

Verification Assistance Briefs (VAB)

In an effort to assist applicants in obtaining verification for the Veterans First program we provide the following Verification Assistance Briefs (VAB). We have developed VAB to clarify the rules associated with 38 CFR 74. They are based on an analysis of issues that cause the majority of denials.

Board Governance

Documenting Control – Corporation Board Of Directors’ Governance

Issue: Demonstrating control.

Board of Directors governance rules, usually found in Corporate Bylaws, is the number one reason why corporations are found to be ineligible for the Veterans First Procurement Program under Public Law (P.L.) 109-461. [additional info](#)

Center for Veterans Enterprise Verification Education Brief - *Providing Clarification to Promote Verification*

Documenting Control – Corporation Board Of Directors’ Governance

Issue: Demonstrating control.

Board of Directors governance rules, usually found in Corporate Bylaws, is the number one reason why corporations are found to be ineligible for the Veterans First Procurement Program under Public Law (P.L.) 109-461.

The Regulation – 38 CFR § 74.4

38 CFR Part 74 is the regulation that implements P.L. 109-461 and establishes eligibility requirements.

38 CFR § 74.4(f) states that “One or more Veterans must control the board of directors of a corporate applicant or participant. ”

38 CFR § 74.4(f)(1) states that "CVE will deem Veterans or service-disabled Veterans to control the Board where:

- (i) A single veteran owns 100 percent of all voting stock of an applicant or participant concern;
- (ii) A single veteran owns at least 51 percent of all voting stock of an applicant or participant, the individual is on the board of directors and no super majority voting requirements exist for shareholders to approve corporation actions. Where supermajority voting requirements are provided for in the concern's articles of incorporation, its by-laws, or by State law, the veteran must own at least the percent of the voting stock needed to overcome any such supermajority voting requirements; or
- (iii) No single veteran owns 51 percent of all voting stock but multiple veterans in combination do own at least 51 percent of all voting stock, each such veteran is on the board of directors, no supermajority voting requirements exist, and the veteran shareholders can demonstrate that they have made enforceable arrangements to permit one of them to vote the stock of all as a block without a shareholder meeting. Where the concern has supermajority voting requirements, the veteran shareholders must own at least that percentage of voting stock needed to overcome any such supermajority ownership requirements."

38 CFR § 74.4(g) allows non-Veterans to be involved in the management of the applicant.

38 CFR § 74.4(g)(1). states that "no non-Veterans may "[e]xercise actual control or have the power to control the applicant or participant."

38 CFR § 74.4(i) provides a non-exhaustive list of circumstances in which non-Veterans or entities may be found to control or have the power to control the applicant.

"(i) Non-veterans or entities may be found to control or have the power to control in any of the following circumstances, which are illustrative only and not all inclusive:

- Non-veterans control the board of directors of the applicant or participant, either directly through majority voting membership, or indirectly, where the by-laws allow non-veterans effectively to prevent a quorum or block actions proposed by the veterans or service-disabled veterans.
- A non-veteran or entity, having an equity interest in the applicant or participant, provides critical financial or bonding support or a critical license to the applicant or participant which directly or indirectly allows the non-veteran significantly to influence business decisions of the participant, unless an exception is authorized by the Office of Small and Disadvantaged Business Utilization.
- A non-veteran or entity controls the applicant or participant or an individual veteran owner through loan arrangements. Providing a loan guaranty on commercially reasonable terms does not, by itself, give a non-veteran or entity the power to control a firm.
- Business relationships exist with non-veterans or entities which cause such dependence that the applicant or participant cannot exercise independent business judgment without great economic risk.

What This Means

It is very important to understand that compliance with 38 CFR § 74.4(f) is necessary but not wholly sufficient to demonstrate control of an applicant. Firms must also demonstrate that non-Veterans do not have the ability to control the applicant. Firms must comply with 38 CFR § 74.4(g) to include, but not limited to the examples provided in 38 CFR § 74.4(i) that addresses how non-Veterans or entities may be found to have the power to control the company, thus making it ineligible for Vet First. Eligibility for the program is dependent on a board governance structure and process that meets both 38 CFR § 74.4(f) and 74.4(g), particularly as illustrated in 74.4(i).

- 38 CFR § 74.4(a) requires that the Veteran(s) must have control over the day-to-day operations and strategic direction of the company. It states that “[c]ontrol means

both the day-to-day management and long-term decision-making authority for the VOSB.” 38 CFR § 74.4(a).

However, having control of the Board of Directors does not necessarily mean that the Veteran wholly satisfies the control requirement. The Veteran must also be in control of the day-to-day management of the applicant (as well as the long-term strategic decision-making authority for the VOSB/SDVOSB). Furthermore, the applicant must demonstrate that non-Veterans do not control or have the power to control the applicant in accordance with 74.4(g) and (i).

- A non-Veteran owner(s), manager or board member must not have the ability to overrule any decision made by the Veteran owner(s) under any circumstances.
- The ability to hire and fire board members is not sufficient if the Bylaws give the board the ability to make legally binding decisions without approval of the Veteran owner(s).
- A firm is not verifiable if non-Veterans have the possibility to out vote the Veteran(s), can be deemed a quorum without the presence of the Veteran(s), can prevent the attainment of a quorum by their absence or in any way preclude the Veteran owner(s) from making any and all decisions on the firm.
- Veteran owners must always have the majority vote, either by representation on the board of directors or by weighted voting. A corporation with two directors (one a non-Veteran) may use weighted voting to show that the Veteran has the majority vote. Weighted voting is defined as a system in which the participants have varying numbers of votes, typically by the number of shares of stock held.

Examples of Lack of Control

Quorum

Negative control by lack of quorum

- “According to Bylaws, the Board of Directors manages the corporation. A quorum for Board meetings consists of the majority of Directors, and the act of a majority of Directors present at a meeting constitutes Board action. Non-Veterans have the ability to exert negative control, as defined in 38 CFR § 74.1, when their absence from a Board meeting prevents the attainment of a quorum. Therefore, it is unreasonable to conclude that you control the business as required by the regulations.”
- “According to Bylaws the majority of Directors constitutes a quorum for a Board of Directors meeting, and the act of a majority of Directors present constitutes a Board act. Both Veteran and non-Veteran must be present for Board meetings, and you both must agree to make a Board act. Thus non-Veteran can exert negative control by preventing a quorum or blocking Board action, as prohibited by 38 CFR § 74.4(g) (1). Therefore, it is unreasonable to conclude that you control the business as required by the regulations.”

Negative control by lack of Veteran in a quorum

- “According to Bylaws, the Board of Directors manages the corporation. A quorum for Board meetings consists of the majority of Directors, and the act of a majority of Directors present at a meeting constitutes Board action. According to corporate documentation, there are 3 Directors of the corporation: Veteran, non-Veteran, and non-Veteran. Since only a majority is needed for a quorum, the Veteran can be excluded entirely from Board meetings and Board action. Non-Veteran and non-Veteran have the ability to exert negative control, as defined in 38 CFR § 74.1. Therefore, it is unreasonable to conclude that you control the business as required by the regulations.”
- “CVE is unable to conclude that you satisfy the control requirements set forth in 38 CFR § 74.4. According to your Bylaws, the Board of Directors manages your corporation. A

quorum for Board meetings consists of the majority of Directors, and the act of a majority of Directors present at a meeting constitutes Board action. According to your corporate documentation, there are 3 Directors of your corporation: you (Veteran), Jane Doe, and John Doe, both non-Veterans. Since only a majority is needed for a quorum, you can be excluded entirely from Board meetings and Board action. Ms. Doe and Mr. Doe have the ability to exert negative control, as defined in 38 CFR § 74.1. As such, it is unreasonable for CVE to conclude that you satisfy the control requirements of the regulations.”

Lack of Weighted Voting

- Corporate Bylaws states that, business of a corporation shall be managed by its Board of Directors. In the case where there are only two directors of the company: Veteran and non-Veteran, and there is no provision for weighted voting, or other provision that in the event of a deadlock that the Veteran’s decision prevails, the firm fails to meet the requirements of 38 CFR § 74.4(i)(1) as the non-Veteran director can exercise negative control as defined by 38 CFR § 74.1 by blocking corporate action. Therefore, it is unreasonable to conclude that the Veteran controls the business as required by the regulations.
- “You supplied Corporate Bylaws for your company. Article II Section 1 states that, “...all corporate powers shall be exercised by or under the direction of, and the business and affairs of the corporation shall be managed under the direction of, the Board of Directors.” Article II, Sections 6 and 7, state that a quorum will be a majority of the directors and that the vote of a majority of the directors present when a quorum is established will be the act of the Board of Directors. The supplied Articles of Incorporation dated 08/27/2010 list you and Mr. John Doe, a non-Veteran, as directors of the company. There is no provision for weighted voting. Therefore, you fail to meet the requirements of 38

CFR § 74.4(f) as the non-Veteran director can exercise negative control as defined by 38 CFR § 74.1 by blocking corporate action. Therefore, it is unreasonable to conclude that you control the business as required by the regulations.”

Limitation on transfer of control

- This applies when a non-Veteran either puts stipulations on control based on an equity interest in the company or when non-Veterans transfer a majority of the stock ownership or control to the Veteran within two years prior to applying for verification and remain involved in the firm. The stipulations on equity interest are stated in 38 CFR § 74.4(i)(2) “[a] non-veteran or entity, having an equity interest in the applicant or participant, provides critical financial or bonding support or a critical license to the applicant or participant which directly or indirectly allows the non-veteran significantly to influence business decisions of the participant.” The transfer of control is spelled out in 38 CFR § 74.4(h), “[n]on-veterans who transfer majority stock ownership or control of the firm to an immediate family member within 2 years prior to the application and remain involved in the firm as a stockholder, officer, director, or key employee of the firm are presumed to control the firm,” but can be overcome by providing proper documentation that the Veteran has the requisite independent management experience and is actively participating in the firm.
- “A corporation is typically owned by its stockholders. The Articles of Incorporation state “the number of shares which the corporation is authorized to have outstanding is 950 shares”. The Stock Ledger showed on 5/05/07, John Doe and Jane Doe were each issued shares; however, the number of shares are not available. A cancelled Stock Certificate, dated 5/14/07 showed Jane Doe was issued 575 of 950 shares and held 50% ownership of the applicant. The 2010 Schedule K-1 showed Catherine Doe held 50%

ownership and John Doe held 50% ownership. The Stock Power, dated 2/1/11 showed Jane Doe transferred 8 shares to John Doe. The Stock Ledger showed that on 2/1/11, John Doe was issued 583 shares represented by Stock Certificate 3 and Jane Doe was issued 567 shares represented by Stock Certificate 4. Since Jane Doe, non-Veteran, recently transferred some stock to John Doe, confirmed service-disabled Veteran, in order to make him 51% owner of Doe Consulting, Inc.; your company does not meet the minimum 51% service-disabled Veteran ownership requirement set forth by the Code of Federal Regulations.”

Trusts

Issue: How can a firm be eligible if the Veteran owner establishes a Trust?

The Regulations

38 CFR § 74.3

- An applicant or participant must be at least 51 percent unconditionally and directly owned by one or more veterans or service-disabled veterans. [additional info](#)

Center for Veterans Enterprise Verification Assistance Brief - Trusts

Issue: How can a firm be eligible if the Veteran owner establishes a Trust?

The Regulations

38 CFR § 74.3

- An applicant or participant must be at least 51 percent unconditionally and directly owned by one or more veterans or service-disabled veterans.
- (a) Ownership must be direct. Ownership by one or more Veterans or service-disabled Veterans must be direct ownership. An applicant or participant owned principally by another business entity or by a trust (including employee stock ownership plans [ESOP]) that is in turn owned by one or more veterans or service-disabled veterans does not meet this requirement. However, ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by a veteran or service-disabled veteran where the trust is revocable, and the veteran or service-disabled veteran is the grantor, a trustee, and the sole current beneficiary of the trust. For employee stock ownership plans where 5 or fewer persons who are individuals, estates, or trusts own 50 percent or more of the total combined voting power of the corporation, the employee plan will be determined to be “excluded stock” and eligible parties must control 51 percent or more of the combined voting power of the corporation. For employee stock ownership plans where greater than 5 persons who are individuals, estates, or trusts own 50 percent or more of the total stock, eligible parties must control 51 percent or more of the combined voting power of the corporation, including the ESOP stock.
- (b) Ownership must be unconditional. Ownership by one or more veterans or service-disabled veterans must be unconditional ownership. Ownership must not be subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal

commercial practices and the owner retains control absent violations of the terms. In particular, CVE will evaluate ownership according to the following criteria for specific types of small business concerns.

What This Means

- In order for a trust to satisfy the ownership requirements of 38 CFR § 74.3, the trust must meet certain legal requirements:
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 - The trust must be revocable.
 - The Veteran or service-disabled Veteran must be the grantor, a trustee, and the sole current beneficiary of the trust.
 - Documentation must be provided which makes it clear that all of these requirements have been met. The Trust Agreement must be provided, if ownership is based on a Trust.
- Because the trust must be revocable, the Veteran must be able to take back full control of the trust property at any time. While there can be more than one trustee, the Veteran must be a trustee and the sole current beneficiary. To be the sole current beneficiary, the Veteran must receive the full income or other distributions from the trust property.
- Having named beneficiaries who will receive benefits or distributions from the trust property only after the Veteran's death does not conflict with the regulation, as the firm would no longer be eligible.

Excerpts from Current Denial Letters

- "CVE is unable to conclude that you satisfy the ownership requirements of 38 CFR Part 74. You supplied the "First Amendment to the Declaration of Trust Establishing The XXX. Revocable Trust". You did not supply the original trust

agreement. The amendment identifies you as the Grantor and Trustee, but the document does not identify you as the sole current beneficiary of the trust. 38 CFR § 74.3(a) does allow for ownership through a trust, but only when the trust is, "revocable, and the Veteran or service-disabled Veteran is the grantor, a trustee, and the sole current beneficiary of the trust." The supplied documentation indicates that your children shall be the beneficiaries, and without the original document, CVE is unable to conclude that you meet the requirement of direct ownership outlined in 38 CFR § 74.3(a)."

- "According to corporate documentation you own your percentage of the company through a trust. 38 CFR § 74.3(a) states that, "...a...trust, may be treated as the functional equivalent of ownership by a veteran or service-disabled veteran where the trust is revocable, and the veteran or service-disabled veteran is the grantor, a trustee, and the sole current beneficiary of the trust." You supplied a document entitled "First Restatement of the YYY Revocable Trust Agreement." This document shows that the trust is revocable, and that you are the grantor and the trustee. However, you are not the sole current beneficiary. The trust lists ZZZ and AAA as the beneficiaries of the trust. For these reasons CVE is unable to conclude that you meet the ownership requirements set forth in 38 CFR § 74.3."
- "You supplied an Operating Agreement for your company. Exhibit A of the Operating Agreement states that The VVV Irrevocable Trust owns 51% of the company. While 38 CFR § 74.3(a) does allow for ownership through a trust it requires that the trust be "...revocable, and the Veteran or service-disabled Veteran is the grantor, a trustee, and the sole current beneficiary of the trust." This trust is not revocable. Therefore CVE is unable to conclude that the trust meets the requirements, and that you own 51% of the company as is required by 38 CFR § 74.3."

Transfer Restrictions

Issue: Can there be any restrictions on the veteran owners ability to transfer ownership of the firm?

The Regulations

38 CFR § 74.3 – As relating to the ownership requirements:

- (b) *Ownership must be unconditional.* Ownership by one or more veterans or service-disabled veterans must be unconditional ownership. Ownership must not be subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity). [additional info](#)

Center for Veterans Enterprise Verification Facts Sheet - *Restrictions on Transfers*

Issue: Can there be any restrictions on the veteran owners ability to transfer ownership of the firm?

The Regulations

38 CFR § 74.3 – As relating to the ownership requirements:

- (b) *Ownership must be unconditional.* Ownership by one or more veterans or service-disabled veterans must be unconditional ownership. Ownership must not be subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than

after death or incapacity). The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms. In particular, CVE will evaluate ownership according to the following criteria for specific types of business concerns.

- (b)(1) *Ownership of a partnership.* In the case of a concern that is a partnership, at least 51 percent of every class of partnership interest must be unconditionally owned by one or more veterans or service-disabled veterans.
- (b)(2) *Ownership of a limited liability company.* In the case of a concern that is a limited liability company, at least 51 percent of each class of member interest must be unconditionally owned by one or more veterans or service-disabled veterans.
- (b)(3) *Ownership of a corporation.* In the case of a concern that is a corporation, at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding must be unconditionally owned by one or more veterans or service-disabled veterans.
- (c) *Stock options' effect on ownership.* In determining unconditional ownership, CVE will disregard any unexercised stock options or similar agreements held by veterans or service-disabled veterans. However, any unexercised stock options or similar agreements (including rights to convert non-voting stock or debentures into voting stock) held by non-veterans will be treated as exercised, except for any ownership interests that are held by investment companies licensed under part 107 of title 13, Code of Federal Regulations.
- (e) *Change of ownership.* (1) A participant may remain eligible after a change in its ownership or business structure,

so long as one or more veterans or service-disabled veterans own and control it after the change and the participant files a new application identifying the new veteran owners or their new business interest.

- (3) Where the transfer results from the death or incapacity due to a serious, long-term illness or injury of an eligible principal, prior approval is not required, but the concern must file a new application with contracting officer and CVE within 60 days of the change. Existing contracts may be performed to the end of the instant term. However, no options may be exercised.

38 CFR § 74.4 – As relating to the control requirements:

- (h) Non-veterans who transfer majority stock ownership or control of the firm to an immediate family member within 2 years prior to the application and remain involved in the firm as a stockholder, officer, director, or key employee of the firm are presumed to control the firm. The presumption may be rebutted by showing that the transferee has independent management experience necessary to control the operation of the firm, and indeed is participating in the management of the firm.

What This Means

- The Veteran owner must be able to transfer any or all of his ownership interest, to anyone, at any time, he/she pleases.
- Ownership must be unconditional. Ownership must not be subject to conditions that allow transfer of ownership benefits to another. Restrictions may not be placed upon the ownership interests of the Veteran owner. Owners should avoid the creation of any business structure which includes conditions or limitations on the Veteran owner's present or immediate right to exercise the full range of ownership rights. The existence of such provisions will prevent the applicant from receiving verified status.

- One common restriction on ownership which will prevent an applicant from receiving verified status (due to ownership not meeting the “unconditional” requirement) is requiring approval of other shareholders/members or a right of first refusal to purchase the Veteran's shares/interest for the Veteran owner to transfer his shares/interest.
- A business may remain eligible for Verification if after the ownership is transferred, another Veteran or service-disabled Veteran owns and controls the applicant and files a new VA Form 0877 application identifying the new Veteran owners or their new business interest and this change is reported to CVE within 60 days...
- If a transfer occurs based on incapacity or death, the concern must file a new VA Form 0877 application with the contracting officer and CVE within 60 days of the change.
- If a transfer in ownership from a non-Veteran to a Veteran has occurred within the past two years, and the non-Veteran remains a stockholder, officer, director, or key employee, the non-Veteran will be presumed to remain in control of the concern. Supporting documentation reflecting management experience of the Veteran and evidence of the Veteran’s current participation in the management of the applicant must be provided to refute this presumption.

Excerpts from Current Denial Letters

- “You supplied a Shareholders’ Agreement for your company. This Agreement states that, “[t]o accomplish the purposes of this Agreement, any transfer, sale, assignment, hypothecation, encumbrance, or alienation of any of the shares of the Corporation, other than according to the terms of this Agreement is void and transfers no right, title, or interest in or to those shares to the purported transferee, buyer, assignee, pledgee, or encumbrance holder. Each Shareholder shall have the right to vote shares held of

record and to receive dividends paid on them until the shares are sold or transferred in accordance with this Agreement.” A subsequent section goes on to state that, “A Shareholder may transfer all or any part of his or her shares to: [a spouse, ancestors or lineal descendants or the spouses of any of such persons, or to any trust solely for the benefit of the Shareholder or any of the foregoing persons,] provided that each such permitted transferee shall first agree in writing to be bound by the terms and provisions of this Agreement.” The agreement does not indicate any other instances where transfer of shares would be permitted. 38 CFR § 74.3(b) requires that the Veteran’s ownership interest must be unconditional. These types of restrictions, placed on the ownership rights of the shareholders, violate the requirements. For these reasons CVE is unable to conclude that you meet the ownership requirements of 38 CFR § 74.3.”

- “You supplied an Operating Agreement for your company. The pertinent Articles state that a Member shall not transfer his membership interest unless all of the Members approve of the transfer. The Operating Agreement identifies you, Jane Doe, and John Jones as Members of the company. Mr. Jones is not a Veteran. 38 CFR § 74.3(b) requires that the service-disabled Veterans own their shares of the business unconditionally. Because Mr. Jones, a non-Veteran, must approve of any transfers, a restriction is placed upon the ownership interests of you and Ms. Doe. For these reasons CVE is unable to conclude that your company meet the ownership requirements set forth in 38 CFR § 74.3.”

Joint Ventures

Issue: How can a Joint Venture be eligible for verification?

The Regulations

38 CFR § 74.1

- *Joint venture* is an association of two or more small business concerns to engage in and carry out a single, specific business venture for joint profit, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. For VA contracts, a joint venture must be in the form of a separate legal entity. [additional info](#)

Center for Veterans Enterprise Verification Assistance Brief - Joint Ventures

Issue: How can a Joint Venture be eligible for verification?

The Regulations

38 CFR § 74.1

- *Joint venture* is an association of two or more small business concerns to engage in and carry out a single, specific business venture for joint profit, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. For VA contracts, a joint venture must be in the form of a separate legal entity.

38 CFR § 74.3

- (d) Profits and distributions. One or more veterans or service-disabled veterans must be entitled to receive:
- (2) At least 51 percent of the net profits earned by a joint venture in which the applicant or participant is the lead concern;

38 CFR § 74.4

- (c)(1) An applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business. An owner engaged in employment or management outside the applicant concern must submit a written statement supplemental to the applicant which demonstrates that such activities will not have a significant impact on the owner's ability to manage and control the applicant concern. Applications from joint-ventures are exempt from the requirement to submit a supplemental written statement.

The Joint Venture also must meet the requirements of VA's SDVOSB and VOSB set-aside clauses in the VA Acquisition Regulation (VAAR) reference SBA's regulation on the character of a joint venture, substituting VOSB for this type of set-aside.

13 CFR § 125.15 (b) *Joint ventures.*

An SDVO SBC may enter into a joint venture agreement with one or more other SBCs for the purpose of performing an SDVO contract.

- **(b)(1) Size of concerns to an SDVO SBC joint venture.**
- (b)(1)(i) A joint venture of at least one SDVO SBC and one or more other business concerns may submit an offer as a small business for a competitive SDVO SBC procurement so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, provided:
 - (A) For a procurement having a revenue-based size standard, the procurement exceeds half the size standard corresponding to the NAICS code assigned to the contract; or
 - (B) For a procurement having an employee-based size standard, the procurement exceeds \$10 million;

- (b)(1)(ii) For sole source and competitive SDVO SBC procurements that do not exceed the dollar levels identified in paragraphs (b)(1)(i)(A) and (B) of this section, an SDVO SBC entering into a joint venture agreement with another concern is considered to be affiliated for size purposes with the other concern with respect to performance of the SDVO contract. The combined annual receipts or employees of the concerns entering into the joint venture must meet the size standard for the NAICS code assigned to the SDVO contract.
- **(b)(2) Contents of joint venture agreement. Every joint venture agreement to perform an SDVO contract must contain a provision:**
 - (i) Setting forth the purpose of the joint venture;
 - (ii) Designating an SDVO SBC as the managing venturer of the joint venture, and an employee of the managing venturer as the project manager responsible for performance of the SDVO contract;
 - (iii) Stating that not less than 51% of the net profits earned by the joint venture will be distributed to the SDVO SBC(s);
 - (iv) Specifying the responsibilities of the parties with regard to contract performance, source of labor and negotiation of the SDVO contract;
 - (v) Obligating all parties to the joint venture to ensure performance of the SDVO contract and to complete performance despite the withdrawal of any member;
 - (vi) Requiring the final original records be retained by the managing venturer upon completion of the SDVO contract performed by the joint venture;
- **(b)(3) Performance of work. For any SDVO contract, the joint venture must perform the applicable percentage of work required by §124.510 of this chapter."**

What This Means

In order for a Joint Venture to be eligible for verification, it must meet the following standards:

- A joint venture must be a separate legal entity

- A joint venture must be controlled by a verified VOSB or SDVOSB concern
- A joint venture must be separately verified
- The SDVOSB or VOSB must earn at least 51% of the profits earned by the joint venture
- In every joint venture, at least one of the businesses must be a verified SDVOSB, in accordance with the Verification Program requirements found in 38 CFR Part 74.
- The verified SDVOSB must be the Managing Venturer of the applicant and have control over all decisions of the joint venture.
- Additionally, all joint venture agreements must contain the provisions stated in 13 CFR § 125.15(b)(2).

Excerpts from Current Denial Letters

- “In order for a Joint-Venture to qualify as a SDVOSB the management and control of the Joint-Venture must be handled by the SDVOSB firm. In this instance, your business, XXX, LLC is a verified SDVOSB, but the supplied documentation for the Joint-Venture shows that it is not in control of the management as is required by the regulations.

You supplied a Joint-Venture Agreement. CVE found in your Articles that, [t]he business and affairs of the Venture shall be managed by an executive committee composed of two persons who shall be responsible for the management of the Venture (the “Executive Committee”).” This executive committee is made up of two members, one from each business comprising the Joint-Venture- and according to subsequent provisions -requires unanimous consent of the members to take action. As only one of the two representatives is from the verified SDVOSB member of the Joint Venture, CVE is unable to conclude that you meet the control requirements set forth in 38 CFR § 74.4 and 13 CFR § 125.15.”

- “In order for a joint venture to be included in the VA VetBiz Vendor Information Pages (VIP) Verification Program as a verified SDVOSB one of the businesses forming the joint venture must be a verified SDVOSB. You applied for SDVOSB status with YYY, LLC, however, this business was denied inclusion in the database as it failed meet the eligibility requirements of 38 CFR Part 74. Because neither of the businesses that form the joint venture is verified as a SDVOSB, CVE is unable to conclude that ZZZ Joint Venture meets the requirements of the regulations.”
 - “CVE is unable to conclude that XXX, Inc. has complete control of the management of the joint-venture. One section of the Joint-Venture Agreement assigns primary and alternate representatives for each business. You are designated as the primary representative for XXX, Inc. and Mr. John Doe, a non-Veteran, is designated as the primary representative for YYY LLC. The pertinent section goes on to state that, “[t]he representative of XXX and the representative of YYY shall comprise the “Committee” of the Joint Venture. The Committee shall be responsible for making decisions for and on the behalf of the Joint Venture.” A subsequent section of the Joint-Venture Agreement states that, “...all decisions, commitments, agreements, understandings and other matters pertaining to the performance of the Contract shall be decided by mutual agreement.” This indicates that both you and Mr. Doe have an equal say in the decisions pertaining to the joint-venture. For these reasons CVE is unable to conclude that you meet the requirements of the regulations.”
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Full Time Control

Issue: Must I work full-time for the applicant firm? Can I hold outside employment?

The Regulations

38 CFR § 74.4

- (c)(1) An applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business. [additional info](#)

Center for Veterans Enterprise Verification Facts Sheet - "Full Time" Control Requirement

Issue: Must I work full-time for the applicant firm? Can I hold outside employment?

The Regulations

38 CFR § 74.4

- (c)(1) An applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business. An owner engaged in employment or management outside the applicant concern must submit a written statement supplemental to the application which demonstrates that such activities will not have a significant impact on the owner's ability to manage and control the applicant concern.
- (c)(3) One or more veterans or service-disabled veteran owners who manage the applicant or participant must devote full-time to the business during the normal working hours of firms in the same or similar line of business.

What This Means

- While other outside employment is not necessarily a bar to establishing control of the applicant, the applicant must demonstrate that a Veteran owner's employment in another business will not interfere with his/her control of the applicant business, per 38 CFR § 74.4(c)(1). The applicant must provide a written statement clearly demonstrating how the other employment does not impact the ability to manage and control the applicant company. It is important to note that the burden of proof lies with the applicant and the ability to control the applicant firm while employed by another entity will not be presumed.
- The Government Accountability Office has flagged this issue, and it issued a report which found that a Veteran cannot control a business when he concurrently has a separate full-time job which operates during the same normal business hours as the applicant firm. See U.S. Gov't Accountability Office, *Service-Disabled Veteran-Owned Small Business Program: Case Studies Show Fraud and Abuse Allowed Ineligible Firms to Obtain Millions of Dollars in Contracts*, GAO-10-108 (Oct. 2009). This example often results in a denial because of the high standard for control by the Veteran owner required by the Vet First program. , The Veteran must provide CVE with a written explanation as to how this outside employment does not affect his/her ability to control the applicant. This statement should be extremely detailed providing examples of how the Veteran is able to show responsibility without delegating material elements of control. Failure to provide any explanation will result in denial.
- The determination as to whether outside employment will bar inclusion in VIP based upon lack of control is decided on a case-by-case basis, evaluating the particular facts and circumstances presented.
- One common example that will prohibit an applicant from receiving verified status: if the Veteran lists on his/her

résumé that he/she currently holds a position other than that in the applicant, and the Veteran has not provided a written explanation to CVE regarding this employment.

Excerpts from Current Denial Letters

“During the site visit and document review, it was determined that you are engaged in a number of other businesses. You were asked to provide a statement which demonstrates that your other business activities do not have a significant impact on your ability to manage and control the applicant concern. Since you have not provided this statement along with other requested documentation, CVE cannot conclude that you “show sustained and significant time invested in the business.” Therefore, CVE finds that you are not in compliance with 38 CFR § 74.4(c)(1).”

Fast Track

Issue: How can a verification application be expedited?

Regulatory Requirement:

There is no regulatory requirement to expedite any verification application or request for reconsideration. There is, however, a requirement in the VAAR for businesses to be verified to be eligible for consideration for a Veterans First procurement action and to be awarded a contract under Veterans First. [additional info](#)

[Center for Veterans Enterprise Verification Assistance Brief - *Fast Track*](#)

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Definition:

Fast Track Program: for a period of time in early 2011, companies who submitted offers to VA and that were determined to be prospective awardees were eligible to have their examination completed within 21 business days, a much more compressed cycle than the 90 days permitted by regulation. This was important because the contract award was suspended until a decision was issued on the company's VOSB Verification Program application. The program was created as a deviation to VAAR 804.1102.

Background:

Why was there a Fast Track Program?

Due to the large backlog of initial verification applications resulting from implementation of P.L. 111-275, firms pending verification during the period October 1, 2010 through September 4, 2011 were listed in the Vendor Information Pages (VIP) while their application was under-going examination. **When all businesses in VIP were verified by September 4, 2011, the Fast Track program was completed and terminated.**

Was the "Fast Track Program" successful?

Yes. 83% of applications were processed within the 21-day time-frame. VA's fast track action identified 141 companies that were ineligible for award for various reasons.

Community Property

Issue: How do Veterans in community property states demonstrate ownership and control?

Definition:

Community Property: All property or income acquired by either spouse during marriage is considered equally owned by both spouses for purposes of the division of the property upon death or divorce or for purposes of business transacted by either spouse. [additional info](#)

Center for Veterans Enterprise Verification Assistance Brief - *Community Property*

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The Regulation – 38 CFR § 74.3

- (f) *Community property laws given effect.* In determining ownership interests when an owner resides in any of the community property States or territories of the United States, CVE considers applicable State community property laws. If only one spouse claims veteran status, that spouse's ownership interest will be considered unconditionally held only to the extent it is vested by the community property laws.

What This Means

- Community Property States include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Puerto Rico is a Community Property Territory.
- If a Veteran or service-disabled Veteran owner resides in any of the community property states or territories and is married, the Veteran or service-disabled Veteran is presumed to only own an undivided half, i.e., 50%, of the community property. The Veteran or service-disabled Veteran can submit evidence that this is not the case, i.e., the property is legally treated as separate property.
 - For example, Veteran John Smith owns 100% of Example, LLC; he is married to a non-Veteran; and he lives in Arizona. According to community property laws, he would only be regarded as holding an undivided 50% interest in Example, LLC. He would not meet the ownership requirements of 38 CFR § 74.3.
 - What Veteran John Smith could do in order to meet the ownership requirements is to provide CVE with documentation proving that he owns his interest in Example, LLC as his sole and separate property (for example, by having his spouse provide a notarized letter disclaiming her interest in the community property) or that his interest in Example, LLC is not subject to the community property laws for another reason (for example, it was acquired prior to marriage, spouse disclaims ownership interest in accordance with state law).
- In the case of multiple veteran owners, ownership percentages are combined to determine eligibility. Example: In the case of two Veteran owners, one being single, and one married, each owning 50% of the applicant. The single Veteran owner's percentage will remain intact at 50%,

whereas the married Veteran owner's percentage will be 25%, totaling 75% Veteran ownership.

Excerpts from Current Denial Letters

"The VA Form 0877 Verification Application you submitted lists you, the service-disabled Veteran, as 51% owner of XXX, Inc. Your business is in the state of Arizona. Arizona is a community property state. This means that property owned by one spouse in a marriage is jointly the property of both spouses. 38 CFR § 74.3(f) states that, "[i]n determining ownership interests when an owner resides in any of the community property States or territories of the United States, CVE considers applicable State community property laws. If only one spouse claims veteran status, that spouse's ownership interest will be considered unconditionally held only to the extent it is vested by the community property laws." This would mean that you and Ms. YYY, a non-Veteran, each own an undivided 50% interest in the company. You have not provided any evidence to support that the ownership interest in the applicant is separate or non-community property. Therefore, CVE is unable to conclude that you meet the 51% ownership requirement of 38 CFR § 74.3."

"In response to a document request from the CVE examiner you stated that your business is a sole proprietorship. The VA Form 0877 Verification Application you submitted lists you as 51% owner. A sole proprietor owns 100% of a sole proprietorship. Your supplied tax documents list you as the proprietor of the business. California is a community property state. These laws make it so that property owned by one spouse in a marriage is jointly the property of both spouses. 38 CFR § 74.3(f) states that, "[i]n determining ownership interests when an owner resides in any of the community property States or territories of the United States, CVE considers applicable State community property laws. If only one spouse claims veteran status, that spouse's ownership interest will be considered unconditionally held only to the extent it is vested by the community property laws." This would mean that you and Mrs. ZZZ each own an

undivided 50% interest in the company. While both of you are Veterans, only you are a service-disabled Veteran. Therefore, CVE is unable to conclude that you meet the 51% ownership requirement of 38 CFR § 74.3.”