STATEMENT OF
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THE AMERICAN LEGION
BEFORE THE
SUBCOMMITTEE ON CONTRACTING AND WORKFORCE
COMMITTEE ON SMALL BUSINESS
UNITED STATES HOUSE OF REPRESENTATIVES
ON
THE CHALLENGES FACING VETERAN-OWNED SMALL BUSINESSES SEEKING FEDERAL CONTRACTS

MARCH 19, 2015

Good morning Chairman Hanna, Ranking Member Velasquez and members of the subcommittee. On behalf of our National Commander, Michael D. Helm, and the 2.3 million members of The American Legion, we thank you for this opportunity to testify at this hearing on the challenges facing veteran-owned small businesses seeking federal contracts.

The American Legion identifies three main issues that poses obstacles for veteran owned small businesses and service-disabled veterans seeking federal contracts: reverse auctions, differences between Small Business Administration (SBA) and Department of Veterans Affairs (VA) procurement policy standards, and exclusion of veterans from Disadvantaged Business Enterprise (DBE) programs.

Reverse Auctions Reduce Quality:

The Small Business Act applies government wide, not just to the Small Business Administration (SBA). Government has a fiduciary responsibility and legal obligation to treat small business fairly, and to not take advantage of its buying power and become predatory.

The American Legion appreciates the goal of the government contracting community to lower federal expenditure through competitive contracting initiatives, but we are concerned that misuse of non-governmental platforms that have not suffered the scrutiny of the appropriations process, are putting veteran owned small businesses at risk and could also be serving to undermine the entire procurement process.

Reverse auctions end up giving a false valuation of fair market product pricing, and will eventually create a disparity between a thorough procurement vehicle processes, where value is made part of the decision matrix, versus the reverse auction -- where value or added value is often omitted from bid consideration. Further, reverse auctions appear to undermine the Government Services Administration's (GSA) application process that requires the government be offered the best possible price in the first place. If that is true, then how can GSA contract holders consistently compete in the reverse auction process at offers lower than their established GSA contract?

An example of added value would be a printer and copier vendor that, through their negotiated license agreement with the manufacturer, is required to provide training and technical support on the products they sell. This added value increases the market price of the product, but may not be reflected in the automated environment of the reverse auction bid process. Reverse auctions create a disproportionate disparity in the federal procurement industry while American Legion resolution 321[1] specifically calls for equal parity in federal procurement, and according to the Federal Acquisition Regulation (FAR); "'Fair market price' means a price based on reasonable costs under normal competitive conditions and not on lowest possible cost".[2] Further, Fair Market Price is mentioned in nearly every part of the FAR and that exact term can be found more than 30 times.

FAR part 19 §807 gives a definition of Estimating Fair Market Price;

"(c) In estimating a fair market price for a repeat purchase, the contracting officer shall consider recent award prices for the same items or work if there is comparability in quantities, conditions, terms, and performance times. The estimated price should be adjusted to reflect differences in specifications, plans, transportation costs, packaging and packing costs, and other circumstances. Price indices may be used as guides to determine the changes in labor and material costs. Comparison of commercial prices for similar items may also be used."

FAR part 15 §404-1 discusses proper Proposal Analysis Technique:

"(a) General. The objective of proposal analysis is to ensure that the final agreed-to price is fair and reasonable."[3]

Finally FAR part 19.1405 outlines Service-Disabled Veteran-Owned Small Business Set-Aside Procedures;

"(b)(2) Award will be made at a fair market price."[4]

While reverse auctions may have a limited capacity place in federal procurement, The American Legion believes that the federal contracting office has the primary responsibility to ensure that every product that the government spends tax payer dollars on, is purchased at fair market value. This assurance protects the tax payer, the small business, and the market.

The American Legion is concerned that reverse auctions will lead to decreased quality and decreased employment opportunities for veterans, which is in direct violation of American Legion resolution number 50 that supports more hiring opportunities for veterans.[5] Reverse auctions encourage vendors to provide the cheapest products and services in order to maintain the smallest possible profit margins in order to maintain a competitive edge. Government will then be stuck purchasing poor-quality products and services because reverse auction platforms

[1] Resolution No. 321: Support reasonable set-aside of federal procurements and contracts for business owned and operated by veterans, American Legion. National Convention August 2012
http://archive.legion.org/handle/123456789/2190
[2] Federal Acquisition Regulation, March 2005, http://www.acquisition.gov/far/current/pdf/FAR.pdf
[3] Ibid
[4] Ibid
[5] Resolution No. 50: Support legislation that bolsters the hiring of veterans in the public and private sectors, American Legion. National Convention, August 2012
http://archive.legion.org/bitstream/handle/123456789/2212/2012N050.pdf?sequence=1

do not provide the ability for an agency to shop for best value and relegate their decision solely on a best price basis. These types of business models favor home-based businesses that primarily operate online and have no employees, aside from the owner, and no customer support. Businesses of this type end up relying solely on federal procurement as their only source of income. This type of business model severely disadvantages other small businesses and do not create jobs, because with employees there comes increased overhead expenses

An article in *Contract Management* magazine points out a case study, conducted by the Department of State, reveals reverse auctions are already losing market share and have dropped 30 percent between 2007 and 2010, despite an increase in bid notifications of more than 225 percent.[6]

There is a belief that use of reverse auctions by government contracting officers will save billions of dollars. However, The American Legion has not been able to find evidence that this process contributes to business innovation, economic growth, or positive partner relationships between government and industry. Instead, we have found that reverse auctions foster resentment between sellers and buyers and leave the seller with an attitude counter to providing anything more than exactly what was paid for, thus obliterating any harmonious relationship that should be developed between buyer and seller.

The American Legion also learned that businesses answering solicitations for services find that customers rarely, if ever, include all necessary requirements in the original solicitation. What is wanted versus what was asked for continues to be a source of frustration between contractors and vendors. The American Legion has received numerous complaints from veteran business owners who routinely argue that their customers are dissatisfied based not on the work that was performed, but more importantly, based on the work that wasn't preformed because it wasn't specified in the original solicitation.

When something is bad for small business, The American Legion recommends simply doing away with it. The federal dollars spent in purchasing this reverse auction services are better utilized in hiring more contracting officers to do market research to ensure that goods and services are purchased at the fair market value. A reverse auction is a shortcut contracting officers resort to because there simply aren't enough of them.

However, if federal contracting officers are allowed the continued use of reverse auctions, The American Legion reiterates the recommendations we have provided in the past:

1. More outreach training for small veteran owned businesses.
2. Eliminate the LEAD or LAG indicators. This creates an unrealistic stressor for the seller and can be extremely detrimental for the nascent business.
3. Collect fees directly from customer (buyer).
4. Build a fair market price list into the process for commonly purchased items, and prevent sellers from going below the established fair market price.
5. Make buyers attest that they have conducted proper and adequate market research to determine fair market price.

[6] Contract management Magazine, Reverse Auctions: Turning Winners into Losers, October 2012 http://www.nxtbook.com/nxtbooks/ncma/cm_201210/index.php#/4

6. Eliminate the ability of the buyer to set a minimally acceptable price, or clearly state to the seller what the starting price is.
7. Requests for debrief, protests, and any other dispute resulting between the seller and the federal government needs to be handled directly by the federal government, not handled through a civilian commercial company who has no authority to represent the federal government.
8. Exact match bids need to be more interactive. Government has unique needs and requirements, and even items issued under the same National Stock Numbers provide variation that can cause end user difficulties.
9. Limit contracting officers' use reverse auctions to contracts over $150,000 for supply contracts that excluding services.

VA Center for Verification and Examination (CVE) Verification:

Many veterans find VA's Veterans First Contracting Program verification process to be overly burdensome, which is why The American Legion passed a resolution titled: *Support Verification Improvements for Veterans' Businesses within the Department of Veterans Affairs*.[7]

The American Legion believes that Public Law 106-50 made all federal agencies stakeholders in supporting veterans' entrepreneurship.[8] A subsequent law passed in 2006 provides VA with the authority in setting higher agency standards for SDVOSB and VOSB set-asides.[9] A new procurement hierarchy within VA was created, which places the highest priority with SDVOSBs followed by VOSBs. VA refers to this program as the Veterans First Contracting Program (Veterans First).

The process of verification involves a review of a business' governance documentation and a determination as to whether the documentation is in compliance with VA's Center for Verification and Examination's (CVE) legal requirements for admittance into the Veterans First Contracting Program.[10] The main challenge with the program is striking the appropriate balance between the amount of government intrusion necessary to verify a business and the amount of government oversight necessary to protect the integrity of the program. This is not an easy task and VA is still trying to find that balance.

The American Legion has been involved with VA verification since the program's inception. Most notably, The American Legion is a participant in the Verification Assistance Counseling Program and for the last two years, we have worked with numerous small business owners who have received verification status. The American Legion would be remiss if we did not mention that CVE has significantly cut down the time it takes for a small business owner to receive an initial decision to less than 30 days. This is a stark contrast to the situation in October of 2012, when it took approximately 85 days for CVE to make a determination on an initial application.

[7] American Legion Resolution No. 108.
[8] The Veterans Entrepreneurship and Small Business Development Act of 1999.
[9] The Veterans Health Care, Benefits and Information Technology Act of 2006; PL 109-461.
[10] 38 CFR §74.

In 2012 and 2013, The American Legion counseled nearly 50 small business owners with questions about the verification process. In 2014 that number was halved, as less small business owners sought counseling services. This could be an indicator that CVE has implemented changes that have improved the process and cut down on wait time. This trend could also be the product of a combination of VA diminishing the backlog of applications in the queue and extended the time a small business can remain on verified status from one to two years.

SBA Involvement in Appeals:

The American Legion believes that SBA and VA need to work closer together to minimize the inconsistencies in the decisions being made. Currently, VA's Office of General Counsel (OGC) makes the final determinations; OGC does not utilize SBA's case laws in their decisions nor do they publish their decision. SBA has the legal expertise, 60 years of long-standing experience, and an ample base of precedential case law that can be applied to future rulings. VA does not. Further, SBA's Office of Hearings and Appeals (OHA) has a 15 day turnover rate for final decisions on appellate claims and OHA does so with substantially less resources. The American Legion believes there is added value for VA to fall back on SBA's expertise and case law.

Last year, VA submitted changes to 38 CFR §74 to make it so that their case reviewers could reconcile requirements for the growth of small businesses with the requirements for proof of ownership and control. Having taken part in the discussion of the final proposal of changes that went to VA Office of General Counsel, The American Legion can attest that these changes drastically differ from SBA's 13 CFR §125. If these changes are adopted, it would defeat the purpose of having appellate hearings conducted at SBA OHA as OHA judges would then have to make adjudications based off a new set of standards.

Further, the current funding mechanism proposed for the appeals to be heard at SBA OHA should not be seen as one agency funding a new program within another. Instead, it is a funding mechanism that incentivizes VA to minimize their appeals and make correct initial decisions. Under the proposed funding mechanism, VA would pay SBA by the case load; therefore, VA could potentially stop having to pay for appeals that go to SBA OHA, when VOSB and SDVOSBs no longer have reasons to appeal.

There has been push-back for moving of appellate hearings of VOSB and SDVOSB statuses to SBA out of concerns that this would add VOSBs as a new set-aside program government wide. The American Legion wants to be clear that this is absolutely not the case and not our intention when we supported the bill last year that proposed moving the appeals process from VA to SBA. We believe that the language was clear that VOSB appellate claims are merely being heard by SBA OHA as they pertain to contracting within VA's Veterans First Contracting Program and nowhere else.

The American Legion impresses upon the Committee that (1) including SBA in the appellate process would ensure more consistency in the final decisions being made and ensure impartiality in not having the agency of original adjudication review their previously denied claim and (2) moving appeals to SBA does not create a new preference group within the federal small business set-aside program.

Differences between Self Certification and CVE Verification:

The American Legion supports verification. Government contracting officers are busy, risk averse and they prefer certifications. This is why within the realm of set-aside procurement; there is a preference for 8(a) and women-owned small businesses. When a contract is awarded, a contracting officer can rest-assured knowing that the recipient of the award has been vetted for ownership and control.

SBA's model and VA's model for verifying a small business currently follows similar regulations, except where SBA allows firms to self certify as SDVOSBs and VA does not. VA requires a firm to enter a rigorous process on the front end, where every issue that may arise from the present and the future would have to be resolved before a firm is verified. SBA's process of self certification polices itself through status protests from the small business community once a contract has been awarded. SBA would then subject the protested firm to rigorous scrutiny. Whereas VA's rigorous verification is necessary for entry into the Veterans First Contracting Program within VA, SBA's self certification process is government wide.

The American Legion understands why contracting officers, agency-wide, have started asking SDVOSBs if they are CVE verified. However, this has added to the confusion of having two types of vetting processes for two agencies for relatively the same purpose. To cut down on the confusion, the Committee should consider a single set of standards for all SDVOSBs to contract with the federal government. The American Legion recognizes the importance of having a single set of standards and vetting practices, but we would defer to the Committee's expertise in selecting the agency most capable of undertaking this task. The American Legion asks the Committee to weigh past performance, expertise and resources in determining which verifying body would be best suited for this job.

Exclusion of Veterans from DOT DBE Program:

By law, the federal government is mandated to award no less than three percent of all federal contracts to SDVOSBs. For a number of reasons a few agencies have not met this goal. One major reason is because some contract funding streams exist outside the realm of regular appropriations and therefore are not susceptible to SBA's small business goal tracking.

One of the most egregious exclusion of veterans owned small businesses occurs in the budget for the U.S. Department of Transportation's Disadvantaged Business Enterprise (DBE) program, which mandates that states receiving federal dollars for highway infrastructure repairs have to set aside 10 percent for preferred groups of small businesses through the *Moving Ahead for Progress in the 21st Century Act* (MAP-21). It is a misconception that this 10 percent is solely relegated to road and infrastructure construction firms. There are a variety of industries involved in infrastructure repairs, such as engineering, landscaping, remediation, utilities and information technology. This is an issue that affects all veteran owned small businesses and not just those in construction.

Section 1101(b) of MAP-21 currently provides that:

> Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts made available for any program under divisions A and B of this Act and section 403 of title 23, United States Code, shall be expended through small business concerns owned and controlled by socially and economically disadvantaged individuals.

Section 1101(b) adopts the definition of *socially and economically disadvantaged individuals* given in Section 8(d) of the Small Business Act and its implementing regulations, which, in turn, establish a presumption that specific groups of minorities are socially and economically disadvantaged. Section 1101(b) also establishes a presumption that women are socially and economically disadvantaged individuals for purposes of the DBE program. Since veterans are not explicitly listed in Section 1101(b), they are excluded from the DBE program.

Recently, Congressman Mike Fitzpatrick from Pennsylvania has successfully added an amendment to rail infrastructure legislation which passed the House on March 4, 2015. Fitzpatrick's amendment, passed as part of the *Passenger Rail Reform and Investment Act,*[11] directs the Secretary of Transportation to conduct "a nationwide disparity and availability study on the availability and use of certain classes of small businesses – including veteran-owned businesses."

The American Legion believes that this is a crucial step in leveling the playing field for our veteran small business owners that are not currently eligible to go after these set-asides.

The American Legion works closely with Congressman Fitzpatrick to advocate for the amending of Section 1101(b) to add "veteran-owned small business concerns" as a separate line to the list of entities eligible. Such an addition would not presume that veterans are "socially and economically disadvantaged." Instead, VOSBs would become independently eligible for the DBE program by establishing two categories of entities who count for purposes of the 10 percent goal: (1) small businesses owned and controlled by presumed socially disadvantaged individuals[12], and (2) VOSBs.

In previous Congresses, Fitzpatrick has introduced the bipartisan *Fairness to Veterans for Infrastructure Investment Act* which seeks to add veterans as a separate category of small businesses they can use to meet their 10 percent goal. The American Legion and numerous other Veteran Service Organizations support this bill and asks again for this Committee's support this summer when Congress reauthorizes the federal highway bill.

Conclusion:

The American Legion appreciates the opportunity to testify today. Thank you again to Chairman Hanna, Ranking Member Velasquez and members of the subcommittee for directing your attention to this critical issue facing veterans. For additional information regarding this testimony, please contact Mr. Larry Provost at The American Legion's Legislative Division, 202-263-5755 or lprovost@legion.org.

[11] H.R. 749
[12] Includes Women Owned Small Businesses.

BIOGRAPHY FOR
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Davy Leghorn was appointed to the position of Assistant Director of the Economic Division of The American Legion in January, 2012. Mr. Leghorn oversees veterans' employment and small business issues and administers The American Legion's National Veterans Hiring Initiative. He also represents The American Legion on the Small Business Administration's Advisory Committee on Veterans Business Affairs.

He previously worked as a National Appeals Representative for The American Legion at the Department of Veteran Affairs' Board of Veterans' Appeals, where he provided representation to veterans, their spouses and dependents in appellate hearings before the Veterans Law Judges.

Mr. Leghorn served as a mortar infantryman in the Army with the 2/72 Armored Battalion, 4/7 Cavalry and 3/15 Infantry, then as a Civil Affairs Specialist with 450th Civil Affairs Battalion.

He currently serves as Second Vice Commander for George Washington Post #1 in The American Legion Department of the District of Columbia.