid Fee hidden or not disclosing to the Federal agency. Lots of terms and penalties relate to paying FedBid their 3% fee and penalties if a seller does not pay the fee. Many of the terms have to do with the Buyers right to change, cancel, repost, invite more potential sellers in, etc. Very few rights are provided to the sellers.

If a small business actually read these terms, I believe they would be reluctant to accept them, given the high risk of bidding against yourself and potentially being blacklisted.

### **How can the Federal government sole source so many FedBid purchases?**

Words from FedBid T’s & C’s explain how they get their money. “FedBid Fees means fees applied to the transaction by FedBid, including the Transaction Fee, as well as subscription and/or per-event management fees, as determined by the Buyer. During the bidding process, **FedBid Fees are incorporated into each of the Bids**; however, **only the Selected Seller incurs FedBid Fees**, which must be received by FedBid or the FedBid Authorized Agent by the Payment Due Date. Sellers not selected do not incur any FedBid fees.”

Words from FedBid T’s & C’s explain clearly that the FedBid Fee is added onto the seller price. “Subscribing to FedBid is free to Buyers and Sellers; however, FedBid applies a proportional Transaction Fee to all Bids within a particular Buy and includes the Transaction Fee in the total Bid Price submitted to the Buyer for consideration. Unless otherwise agreed by FedBid and Buyer, the resulting FedBid Fee for any Buy is included.”

Repeatedly government officials, as high as SES, will boast about the hundreds of thousands or millions they save because of their use of FedBid. I think the odds are pretty good when the government uses FedBid they are paying 3% more than the Sellers lowest price.

**Hesser, cont. page 15**

## Hesser, from page 14

Repeatedly government officials, as high as SES, will boast about the hundreds of thousands or millions they save because of their use of FedBid. I think the odds are pretty good when the government uses FedBid they are paying 3% more than the Sellers lowest price.

The FedBid website states: “During 2011, thousands of Buyers at federal and commercial organizations utilized FedBid, resulting in double-digit NET average savings, and approximately 80% of all dollars were awarded to small businesses. To date, FedBid customers have awarded billions worth of acquisitions through FedBid. How do they know these figures are accurate? “...double-digit NET average savings...” Compared to what? FedBid, though confusing, is another contracting vehicle detrimental to SDVOSB. Read about it here and make your own judgment:

<http://tinyurl.com/86hv5w3>

## GAO Sustains Aldevra Protest Round III

Aldevra, the heroes of the SDVOSB community, again had their VA protest sustained by GAO for failure to conduct market research for eligible SDVOSB that can complete the terms of the contract. Rodney and Maggie have become household names to SDVOSB, having won three of three GAO protest since October 2010. We caught up with Maggie Bullard-Marshall on April 29 and the relentless SDVOSB advocate commented on the third GAO victory.

“It would be nice if we SDVOSBs could focus on providing high quality products and services at the best value to the VA instead of fighting every solicitation. It's time for the President & Sec. Shinseki to stand up for veterans. After all, we only ask for consideration. I'm not sure why Congress feels it is in the taxpayers' best interest to spend millions on a SDVOSB verification program when the VA continues to refuse to consider us when purchasing goods and services, even for small items like griddles and refrigerators.”

### Aldevra I

<http://www.gao.gov/decisions/bidpro/405271.pdf>

### Aldevra II

<http://gao.gov/assets/590/589379.pdf>

### Aldevra III

<http://www.gao.gov/assets/590/589379.pdf>

**“[We] don't expect to win anything, but on the other hand, we have nothing to lose.”**

**Hunter S. Thompson**

# Interpretation of 109-461

## From the desk of Timothy Power, Esq.

Does the Interim Final rule to the Department of Veteran Affairs acquisition regulation (VAAR) spell doom for the Veterans First contracting program? Not in my opinion. The interim rule amends VAAR 819.7001 to add subsection (c) stating 819.7001 (the Veterans First program) does not apply to requirements that can be satisfied through (1) Ability One, (2) Federal Supply Schedules, (3) the Government Printing Office, or (4) indefinite delivery contracts.

The interim rule is supposed to clarify that the VA can use any of the above acquisition methods before considering a SDVOSB set-aside. However, the rule also clarifies the basis upon which the VA relies to give those methods priority over SDVOSB set-asides. The rule relies upon FAR Part 8 for the preferences excluded from VAAR 819.7001. Prior to this the VA in *Service Disabled Veteran Owned Small Business Network v. United States et al* had relied upon (1) an interpretation of 38 U.S.C. §8127(d) as not creating a mandatory set-aside and (2) FAR Part 8's sources of supplies and services.

The basis for my opinion that this rule does not spell doom for the Veterans First contracting program is the basic rules of law that (1) statutes take precedence over regulations and that (2) regulations have to follow the statute that authorizes them. If 38 U.S.C. §8127(d) is interpreted to establish a mandatory SDVOSB set-aside, as I believe it will, the VAAR cannot change this. Under this interpretation the exceptions in the interim rule would fall to the provisions of the statute as either unauthorized by the statute or in conflict with the statute.

By relying upon FAR Part 8 as the justification for the alleged preference for the FSS and Ability One programs, the VA has created a conflict between a regulatory mandate in FAR Part 8 and a statutory mandate in 38 U.S.C. §8127(d). The statute wins. If the VA based its position on Ability One's preference upon conflicting statutory mandates for Ability One and SDVOSB set-asides, the better argument is that the Veterans First program would prevail as being the most recently enacted statute and that it is the more specific statute. No statute mandates the use of FSS.

The most important clarification this rule gives is the unintended one that the FSS and other alleged preferences to SDVOSBs is now firmly based upon FAR Part 8 and not upon any interpretation of 38 U.S.C. §8127 that the mandatory set-aside can only be used to meet the DVA's annual goals for SDVOSB or VOSBs.

By relying upon FAR Part 8 as the justification for the alleged preference for the FSS and Ability One programs, the VA has created a conflict between a regulatory mandate in FAR Part 8 and a statutory mandate in 38 U.S.C. §8127(d). The Veterans First statute wins.

**Filner, from page 2**

sector. Since DoD is the largest agency it has the biggest budget and procurement dollars to help veteran small businesses get started and grow in large enterprises that will hire other veterans.

*VLM: How many SDVOSB are there in CA?*

**BF:** According to the Small Business Administration, Office of Veterans Business Development there are nearly 2,000 SDVOSB in California.

*VLM: DoD has a significant procurement presence in CA. Do you think that HR 3438, if passed, will provide more subcontracting opportunities in the federal marketplace for SDVOSB?*

**BF:** If DoD were to meet a higher set-aside number than they are currently meeting, I believe that it would provide more opportunities nationwide. So I would expect simply because of this California would see benefits from a stronger effort from DoD.

*VLM: If DoD finally follows the law and provides more opportunities for SDVOSB, do you think additional legislation will be introduced compelling other government entities to do the same?*

**BF:** It is not if DoD follows the law it is when we compel DoD to follow the law. We should not expect anything less from all of our federal agencies.

*VLM: Is there broad bipartisan support in Congress for HR 3438?*

**BF:** I believe that once people know about the bill and know how important it is in our overall effort to advance the agenda of veterans it will garner support from both sides of the aisle.

*VLM: Thus far, who is co-sponsoring the bill?*

**BF:** I do not have any co-sponsors at this time so I welcome all our readers calling their Members of Congress to co-sponsor my bill and help me to better educate their Member of Congress on these issues.

*VLM: The defense industry has an overwhelming lobbying presence in Washington. How might this effect Congressional reception of HR 3428?*

**BF:** On any issue in Washington there are scores of lobbyists on both sides, so I do not worry about much about them. I worry about doing the right thing for our veterans. Our veterans have earned our support through their sacrifice – this is why I want the best for our veterans and their families.

*VLM: Do you think that HR 3438 can 'set the table' for a government-wide commitment to SDVOSB? Will other legislation need to be introduced to require other agencies to abide by the law—PL 106-50?*

**BF:** That is what I would like to see happen. This is a good starting point by beginning with the largest federal agency. As you know, VA is the second largest federal agency. The difference is that VA is already meeting the set aside goals. If we can get some good results with DoD we can have a large and immediate impact in the SDVOSB community.

*VLM: Will you introduce companion legislation in the future to compel other agencies to abide by the 3% minimum?*

**BF:** Logically that would make good sense. Right now I am focused on DoD. You should pick one fight at a time and gather as much support as possible. If we go in so many different directions it will dilute our strength and diminish our focus.

*VLM: Veterans hire other veterans. The unemployment rate for returning veterans from the Middle East by far exceeds the national unemployment rate. Did this factor into the decision to introduce 3438?*

**BF:** I am concerned about all veterans and we work very hard to pass bills that will have positive overall effect for everyone.

**Filner, continued page 18**

**Filner, from page 17**

**VLM:** Do you think there should be penalties imposed on agencies that do not abide by the 3% minimum? More specifically, does this legislation impose penalties on DoD for not meeting the 3% minimum?

**BF:** This bill does not impose penalties and I do not believe that is where we should go. I would be more supportive of fencing off certain dollar amounts for service disabled veteran enterprises over penalties that will not help their businesses grow. We need to convince a large bureaucracy of the value that veterans bring and how they can contribute to DoD's mission.

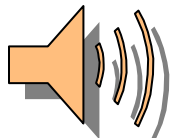
Thank you, Congressman, for spending time with VetLikeMe.



## Other Voices

VLM receives emails and comments from members of the national SDVOSB community that provide perspective and a sense of political urgency for our community. Comments, criticism and suggestions are encouraged.

**Identifying information is redacted. Email: [bluepoint1@comcast.net](mailto:bluepoint1@comcast.net)**



"There has to be a "National" outcry to the obvious and blatant attempt by the VA to ignore the significance of 109-461. It's bad enough that we, as applicants, who are attempting to get verified by the CVE may actually achieve the required status to participate in the Veterans First program only to realize that the Veterans First program is being denigrated. Has the mission goal of the VA changed to the extent that the employees have forgotten who they are serving? This is insane! This is the result of tenured employees losing their focus and falling into an abyss of complacency.

The really sad thing about what I have stated is that: unless there is a complete "cleansing" from the bottom up, it will not change."

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"Our problem boils down to the fact that the Veteran and Service Disabled Veteran community has no strong lobby voice on the Hill. The 8a community does. That makes a huge difference. We are paid lip-service; people say the politically correct things, but nothing gets done. Congress and the Administration really doesn't care at this point.

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"If someone in the VA doesn't like the Veterans First program, the easiest way to make it go away is to deny verification to the VOSB or SDVOSB companies, and then claim that there are no legitimate firms out there with which to work, or not enough."

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"I hope that everyone is not like the heard that follows the lead bull over the cliff. I am very sorry that we, as Disabled Veterans have to go through the grueling and lengthy process of certification. Last year, it took 6 months to get verified. This year, due to a continued string of requests for more paperwork, it is still not complete. They are not bestowing an honor on us. They are creating a process that discourages legitimate Veterans from even starting the process. Of course we are paying for the transgressions of others in their past illegal acts. I fault the VA for that one. Checking the status of any Disabled Veteran should take 5 minutes or less via computer links to government records. A simple questionnaire could suffice for verification of a business and the validation of that business could be check via the state or county that business is registered in. In the past, neither process was followed and that left the door open for illegal activity. We, the Veterans are now paying the price for a bad government system. As far as taking time to validate our companies, the VA has typically under-manned their staff. They knew the demand and they have not stepped up and we pay."

"This is a real negative (The GAS pamphlet encouraging schedule for SDVOSB) for the guys not on the schedule and makes is so easy for the federal buyer to avoid the tedious chore.. market research. Getting on schedule is not easy and takes time. Everyone knows being on schedule does not guarantee business. I hope the federal contracting officials meet personally with veteran owned and service disabled veteran owned small businesses (ESPECIALLY THOSE NOT ON SCHEDULE) and expand their universe of choices. These guys deserve a chance."

"We are on a (GSA) schedule but buying is very slow on the schedule then one may think. Since being on the schedule we have sold no business to the Government. Our private sector market is 90% of our revenue. As the Gov. gets more restrictive on the funds it's best to look to the private sector to supplement your revenue for 2012. I will bet the Gov. will fail to make 3% on the schedule either. I hope they use the schedule? We will see."

The logo for BluePoint Productions features the company name in a blue, cursive-style font. The word "BluePoint" is on the top line and "Productions" is on the bottom line. A blue arrow points to the right from the end of "BluePoint", and another blue arrow points to the left from the beginning of "Productions".

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