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An open door and a leg up: increasing service-disabled veteran-owned small business (SDVOSB) participation in defense, Navy, and Marine Corps contracting through simplified acquisitions

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**AN OPEN DOOR AND A LEG UP:
INCREASING
SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS
(SDVOSB)
PARTICIPATION
IN DEFENSE, NAVY, AND MARINE CORPS CONTRACTING
THROUGH SIMPLIFIED ACQUISITIONS**

by

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Contracting with service-disabled veteran-owned small businesses (SDVOSBs) is widely promoted as an important benefit for veterans, particularly at the Department of Defense (DOD) and its component the Department of the Navy (DOD). In FY2014, DOD finally met its three (3) percent SDVOSB statutory contact spending goal, while DON made significant strides towards meeting it. This real progress came despite five (5) academic assessments which persistently suggested that the SDVOSB Procurement Program's design contain inherent conceptual flaws that sow confusion among disabled veterans and Contracting Officers about scope of discretion to assist SDVOSBs, generate widespread disillusionment among veterans, promote entrenchment by a few already successful firms instead of helping veterans at large to obtain self-employment, and thereby impede goal achievement. This study tests the academic criticisms by examining the SDVOSB Program design and operation trends through the prism of the generally accepted Cohen-Eimicke Contract Management Performance Model. Finally, this study proposes veteran-centric performance management realignments of the SDVOSB Program at DOD and DON through the use of targeted set-asides and Simplified Acquisition Procedures (SAP) in order to match the Program with its original intent of broad-based SDVOSB business development.

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ABSTRACT

Contracting with service-disabled veteran-owned small businesses (SDVOSBs) is widely promoted as an important benefit for veterans, particularly at the Department of Defense (DOD) and its component the Department of the Navy (DOD). In FY2014, DOD finally met its three (3) percent SDVOSB statutory contact spending goal, while DON made significant strides towards meeting it. This real progress came despite five (5) academic assessments which persistently suggested that the SDVOSB Procurement Program's design contain inherent conceptual flaws that sow confusion among disabled veterans and Contracting Officers about scope of discretion to assist SDVOSBs, generate widespread disillusionment among veterans, promote entrenchment by a few already successful firms instead of helping veterans at large to obtain self-employment, and thereby impede goal achievement. This study tests the academic criticisms by examining the SDVOSB Program design and operation trends through the prism of the generally accepted Cohen-Eimicke Contract Management Performance Model. Finally, this study proposes veteran-centric performance management realignments of the SDVOSB Program at DOD and DON through the use of targeted set-asides and Simplified Acquisition Procedures (SAP) in order to match the Program with its original intent of broad-based SDVOSB business development.

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***"We need to look at this from the perspective of the soldier, not the perspective of the government."* – Former Secretary of Defense Robert M. Gates on the wounded warrior transition system in *Duty: Memoirs of a Secretary at War.*[1]**

Successful self-employment of service-disabled veterans (SDVs) through entrepreneurship, including veterans going into business with Federal civilian and military agencies, has become our avowed national policy priority[2] and a frequent topic of academic research.[3] Since the mid-1970s, various Federal commissions and legislative policymakers of both parties have authorized and promoted procurement assistance for veterans and, especially, SDVs seeking self-employment. The current Service-Disabled Veteran-Owned Small Business (SDVOSB) Procurement Program consists of two set-aside tools, namely, a discretionary authority to set aside contracting opportunities for competition among SDVOSBs (competitive set-aside) and a discretionary authority to set aside contracting opportunities for sole source awards to a SDVOSBs without competition (sole source set-aside); the Federal Program is government-wide but each agency has its own replica of the government-wide Program (except for the Department of Veterans Affairs).[4] Such replicas exist in the Department of Defense (DOD) and its

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[1] ROBERT M. GATES, DUTY: MEMOIRS OF A SECRETARY AT WAR 138 (Knopf ed., 2014).

[2] Dina El-Boghdady, *Set-Aside Programs Fall Short of Goals*, The Washington Post (Feb. 28, 2005), available at: http://www.lmt-inc.com/pdf/news_and_press/2005_02_setaside_programs_fall_short_of_goals.pdf.

[3] *See, e.g.*, Jennifer L. Humensky, Neil Jordan, Kevin T. Stroupe, and Denise M. Hynes, *How Are Iraq/Afghanistan-Era Veterans Fairning in the Labor Market,* 39 ARMED FORCES & SOCIETY, issue I, 158-183 (2013); Jared Hoppenfeld, Trip Wyckoff, Jo Ann J. Henson, Jenna N. Mayotte, and Hal. P. Kirkwood, Jr., *Librarians and the Entrepreneurship Bootcamp for Veterans: Helping Veterans with Business Research,* 18 JOURNAL OF BUSINESS & FINANCE LIBRARIANSHIP, issue 4, 293-308 (2013); U.S. SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY (SBA ADVOCACY), *Veteran-Owned Business and Their Owners: Data from the Census Bureau's Survey of Business Owners* (2012).

[4] FEDERAL ACQUISITION REGULATION (FAR) COUNCIL, *Procurement Program for Service-Disabled Veteran-Owned Small Businesses*, Interim Rule with Request for Comments, 69 Fed. Reg. 25,274 (May 5,

component Department of the Navy (DON) that is responsible for the U.S. Navy and the U.S. Marine Corps contracting. These set-aside tools were enacted in 2003 in light of the government's failure to attain the prime contracting goal to spend at least 3 percent of total Federal purchases with SDVOSBs; along with the 3 percent subcontracting goal, the prime contracting minimum goal was enacted four years earlier in 1999.

Since inception, the Federal and DOD Programs have experienced continued turbulence because of design and re-design attempts by not only the DOD but also by the Congress, the Federal Acquisition Regulation (FAR) Council (representing the White House Office of Federal Procurement Policy (OFPP), the DOD, the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA)), the Small Business Administration (SBA), Presidential Administrations, and even judicial and administrative tribunals such as the Government Accountability Office (GAO), the Court of Federal Claims (COFC), and the Court of Appeals for the Federal Circuit (CAFC). One of the most far-reaching SDVOSB Program design attempts by the Executive Branch occurred on March 23, 2005, when the FAR Council made it one of the stated purposes of the entire FAR Part 13, Simplified Acquisition Procedures (SAP), "to improve opportunities for . . . service-disabled veteran-owned small business concerns to obtain a fair proportion of Government contracts."[5] The effects of SDVOSB Program design and re-design efforts are considered in this study.

Historically, most SDVOSB contracting advocates as well as the DOD and DON themselves have recognized the moral, rehabilitative, and economic significance of its SDVOSB Procurement Program due to DOD's special nexus to its former military members who incurred or aggravated service-connected disabilities. Perhaps the most

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2004), available at: http://www.gpo.gov/fdsys/pkg/FR-2004-05-05/pdf/04-9752.pdf; Final Rule, 70 Fed. Reg. 14,950 (March 23, 2005), available at: http://www.gpo.gov/fdsys/pkg/FR-2005-03-23/pdf/05-5656.pdf.

[5] FEDERAL ACQUISITION REGULATION (FAR) COUNCIL, *Procurement Program for Service-Disabled Veteran-Owned Small Businesses*, Final Rule, 70 Fed. Reg. 14,950 (March 23, 2005), http://www.gpo.gov/fdsys/pkg/FR-2005-03-23/pdf/05-5656.pdf, *amending* FAR §13.002(b), Purpose (2005). The May 5, 2004 Interim Rule contained no such change.

comprehensive recognition is found in a 2007 policy memorandum by Under Secretary of Defense for Acquisition, Technology, and Logistics (USD AT&L) Kenneth Krieg:

> *I urge the acquisition community and major commands . . . to meet the 3 percent procurement goal established by Congress and incorporated into the DOD Service-Disabled Veteran-Owned Small Business Strategic Plan. . . . The Department has made contract awards to firms owned by service-disabled veterans who have served in World War II, the Korean War, the Vietnam War, the Gulf Wars, Operation ENDURING FREEDOM and IRAQI FEREEDOM. While we have made progress towards meeting the goal, we still have a long way to go. We must pursue this goal with vigor. Many more disabled veterans will return from the campaigns in Iraq and Afghanistan and will seek to participate in DOD procurements. . . . By contracting with these teams of businesses owned by service-disabled veterans, we acknowledge their service as Warfighters and appreciate their acumen as entrepreneurs and vendors to the Department*.[6]

In the follow-up memorandum, the USD AT&L Office of Defense Procurement and Acquisition Policy (DPAP) stated:

> *We need to dedicate efforts toward promoting increased business opportunities for those warfighters who have sacrificed in service to our Nation. By increasing business opportunities for SDVOSB concerns, not only will we demonstrate improvement towards meeting our goals, we will also be giving something back to the service-disabled veterans by creating opportunities for them to provide goods and services in support of the DOD mission*."[7]

[6] OFFICE OF THE UNDERSECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY, AND LOGISTICS (USD AT&L), Memoranda, *Service-Disabled Veteran-Owned Small Business Procurement Program* (April 12, 2007), and *GSA GWAC for SDVOSBs in Information Technology* (May 18, 2007), available at: http://www.acq.osd.mil/dpap/policy/policyvault/2007-0828-DPAP.pdf.

[7] USD ATL&L, Memoranda, *Service-Disabled Veteran-Owned Small Business Procurement Program* (April 12, 2007), and *GSA GWAC for SDVOSBs in Information Technology* (May 18, 2007), available at: http://www.acq.osd.mil/dpap/policy/policyvault/2007-0828-DPAP.pdf.

The DON leadership announced similar policies. The August 24, 2006 memorandum by the Under Secretary of the Navy (UNSECNAV) Dionel Aviles stated:

> *Despite the Department's success in increasing the total dollars awarded SDVOSBs, DON failed to achieve the 3 percent goal. . . . To assist Federal agencies with achieving this goal for contracts awarded to SDVOSBs, Congress . . . created a procurement set-aside program for small businesses owned and controlled by service-disabled veterans. . . . Additionally, Executive Order 13360 of October 20, 2004 emphasizes the importance of increasing Federal contracting and subcontracting opportunities with SDVOSBs. . . . Achieving the three percent SDVOSB goal is a major challenge. To achieve success, the DON must improve its record of awarding contracts to America's service-disabled veteran-owned small businesses. Please relay the message to your acquisition workforce that you expect their whole-hearted support in increasing SDVOSB firms' participation in your acquisition programs*.[8]

The December 4, 2007 memorandum by the Director, Secretary of the Navy Office of Small Business Programs (SECNAV OSBP) and the Acting Assistant Secretary of the Navy for Research, Development, and Acquisition (ASN RD&A), endorsed the above-referenced DOD and DON memoranda, and further stated:

> *It is the policy of the Department of the Navy (DON) to provide maximum practicable opportunities in its acquisitions to service-disabled veteran-owned small businesses. In recognition of the debt owed to our service-disabled veterans, please ask each member of your Navy/Marine Corps Team to review all current and future requirements with a view to increasing awards of prime contracts and subcontracts to SDVOSB concerns*.[9]

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[8] Dionel Aviles, Under Secretary of the Navy (UNSECNAV), Memorandum, *Contracting with Service-Disabled Veteran-Owned Small Businesses* (Aug. 24, 2006), http://www.secnav.navy.mil/rda/Policy/2006%20Policy%20Memoranda/sericedisabled24aug2006aviles.pdf.

[9] Tim Foreman, Director, Secretary of the Navy Office of Small Business Programs (SECNAV OSBP) and John Thackrah, Acting Assistant Secretary of the Navy for Research, Development, and Acquisition (ASN RD&A), Memorandum, *Service-Disabled Veteran-Owned Small Business Program Performance* (Dec. 4, 2007), available at: http://www.secnav.navy.mil/rda/Policy/2007%20Policy%20Memoranda/sericedisabled00604dec071.pdf.

The economic size of DOD's SDVOSB contracting reinforces its moral and rehabilitative significance. Over the last decade, since Executive Order 13360, *Providing Opportunities for Service-Disabled Veteran Businesses to Increase Their Federal Contracting and Subcontracting,*[10] made 3 percent the mandatory goal floor for its procurement spending, the Federal Procurement Data System (FPDS)[11] reported a total of $42,611,209,441.34 in taxpayer dollars spent by DOD towards SDVOSB goals, with annual goal-report spending rising from $1,106,784,586.32 in Fiscal Year (FY) 2005 to $7,015,585,365.61 in FY2014. The FPDS likewise reported a total of $ $9,447,283,494.56 spent by DON, with annual goal-report spending rising from $170,906,769.61 in FY2005 to $1,768,749,049.22 in FY2014. On October 14, 2014, the Director, DOD Office of Small Business Program (OSBP), announced that DOD met and exceeded the 3 percent SDVOSB contracting goal for the first time ever during FY2014.[12] According to FPDS, the FY2014 DON SDVOSB goal achievement result was at 2.3309 percent, up from 1.7419 percent in FY2013. Continued growth of SDVOSB contracting, as well as continued success of the SDVOSB Program and the achievement of the SDVOSB goal, are thus major imperatives for DOD and DON.

The maximum practicable opportunity policy for SDVOSBs is confirmed in the Navy-Marine Corps Acquisition Regulation Supplement (NMCARS) § 5219.201, General Policy (2013).

[10] President George W. Bush, Exec. Order 13360, *Providing Opportunities for Service-Disabled Veteran Businesses to Increase Their Federal Contracting and Subcontracting* (Oct. 20, 2004), available at: http://www.gpo.gov/fdsys/pkg/FR-2004-10-26/pdf/04-24098.pdf.

[11] *See* U.S. GENERAL SERVICES ADMINISTRATION (GSA), Federal Procurement Data System-Next Generation (FPDS-NG) (2015), available at: https://www.fpds.gov.

[12] Claudette Roulo, DOD NEWS, DEFENSE MEDIA ACTIVITY, *Small Business Contracting on the Rise, Official Says* (Oct. 14, 2014), http://www.defense.gov/News-Article-View/Article/603453.

II. THE PARADOX OF DOD SPENDING GOAL ACHIEVEMENT DESPITE ACADEMIC PREDICTIONS OF PROGRAM MALFUNCTION: RESEARCH PROBLEM, QUESTIONS, AND HYPOTHESIS.

The very real FY2014 DOD goaling achievement created a paradox that is this study's research problem: the success came notwithstanding predictions of SDVOSB Program malfunctions in at least five (5) academic assessments of the Program to date as well as the DON's continued lag in meeting the 3 percent goal. What, then, are the significance and the sustainability prospects of DOD's goal achievement? What of the contrast between DOD and DON goaling performance results? Does DOD's achievement disprove the criticism about the SDVOSB Program's design and effectiveness?

The most significant, and direst, warnings about the SDVOSB Program came in the 2013 Rand Corporation study by Cox and Moore, *Improving Federal and Department of Defense Use of Service-Disabled Veteran-Owned Businesses,*[13] commissioned by DOD OSBP itself. That study questioned that the 3 percent goal could ever be achieved, highlighted persistent veteran disillusionment with the SDVOSB Program, and criticized the Program's discretionary design as not conducive to veterans' business development. Those findings by Cox and Moore findings echoed prior criticism from academia, veterans groups, and some in Congress.[14] With its significant spending volume and high public profile, the Federal and DOD SDVOSB Procurement Programs have been subject to research studies by multiple government agencies and academic researchers. Much of that research concentrates on the problems of fraud, manipulation, and misrepresentation surrounding qualifications for SDVOSB status or for reporting of SDVOSB

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[13] *See* Amy G. Cox and Nancy Y. Moore, *Improving Federal and Department of Defense Use of Service-Disabled Veteran-Owned Businesses*, RAND RESEARCH REPORT 322 (2013), available at: http://www.rand.org/content/dam/rand/pubs/research_reports/RR300/RR322/RAND_RR322.pdf.

[14] *Accord* U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON SMALL BUSINESS (HSBC), SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT, AND GOVERNMENT PROGRAMS, and COMMITTEE ON VETERANS AFFAIRS (HVAC), SUBCOMMITTEE ON BENEFITS, *Hearing on Excellence in Action: Government Support of Disabled Veteran-Owned Businesses,* HSBC No. 108-73, HVAC No. 108-48 (July 15, 2004).

participation.[15] There is also some research literature which simply lumps SDVOSBs together with other socioeconomic programs as one of the heterogeneous many.[16] However, there have been 5 SDVOSB Program assessments in the legal and policy academia, which studied the issues of effectiveness of the SDVOSB Procurement Program and barriers to its success. Those assessments include the 2004 Congressional testimony of Professor Schooner[17] and the legal policy writings of Sherman,[18] Korsak,[19] and McGann,[20] all analyzing the Program's original design, as well as the above-mentioned policy research study by Cox and Moore,[21] surveying its beneficiaries for barriers to success.

The first assessment came on July 15, 2004, when the House Small Business and Veterans Affairs Committees held the *Hearing on Excellence in Action: Government Support of Disabled Veteran-Owned Businesses.*[22] Professor Steven Schooner strongly

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[15] *See, e.g.*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE (GAO), *Service-Disabled Veteran-Owned Small Business Program: Vulnerability to Fraud and Abuse Remains*, GAO-12-967 (August 2012), and *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 (October 2009).

[16] *See, e.g.*, Nancy Y. Moore, Clifford A. Grammich, Julie DaVanzo, Bruce Held, John Coombs, Judith D. Mele, *Enhancing Small Business Opportunities in the DOD*, RAND TECHNICAL REPORT 601-1 (2009), available at: http://www.rand.org/content/dam/rand/pubs/technical_reports/2008/RAND_TR601-1.pdf.

[17] *See* HOUSE OF REPRESENTATIVES, COMMITTEE ON SMALL BUSINESS (HSBC), SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT, AND GOVERNMENT PROGRAMS, and COMMITTEE ON VETERANS AFFAIRS (HVAC), SUBCOMMITTEE ON BENEFITS, *Hearing on Excellence in Action: Government Support of Disabled Veteran-Owned Businesses*, HSBC No. 108-73, HVAC No. 108-48 (July 15, 2004) (Statement of Professor Schooner).

[18] Paul Sherman, *Paved with Good Intentions: Obstacles to Meeting Federal Contracting Goals for Service-Disabled Veterans-Owns Small Business*, 36 PUB. CONT. L.J. 125 (2006).

[19] Theron Korsak, *The Service-Disabled Veteran-Owned Small Business in the Federal Marketplace*, THE ARMY LAWYER, DEPT. OF THE ARMY PAM 27-50-422, 47-48 (2008).

[20] Kelly McGann, *Benign Neglect: Veteran-Owned Small Business in Federal Procurement Today*, 6 VETERANS L. REV. 187 (2014).

[21] Amy G. Cox and Nancy Y. Moore, *Improving Federal and Department of Defense Use of Service-Disabled Veteran-Owned Businesses*, RAND RESEARCH REPORT 322 (2013), available at: http://www.rand.org/content/dam/rand/pubs/research_reports/RR300/RR322/RAND_RR322.pdf.

[22] *See* U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON SMALL BUSINESS (HSBC), SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT, and Government Programs, and COMMITTEE ON VETERANS AFFAIRS

criticized the SDVOSB Program's design. Some of Schooner's arguments appeared to be largely philosophical in nature and derived from his 2002 paper *Desiderata: Objectives for a System of Government Contract Law*:[23] that set-asides and sole source contracts are inconsistent with systemic principles of efficiency and competition; that the program "merely redistributes opportunities" and "further subdivides the existing small business pie by pitting small businesses against each other"; and that asking the acquisition workforce "without additional resources, to cater to special interest groups, is unrealistic and arguably fiscally irresponsible."[24] His other arguments were pragmatic: that the goal feature of the Program "may not be the most efficient tools if your purpose is to broadly distribute contract opportunities to emerging firms" because "Contracting Officers have an incentive to award the largest possible contract to the smallest number of eligible firms" and thereby favor "the most successful or strongest existing firms . . . many of which strategically avoid formal growth."[25]

Two years later, in the fall 2006 *Public Contract Law Journal* note *Paved with Good Intentions: Obstacles to Meeting Federal Contracting Goals for Service-Disabled Veteran-Owned Small Businesses,*[26] Sherman provided perhaps the most cogent critique of the Program's entrenchment challenge. Echoing Schooner's 2004 testimony, he observed: "[T]he program seems almost paradoxical. To the extent that the SDVOSB program assists service-disabled veterans who are already the owners of successful small businesses, it arguably provides assistance to the least-needy members of the service-

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(HVAC), SUBCOMMITTEE ON BENEFITS, *Hearing on Excellence in Action: Government Support of Disabled Veteran-Owned Businesses*, HSBC No. 108-73, HVAC No. 108-48 (July 15, 2004).

[23] *See generally*, Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROC. L. REV. 103 (2002).

[24] U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON SMALL BUSINESS (HSBC), SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT, and Government Programs, and COMMITTEE ON VETERANS AFFAIRS (HVAC), SUBCOMMITTEE ON BENEFITS, *Hearing on Excellence in Action: Government Support of Disabled Veteran-Owned Businesses*, HSBC No. 108-73, HVAC No. 108-48 (July 15, 2004) (Statement of Professor Schooner).

[25] *Id.*

[26] Paul Sherman, *Paved with Good Intentions: Obstacles to Meeting Federal Contracting Goals for Service-Disabled Veterans-Owns Small Business,* 36 PUB. CONT. L.J. 125 (2006).

disabled veteran community. Indeed, the program appears considerably more likely to reward already successful SDVOSBs, further exacerbating entrenchment concerns, than to create significant opportunities for new SDVOSBs."[27] Sherman, however, made much of this challenge on philosophical objections to effectiveness of set-asides. Not surprisingly, Sherman opposed making SDVOSB set-asides mandatory instead of discretionary; instead, Sherman called for increased information about SDVOSB capabilities.

The third assessment came in July 2008, when Korsak's *Army Lawyer* article *The Service-Disabled Veteran-Owned Small Businesses in the Federal Marketplace* [28] addressed the Federal government's progress in implementing the SDVOSB Procurement Program in the wake of EO 13360. His view of the Order was positive, but guarded: "The order provided much-needed direction and a clear mandate to the heads of federal agencies. Agency officials no longer could ignore the legislative framework that Congress created to assist service-disabled veteran-owned businesses. In the order, the President outlined the respective roles for [agency heads and] . . . also directed all federal agency heads to develop a 'strategic plan' to implement the policies as prescribed by Congress. In the years immediately following the executive order the number of contracts awarded to service-disabled veteran-owned small businesses increased, but at a sluggish rate. The slow growth prompted further congressional direction."[29] Korsak noted that "Congress squarely placed the task of ensuring success of the service-disabled veteran-owned small business program on the shoulders of Federal [buying] agencies."[30] He attributed implementation challenges to regulatory burdens on Contracting Officers' discretion. These included: conflicts with other socio-economic small business programs; conflicts with business or administrative pressures to bundle or consolidate

[27] Paul Sherman, *Paved with Good Intentions: Obstacles to Meeting Federal Contracting Goals for Service-Disabled Veterans-Owns Small Business*, 36 PUB. CONT. L.J. 125 (2006).

[28] Theron Korsak, *The Service-Disabled Veteran-Owned Small Business in the Federal Marketplace*, THE ARMY LAWYER, DEPT. OF THE ARMY PAM 27-50-422, 47-48 (2008).

[29] *Id*.

[30] *Id.*, at 56.

contracts; and, finally, the potential of size, status, and bid protests where agency identifications of SDVOSBs, responsibility determinations, and acquisition strategies may be challenged for arbitrariness, caprice, or abuse of discretion.[31]

The 2013 Rand Corporation report by Cox and Moore[32] was dedicated to both design and functioning of the Federal and DOD SDVOSB Programs. It was commissioned by Director, DOD OSBP, "to investigate barriers to entry for Service Disabled Veteran Owned Small Businesses (SDVOSBs). This study [was to] outline progress towards meeting SDVOSB prime contracting goals for DOD, and incidentally for other federal agencies and the federal government as a whole. It [was intended to] also identify any barriers SDVOSBs face in forming small businesses and winning prime contract awards and recommend ways to reduce these barriers."[33] Relying on surveys and interviews of SDVOSBs and DOD officials, the 2013 Cox and Moore study[34] identified three major categories of barriers to SDVOSB participation in DOD prime contracts and DOD's SDVOSB goal attainment.

The first barrier category concerned the understandings of DOD Contracting Officers of the discretionary nature of the SDVOSB Program authorities to conduct sole source and competitive SDVOSB set-asides. Two barriers within this category included differences between SDVOSB and other small business contracting programs such as HUBZone or Section 8(a) SDB programs: (1) higher statutory or agency-negotiated goals for firms in

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[31] Theron Korsak, *The Service-Disabled Veteran-Owned Small Business in the Federal Marketplace*, THE ARMY LAWYER, DEPT. OF THE ARMY PAM 27-50-422, 47-48 (2008).

[32] Amy G. Cox and Nancy Y. Moore, *Improving Federal and Department of Defense Use of Service-Disabled Veteran-Owned Businesses*, RAND RESEARCH REPORT 322 (2013), available at: http://www.rand.org/content/dam/rand/pubs/research_reports/RR300/RR322/RAND_RR322.pdf.

[33] Andre Gudger, Director, Department of Defense Office of Small Business Programs (DOD OSBP), Testimony before the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, House Committee on Oversight and Government Reform (Feb. 7, 2012), available at: http://oversight.house.gov/wp-content/uploads/2012/02/2-7-2012_Tech_Gudger.pdf.

[34] *See* Amy G. Cox and Nancy Y. Moore, *Improving Federal and Department of Defense Use of Service-Disabled Veteran-Owned Businesses*, RAND RESEARCH REPORT 322 (2013), available at: http://www.rand.org/content/dam/rand/pubs/research_reports/RR300/RR322/RAND_RR322.pdf.

other programs, which conveyed the appearance of higher priority; and (2) differences between permissive SDVOSB set-aside language and the mandatory set-aside language for other programs, which made DOD buyers choose between prohibitive uncertainty and certainty.

The second barrier category, concerned the fundamental misunderstanding by service-disabled veteran business owners at large that the SDVOSB Program's goals and set-asides constitute a government guarantee of contracted work for veterans in return on some initial start-up investment. "[M]any did not understand that the SDVOSB procurement goals are not mandatory and are not guaranteed. . . . The widely publicized 3 percent goal raised the expectations of many of these SDVOSBs that they would receive federal business, and they invested in their companies and in bids accordingly."[35] What Cox and Moore found was that many veterans perceived the SDVOSB as a business development program that was suitable for transitioning veterans or business start-ups, and would help them get both the business and the experience in Federal and defense contracting.

The third barrier category concerned limited access to SDVOSB Program support and information about the procurement process. Though the FAR speaks of "assistance" for SDVOSBs by contracting agencies through set-asides and goals, Cox and Moore found that actual assistance in winning contracts was generally not provided by DOD Contracting Officers. In fact, Cox and Moore described the prospects of having to provide such assistance as a deterrent to DOD buyers against doing business with SDVOSBs. Rather, most meaningful assistance was reportedly provided by Procurement Technical Assistance Centers (PTACs), which are funded by the Defense Logistics Agency (DLA) under cooperative agreements with state or local organizations.[36] Cox

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[35] Amy G. Cox and Nancy Y. Moore, *Improving Federal and Department of Defense Use of Service-Disabled Veteran-Owned Businesses*, RAND Research Report 322 (2013), http://www.rand.org/content/dam/rand/pubs/research_reports/RR300/RR322/RAND_RR322.pdf

[36] *See generally* 10 U.S.C. § 2411-19 (2013) for the Procurement Technical Assistance Program's statutory authority.

and Moore suggested that DOD buyers were rejecting many SDVOSBs as risky due to "lack of knowledge and prior experience in federal contracting."[37]

In addition to SDVOSB Program-specific challenges, SDVOSBs were also found to face information barriers typical of other small and non-traditional suppliers: "These included the inherent complexities of the FAR and of the federal bidding process, a lack of sufficient federal educational and networking opportunities, a lack of communication from key contracting personnel, the slow federal processes for award decisions and making final payments, insufficient knowledge among SDVOSBs about their chances of winning a bid, the risk of wasting resources on developing a bid that was likely to go to an incumbent or another established supplier or of investing in a bid that was subsequently cancelled, and the possibility of being in an emerging industry that does not fit existing NAICS [North American Industrial Classification] categories."[38] (NAICS codes are assigned to each contract solicitation for use in market research across industries as well as determinations whether a firm is small by reference to NAICS-based business size standards, while other codes, Product Service Codes/Federal Supply Codes (PSCs/FSCs) are used to identify what is actually bought.[39]) According to Cox and Moore, to overcome these barriers, SDVOSBs had to partner with established government contractors, hire personnel experienced in the procurement process, invest in learning procurement rules, as well as cater to the needs of byers and end users.

The last academic critique of the Federal and DOD SDVOSB Programs came in McGann's 2014 *Veterans Law Review* article *Benign Neglect: Veteran-Owned Small Business in Federal Procurement Today.*[40] While calling for a VOSB preference

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[37] Amy G. Cox and Nancy Y. Moore, *Improving Federal and Department of Defense Use of Service-Disabled Veteran-Owned Businesses*, RAND RESEARCH REPORT 322 (2013), http://www.rand.org/content/dam/rand/pubs/research_reports/RR300/RR322/RAND_RR322.pdf.

[38] *Id*.

[39] *See* Timothy Bunting, *Play It Again, Sam: Taking Another Look at How Supplies and Services Are Classified*, 42 PUB. CONT. L. J. 549 (2013).

[40] Kelly McGann, *Benign Neglect: Veteran-Owned Small Business in Federal Procurement Today*, 6 VETERANS L. REV. 187 (2014).

regardless of disability, McGann again raised the entrenchment concerns regarding the SDVOSB Program.[41] She argued that the SDV status certification rules are at once too burdensome, too vulnerable to fraud, and too exclusionary of the neediest disabled veterans. McGann likewise predicted that contract awards "based on any particular [SDVOSB] 'status'" would soon be viewed as an unfair benefit and an undue burden on the competitive procurement market. She did, however, credit the VA's 2006 Veterans First set-asides program which gave SDVOSBs first priority among other categories for VA's record of persistent goal achievement. She, therefore, called for replicating it within the DOD: "DOD has a vast contracting budget along with firsthand knowledge of veterans sacrifice and skill-sets. Further, DOD's livelihood depends on encouraging military service from future veterans; preferential treatment for veteran entrepreneurship is one method to encourage service."[42]

The common feedback from these 5 studies was that, despite eloquent policy statements to the contrary, Federal and DOD SDVOSB Programs were not actually designed to help disabled veterans (especially transitioning veterans of recent wars) build businesses through government contracting or to provide SDVs viable opportunities to be part of the DOD total force. To be sure, the Programs' design made those objectives theoretically possible, but not preferred or likely. Instead, as the 5 assessments concluded, the Programs' design: (1) heavily favored entrenchment of already-successful SDVOSBs who could have likely got government contracts without the Program, to the possible exclusion of newer or niche SDVOSBs; (2) sowed actual or potential confusion for government buyers and SDVOSBs alike because of discretionary language in laws and regulations that conflicted with other public policies such as competition, fairness, or business development; and (3) fostered actual or potential disillusionment with the SDVOSB Program. The consensus among those assessments was that one or more of these design flaws would render achievement of the 3 percent goal problematic.

[41] Kelly McGann, *Benign Neglect: Veteran-Owned Small Business in Federal Procurement Today*, 6 VETERANS L. REV. 187 (2014).

[42] *Id.* at 200. (2014).

Despite the 10-year, 5-study refrain of "entrenchment, confusion, disillusionment," no study to date suggested fundamental reforms to the SDVOSB Program so as to reduce or eliminate those three challenges. It is what this study intends to do by applying performance management aspects of contract management theory to the question of SDVOSB contracting. This study attempts to examine the research problem of the paradox between real goal achievement success and the predictions of program malfunction in relation to the SDVOSB Program.

In addition to the above review of prior academic assessments, this study includes an analytical examination of the theoretical foundations of effective program design based on the Cohen-Eimicke Contract Management Performance Model in relation to the current SDVOSB Program design (such as that design is shaped by different policymakers). **Thus, this study addresses three research questions below:**

(1) Can the SDVOSB Program's operations, successes, and challenges be better explained in terms of the generally accepted Cohen-Eimicke Contract Management Performance Model (inputs, process, outputs, and outcome)?

(2) Is broad and unguided individual-level Contracting Officer discretion the right mechanism to support SDVOSB participation in Defense, Navy, and Marine Corps contracting?

(3) Can FAR Part 13 Simplified Acquisitions positively influence Program outcomes?

This study's research hypothesis is that the Federal/DOD/DON SDVOSB Procurement Program's design(s) overlooked the issues of performance management and contracting capacity necessary to achieve the systemic, veteran-centric outcomes cited by Program architects and proponents at the reasons for its creation and continuation. This design flaw prioritizes the 3 percent goal above other priorities, such as helping the greatest possible number of SDVOSBs, ensuring that DOD contracting is a viable path for veteran self-employment, achieving SDVOSB community support, bringing new entrants to DOD procurement, and meeting moral and rehabilitative obligations to SDVs.

To explore this hypothesis, this study first defines what would constitute an effective performance design for a socio-economic contracting program as a matter of contract management theory. Next, this study applies this theoretical framework to the historical, legal, and policy developments in Program rules in order to create a comprehensive taxonomy of Program design reflecting the priorities and actions of different policy designers. This study then validates the understanding of this design taxonomy by analyzing data from government databases such as the Federal Procurement Data System-Next Generation (FPDS-NG), the Veterans Administration, and System for Award Management SAM). The purpose of data analysis is to see if the Program operates as actually designed. To the extent the research hypothesis is substantiated, this study would then propose veteran-centric performance management realignments of the Program through new contractors' most suitable tool, Simplified Acquisition Procedures (SAP), including targeted SDVOSB SAP set-asides.[43]

[43] For discussion of SAP suitability for new contractors, see the original SAP creation proposal in DOD ACQUISITION LAW ADVISORY PANEL, *Streamlining Defense Acquisition Laws, Executive Summary: Report of the DOD Acquisition Law Advisory Panel*, AD-A264919 (January 1993). For purposes of this study, Far Part 13 SAP contracts include contracts capped at the Simplified Acquisition Threshold (SAT) (originally set at $100,000 and raised to $150,000 for non-emergency, domestic procurements) as well as certain commercial item contracts capped at the Commercial Item SAP threshold, formerly known as the Commercial Items Test Program threshold (originally set at $5 million and later raised to $6.5 million). These thresholds were in effect during the time period studied.

III. THEORETICAL FOUNDATIONS OF EFFECTIVE PROGRAM DESIGN: APPLYING THE COHEN-EIMICKE CONTRACT MANAGEMENT PERFORMANCE MODEL TO SOCIO-ECONOMIC CONTRACTING.

In their 2008 modern classic *The Responsible Contract Manager*, Cohen and Eimicke classify contracting programs' performance measurements according to four types of measures: input(s), process(es), output(s), and outcome(s).[44]

Inputs typically concern program resources, such as "dollars appropriated and allocated, . . . length of time committed to the problem," involvement of other organizations, etc.[45] "Input measures are frequently criticized because they tell you only how hard you are trying to do something about a problem or the extent of your commitment to reach a particular goal. . . . Input measures tell you very little about how well you are doing in reaching the objective – they measure effort much better than they assess results. But input measures should not be ignored. They provide an important barometer of the scope of activity and of the present and future demand on overall resources, serve as surrogates of the organization's priorities, and often reflect the organization's customer preferences as well."[46] In socio-economic contracting programs, performance is typically measured by reference to statutory Small Business Act goals (or SBA-negotiated goals) establishing that target small businesses receive a certain percentage of an agency's

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[44] STEVEN COHEN AND WILLIAM EIMICKE, THE RESPONSIBLE CONTRACT MANAGER: PROTECTING THE PUBLIC INTEREST IN AN OUTSOURCED WORLD (PUBLIC MANAGEMENT AND CHANGE) (Georgetown University Press, 2008). For reception of this book, see Amanda M. Girth, *Strengthening Contract Management Capacity to Ensure Accountability*, 6 JOURNAL OF PUBLIC ADMINISTRATION RESEARCH AND THEORY, Issue 3, 795-799 (2014), available at : http://jpart.oxfordjournals.org/content/24/3/795.short; M. Ernita Joaquin, *Book Review of The Responsible Contract Manager: Protecting the Public Interest in an Outsourced World*, 23 GOVERNANCE: AN INTERNATIONAL JOURNAL OF POLICY, ADMINISTRATION, AND INSTITUTIONS, no. 1, 195-198 (2010), available at: http://digitalscholarship.unlv.edu/sea_fac_articles/393; Anthony Filipovitch, *Book Review of The Responsible Contract Manager: Protecting the Public Interest in an Outsourced World*, 39 NONPROFIT AND VOLUNTARY SECTOR QUARTERLY, no. 2, 373-375 (April 2010). This book is also used in the Naval Postgraduate School contract management curricula.

[45] STEVEN COHEN AND WILLIAM EIMICKE, THE RESPONSIBLE CONTRACT MANAGER: PROTECTING THE PUBLIC INTEREST IN AN OUTSOURCED WORLD (PUBLIC MANAGEMENT AND CHANGE) (Georgetown University Press, 2008).

[46] *Id.* at 152.

contracts or subcontracts spending. Inputs may also include training courses or number of staff assisting in carrying out the program.[47]

The second performance measurement, process, or steps involved in production of goods and services, is a function of total quality management (TQM). "Measurement of those activities facilitates organizational learning and improvement. Process measures include the delineation and definition of specific work steps, measures of the amount of time it takes to perform specific tasks, error rates, and similar indicators. Requiring organizational units to report process measures can signal government's concern for the quality and efficiency of an organization's internal operations and can compel attention to these fundamental management issues."[48] In socio-economic contracting programs, process measures would concern contracting tools such as set-asides or steps in publicizing contract opportunities and market research.

The third performance measurement category is output measures, which "seek to quantify the amount of work accomplished with the inputs or resources provided. Output measures can seek to measure quantity, quality, or both. Typical output measures include customers or clients served, facility condition and cleanliness, miles of road paved, . . . or number of products sold. . . . Utilizing a select number of indicators that have a direct impact on performance (particularly for customers and funding agencies) leads to a successful performance measurement system."[49] A typical output measure for a socio-economic contracting program would be the number of target small businesses that benefitted from the program, or a number of contracts awarded through the program.

Finally, there are the outcome- or impact-based measures, which assess whether the desired state (e.g., greater overall economic opportunity for disabled veterans or a more

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[47] STEVEN COHEN AND WILLIAM EIMICKE, THE RESPONSIBLE CONTRACT MANAGER: PROTECTING THE PUBLIC INTEREST IN AN OUTSOURCED WORLD (PUBLIC MANAGEMENT AND CHANGE) 153 (Georgetown University Press, 2008).

[48] *Id.*

[49] *Id.* at 153-154

SDVOSB-friendly contracting market) is being achieved. Outcome measures are notoriously hard to pinpoint and identify, however. Overall, “the function of performance management remains the same: What are we trying to do, and are we succeeding in doing it?”[50]

[50] STEVEN COHEN AND WILLIAM EIMICKE, THE RESPONSIBLE CONTRACT MANAGER: PROTECTING THE PUBLIC INTEREST IN AN OUTSOURCED WORLD (PUBLIC MANAGEMENT AND CHANGE) 155 (Georgetown University Press, 2008).

IV. UNDERSTANDING THE PERFORMANCE TAXONOMY OF THE SDVOSB PROGRAM DESIGN.

The current DOD SDVOSB Program has been shaped by multiple policymakers and stakeholders, including Presidential Administrations, Congress, the SBA, the FAR Council, the GAO, Federal courts, and veteran advocacy groups. As described more in detail below, it was originally intended and proposed to be designed as a business development program like the Section 8(a) Program for small disadvantaged businesses (SDBs).

Under Section 8(a) of the Small Business Act, the SBA is authorized and directed to provide business development assistance to small disadvantaged businesses (SDBs). This assistance includes a tailored business development plans, pool of contract requirements "accepted into" the program for note more than 7 years for sole source and competitive set-asides, management and technical advice, agency goals, and other measures. Sole source awards can be made based on such business development plan even if there is another willing, but more successful 8(a). The assistance mix would change as the firms established past performance and progressed towards program graduation. The SBA reports to Congress annually on assistance metrics, including number of firms assisted and agencies' spending goal achievement.[51] Federal and DOD Contracting Officers make non-competitive 8(a) awards with SBA direction or concurrence, and may not rededicate 8(a) Program contracts for other businesses without SBA approval. In the Cohen-Eimicke framework, this assures a "floor" in terms of program input, i.e. spending. [52]

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[51] See generally 15 U.S.C. § 637(a) (2014); 13 CFR Part 124 (2014), U.S. SMALL BUSINESS ADMINISTRATION (SBA) OFFICE OF BUSINESS DEVELOPMENT, STANDARD OPERATING PROCEDURE (SOP) 80 05 3A (2008), available at: https://www.sba.gov/sites/default/files/sops/serv_sops_sop80053a.pdf; U.S. SMALL BUSINESS ADMINISTRATION (SBA), *About the 8(a) Program* (2014), available at: https://www.sba.gov/content/about-8a-business-development-program.

[52] *Cf.* STEVEN COHEN AND WILLIAM EIMICKE, THE RESPONSIBLE CONTRACT MANAGER: PROTECTING THE PUBLIC INTEREST IN AN OUTSOURCED WORLD (PUBLIC MANAGEMENT AND CHANGE) (Georgetown University Press, 2008).

Further, the 8(a) Program increases the outcome of business development of disadvantaged entrepreneurs through a firm(output)-focused process there the SBA assumes much of the responsibility for picking firms in need of contract awards, leaving Contracting Officers to focus on better requirements definition and contract administration. Instead, the SDVOSB Program features have morphed over time into a 3 percent goal-driven, input-based design that relies for process on individual-level discretion of DOD Contracting Officers to reserve competitive or sole source contract awards for SDVOSBs whenever the contracting officer determines such awards are needed. In essence, a Contracting Officer bears an undefined moral responsibility for supporting SDVOSBs while assuming definite risk of performance failure should the SDVOSB firm's capabilities fail. Neither the quantity nor the business development needs of outputs, that is, number of assisted firms, are used as strategic guides for exercise of Contracting Officers' discretion at the individual level, DOD-wide, or military department-wide. The end result is a long history of missed opportunities to align Program design with its mission, where the common thread among most policy initiatives was to leave the business development power with the wrong people: individual Contracting Officers.

A. ORIGINAL DESIGN INTENT FOR THE SDVOSB PROGRAM: BUSINESS DEVELOPMENT OUTCOME.

Veteran advocates have long argued for a Section 8(a)-style program for SDVOSBs. In November 1998, the SBA submitted to Congress the report of its Veterans Affairs Task Force on Entrepreneurship, which included a "high priority" recommendation for "a regulation classifying veteran-owned businesses as a 'socially and economically disadvantaged business group.'"[53]

On January 14, 1999, the Congressional Commission on Service members and Veterans Transition Assistance issued its final report, which recommended admission of SDVOSBs owned by veterans with majority-disabled ratings in order to "increase

[53] 145 CONG. REC. 21,168 (Sept. 9, 1999) (Statement of Rep. James H. Talent on the Veterans Entrepreneurship and Small Business Development Act of 1999).

opportunities for veterans who are, or want to become, small business owners."[54] That report emphasized the disabled veterans' need for 8(a) "special assistance" due to "costs and impediments that are not factor for their nondisabled competitors."[55] The report also found that veterans "earned . . . through their service" a goaling "incentive" for Federal agencies such as DOD to do business with VOSBs and SDVOSBs.[56] Despite the excellent fit of this design to the realities of contracting process and SDV needs, neither Congress nor the Executive Branch expressly adopted it.

B. LEGISLATIVE ESTABLISHMENT OF INPUT-FOCUSED DESIGN.

The first SDVOSB Program design was supposedly adopted on January 2, 1974, upon enactment of Public Law 93-237 with what was known as the "Anti-Discriminatory Amendment" to Section 4 of the Small Business Act, codified as 15 USC §633(4) (2014); that Amendment required that "the Small Business Administration shall give special consideration to veterans of the Armed Forces of the United States and their survivors or dependents." No significant contracts flowed to veterans from that measure.

The next significant reform came on December 2, 1997, with enactment of the Small Business Reauthorization Act of 1997, Public Law 105-135. The Act's Title VII, Service-Disabled Veterans, contained several measures intended to "(1) to foster enhanced entrepreneurship among eligible veterans by providing increased opportunities; (2) to vigorously promote the legitimate interests of small business concerns owned and controlled by eligible veterans; and (3) to ensure that those concerns receive fair consideration in purchases made by the Federal Government."[57] These measures included Section 703 direction to the SBA to study and report "the percentage, and dollar

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[54] CONGRESSIONAL COMMISSION ON SERVICE MEMBERS AND VETERANS TRANSITION ASSISTANCE, REPORT OF THE COMMISSION 9 (1999), available at: http://www.tricare.mil/tma/ocmo/download/Exec_Summary/ES-11_ReportCongCommServMembersVetsTransitionAssistance.pdf.

[55] *Id.* at 147.

[56] *Id.* at 147.

[57] Small Business Reauthorization Act of 1997, Pub. L. No. 105-135, Title VII, § 701 (1997).

value, of Federal contracts" awarded to SDVOSBs over the previous 5 years, and Section 707 direction to the SBA "to take such actions as may be necessary" to ensure that SDVOSBs "have access to programs established under the Small Business Act" providing "business development assistance" and other help. Thus, while contracting and other business development assistance was mentioned, it seemed be tied to inputs, not outputs or outcome.

The transition to explicit input-based design occurred in 1999 with Public Law 106-50, the Veterans Entrepreneurship and Small Business Development Act of 1999. That law amended the Small Business Act to create a 3 percent minimum prime contracting and subcontracting government-wide SDVOSB goals as part of other government-wide small business goals.[58] The law also provided for veterans' business development entities within the SBA, the VA, and the stand-alone National Veterans Business Development Corporation (NVBDC).

On December 16, 2003, the Veterans Benefits Act of 2003 became Public Law 108-183. Section 308[59] of that law, codified at 15 U.S.C. § 657f, gave Federal agencies the tools to achieve the 3 percent goal by amending the Small Business Act to authorize competitive and sole source set-asides for SDVOSBs. The original 2003 set-aside authority (with thresholds since adjusted for inflation to $6 million for manufacturing NAICS buys and $3.5 million for other buys) provided:

> *(a) Sole source contracts. In accordance with this section, a contracting officer may award a sole source contract to any small business concern owned and controlled by service-disabled veterans if— (1) such concern is determined to be a responsible contractor with respect to performance of such contract opportunity and the contracting officer does not have a reasonable expectation that 2 or more small business concerns owned and controlled by service-disabled veterans will*

[58] Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, § 502, codified in the Small Business Act at 15 U.S.C. §644(g) (1999).

[59] Veterans Benefits Act of 2003, Pub. L. No. 108-183, §308, codified in the Small Business Act as 15 U.S.C. §657f (2003).

submit offers for the contracting opportunity; (2) the anticipated award price of the contract (including options) will not exceed— (A) $5,000,000, in the case of a contract opportunity assigned a standard industrial classification code for manufacturing; or (B) $3,000,000, in the case of any other contract opportunity; and (3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price. (b) Restricted competition. In accordance with this section, a contracting officer may award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price.[60]

C. THE CONGRESSIONAL COMPROMISE OF 2003: MISSED OPPORTUNITIES FOR TYING SDVOSB PROGRAM INPUTS TO BUSINESS DEVELOPMENT OUTCOMES FOR SERVICE-DISABLED VETERANS.

Two provisions of Veterans Benefits Act of 2003, Public Law 108-183 (which remained law but which did not become U.S. Code sections), as well as related legislative history, provide some insight into the legislative intent for the objectives of the SDVOSB Procurement Program as well as the choice of means to accomplish them. Collectively, these authorities show that Congress intended the SDVOSB Program to be business development in nature, but chose not to mandate this intent. Rather, Congress compromised the clarity and strength of this intent in order to accommodate concerns over the commingling of SDVOSBs and SDBs into one 8(a) Program or creation of a rival 8(a)-style Program.

Section 101 of the Veterans Benefits Act indicates that Congress intended the SDVOSB Program to be in its nature a business development program:

SEC. 101. FINDINGS. Congress finds the following: (1) Veterans of the United States Armed Forces have been and continue to be vital to the small business enterprises of the United States. (2) In serving the United States, veterans often

[60] 15 U.S.C. § 657f (2003).

> *faced great risks to preserve the American dream of freedom and prosperity. (3) The United States has done too little to assist veterans, particularly service-disabled veterans, in playing a greater role in the economy of the United States by forming and expanding small business enterprises. (4) Medical advances and new medical technologies have made it possible for service-disabled veterans to play a much more active role in the formation and expansion of small business enterprises in the United States. (5) The United States must provide additional assistance and support to veterans to better equip them to form and expand small business enterprises, thereby enabling them to realize the American dream that they fought to protect.*[61]

Section 102 addressed tools to achieve these objectives. Section 102 language shows that Congress designed the SDVOSB Program to operate not as a tailored business development program such as the Section 8(a) Program for Small Disadvantaged Businesses (which has the highest goals and strongest set-aside mandates of all socioeconomic categories), but as a form of additional assistance to SDVOSB firms of various levels of sophistication:

> *SEC. 102. PURPOSE. The purpose of this Act is to expand existing and establish new assistance programs for veterans who own or operate small businesses. This Act accomplishes this purpose by—(1) expanding the eligibility for certain small business assistance programs to include veterans; (2) directing certain departments and agencies of the United States to take actions that enhance small business assistance to veterans; and (3) establishing new institutions to provide small business assistance to veterans or to support the institutions that provide such assistance.*[62]

Legislative history shows that Congress approached the SDVOSB Program design from the perspective of compromise, rather than the perspective of design effectiveness and cohesion. In the House Report 108-142, Part I, on H.R. 1460, Veterans Entrepreneurship

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[61] Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 101 (2003).

[62] Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 102 (2003).

and Benefits Improvement Act of 2003 (June 5, 2003), the House Committee on Veterans Affairs admitted that service-disabled veterans require special business development assistance in terms of accessing government contracts, but expressly rejected the recommendation to let them tap into an already-existing 8(a) assistance framework:

> *The Committee notes the 1999 report of the bipartisan Congressional Commission on Servicemembers and Veterans Transition Assistance recommended that ``Special assistance, such as lending opportunities and access to a disadvantaged business development program like SBA's 8(a) program is needed to support disabled veteran entrepreneurs.'' H.R. 1460, as amended, does not make service-disabled veteran-owned small businesses part of the 8(a) program, but it does give them sole source/set-aside-type contracting opportunities on a discretionary basis. The Commission also concluded that, ``Disabled-veteran entrepreneurs require additional assistance because these business owners encounter costs and impediments that are not factors for their non-disabled competitors'' and ``As a matter of fundamental fairness, Congress should accord veterans a full opportunity to participate in the economic system that their service sustains."*[63]

What really concerned the Committee was the Federal government's failure to meet the Public Law 106-50 3 percent goaling floor four years since its passage. In the wake of the June 2003 hearings, the Committee reached the consensus with the Bush Presidential Administration that a set-aside tool "is needed as government-wide implementation of the 3 percent goal has been 'abysmal.'"[64] Thus, Congress tied the set-asides process to spending inputs in the parts of the 2003 law that were codified in Title 15, Chapter 14A of the U.S. Code as part of the Small Business Act, while preserving the SDVOSB Program's business development intent in the parts of 2003 law that were to become notes to U.S. Code sections and not the Code sections themselves. As described below,

[63] H.R. REP. 108-142, Part I, *H.R. 1460, Veterans Entrepreneurship and Benefits Improvement Act of 2003* (June 5, 2003).

[64] *Id.*

this approach spawned years of legal, contracting, and managerial conflicts and confusion.

D. THE FAR COUNCIL'S AND THE SBA'S REJECTIONS OF OUTCOME-FOCUSED OR OUTPUT-FOCUSED DESIGNS FOR THE SDVOSB PROGRAM.

Like Congress, the SBA and the FAR Council adopted input-focused Program designs in regulatory history. On March 23, 2005, the FAR Council issued the final FAR rule on the SDVOSB Procurement Program.[65] The final rule asserted that the SDVOSB set-asides were not intended to build SDVOSB firms, but simply to provide them with some form of preferential contracting treatment: "It is important to note that the 8(a) Program is a business development program. While the 8(a) Program offers a broad scope of assistance to socially and economically disadvantaged small businesses, the SDVOSB Program strictly pertains to benefits in Federal contracting."[66] As mentioned above, the Final Rule also amended the purpose of FAR Part 13, Simplified Acquisition Procedures to cover SDVOSB contracting opportunities.

The SBA issued its final SDVOSB Program rule on the same day, March 23, 2005.[67] In that final rule, the SBA addressed "the general nature of the SDVO SBC Program" in terms of business development assistance. Rebuffing requests that SDVOSBs be allowed to tap the mentor-protégé assistance which the SBA makes available to 8(a) firms, the SBA stated:

> *SBA has reviewed this issue thoroughly and believes that the SDVO SBC Program, unlike the 8(a) BD Program, is not developmental in nature. Rather, it is the result of a recognized need to increase the participation of ''established'' SDVO SBCs in the Federal marketplace. The first attempt, Public Law 106–50,*

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[65] FEDERAL ACQUISITION REGULATION (FAR) COUNCIL, Procurement Program for Service-Disabled Veteran-Owned Small Businesses, Final Rule, 70 Fed. Reg. 14950 (March 23, 2005), http://www.gpo.gov/fdsys/pkg/FR-2005-03-23/pdf/05-5656.pdf.

[66] *Id.*

[67] U.S. SMALL BUSINESS ADMINISTRATION (SBA), SBA Regulations, Government Contracting Programs, 70 Fed. Reg. 14523-14529 (March 23, 2005), available: http://www.gpo.gov/fdsys/pkg/FR-2005-03-23/pdf/05-5466.pdf.

> *instituted the 3% goal for SDVO SBCs. When data indicated that the desired results were not being achieved, Public Law 108–183 was enacted. Public Law 108–183 established tools (a restricted competition and sole source authority) for Contracting Officers to use to reach that segment of the small business population. Although there is no prohibition against SBA establishing an SDVO SBC Mentor-Protégé Program, at this juncture, SBA prefers to wait and see if implementation of the procurement tools in Public Law 108–183 will allow contracting activities to reach their SDVO SBC goals. SBA notes that there is no prohibition for SDVO SBCs, when eligible, to participate in the Mentor-Protégé Programs of other agencies*.[68]

The SBA rulemaking comments did not provide any source reference for the "established" businesses quote.

E. THE REGULATORY DESIGN OF CONTRACTING OFFICERS' DISCRETION FOR SDVOSB SET ASIDE PROCESS.

The actual SBA and FAR regulatory provisions originally contained no alignment between set-asides process and any other Program performance metrics, but were only exhorting breadth of market research. From 2004 and until 2011, the texts of the FAR and the SBA regulations did not require that Contracting Officers consider SDVOSB set-aside prior to conducting the mandatory market research for mandatory considerations of small business set-asides. FAR §19.1405(a) (2007)[69] provided only that the Contracting Officers "may" consider such set-asides, while the SBA Regulations at 13 C.F.R. §125.19 (2007)[70] provided that they "should" consider them along with HUBZone and 8(a) set-asides (Women-Owned SBs were added later) and before regular small business set-asides. In acquisitions above the Simplified Acquisition Threshold (SAT), HUBZone firms at the time would take precedence over SDVOSBs. The FAR further provided that

[68] U.S. SMALL BUSINESS ADMINISTRATION (SBA), SBA Regulations, Government Contracting Programs, 70 Fed. Reg. 14523-14529 (March 23, 2005), available at: http://www.gpo.gov/fdsys/pkg/FR-2005-03-23/pdf/05-5466.pdf.

[69] FAR §19.1405(a) (2007).

[70] 13 C.F.R. § 125.19 (2007).

a contracting officer "may set-aside acquisitions exceeding the micro-purchase threshold for competition restricted to [SDVOSBs when the Rule of Two is met]. The contracting officer shall consider service-disabled veteran-owned small business set-asides before considering service-disabled veteran-owned small business sole source awards."[71]

In 2011, the FAR and SBA Regulations strengthened market research duties and aligned set-asides to goals. The SBA amended its regulations on February 4, 2011 and made market research for purposes of considering SDVOSB set-asides mandatory: "after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVO SBC or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type and extent of market research conducted."[72] The FAR amendments provided for parity and also expressly mandated consideration of the SDVOSB Program and other socio-economic programs before proceeding with regular small business set-asides above SAT. The FAR Council defined it as follows: "FAR 19.203(d) was added to include language consistent with 13 CFR 125.2(f)(2)(ii) regarding the minimum elements a contracting officer should examine when choosing a socioeconomic program: The results of market research and progress in fulfilling agency small business goals."[73]

Since early 2011, the SBA and FAR regulatory texts require mandatory ("shall" language) consideration of SDVOSB set-asides for open market contracts above the SAT, and authorize discretionary consideration ("may" language) for Indefinite-Delivery Vehicle (IDV) contracts and orders as well as open market contracts not exceeding SAT. Taking into account the reforms adopted in the Small Business Jobs Act of 2010, Public

[71] FAR §19.1405(a) (2007).

[72] 13 C.F.R. § 125.19(b)(2)(i) (2011).

[73] FAR COUNCIL, Federal Acquisition Regulation: Socioeconomic Program Parity (March 2, 2012), available at: http://www.gpo.gov/fdsys/pkg/FR-2012-03-02/html/2012-4488.htm.

Law 111-240 (Sept. 24, 2010),[74] FAR § 19.203 (2011) outlines three general rules of precedence for Open Market procurements.

First, "[s]mall business set-asides have priority over acquisitions using full and open competition."[75] In other words, set-asides always take priority over unrestricted buys.

Second, "[t]here is no order of precedence" among the four small business socioeconomic programs: the 8(a) Program, the HUBZone Program, the Service–Disabled Veteran–Owned Small Business (SDVOSB) Procurement Program, or the Women–Owned Small Business (WOSB) Program.[76]

The third rule concerns the choice between small business set-asides and small business socio-economic set-asides. Above-SAT buys are to be considered for socio-economic programs first, before considering them for small business set-asides. However, the parity between those programs is still subject to the 8(a) claw-back priority: "However, if a requirement [above SAT] has been accepted by the SBA under the 8(a) Program, it must remain in the 8(a) Program unless the SBA agrees to its release in accordance with 13 CFR parts 124, 125, and 126."[77] Below-SAT buys are different, in that they are to be "exclusively reserve[d] . . . for small business concerns," which merely "does not preclude the contracting officer from awarding a contract to a small business under the 8(a) Program, HUBZone Program, SDVOSB Program, or WOSB Program."[78]

The choice "which socioeconomic program to use" is subject to guided discretion, in that "the contracting officer should consider, at a minimum -- (1) results of market research that was done to determine if there are socioeconomic firms capable of satisfying the

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[74] Small Business Jobs Act of 2010, Pub. L. 111-240 (Sept. 24, 2010).

[75] FAR §19.203 (2011).

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[77] *Id.*

[78] *Id.*

agency's requirement; and (2) agency progress in fulfilling its small business goals."[79] It was left unclear in the text, however, whether these criteria apply below the SAT.

F. THE BUSH-ERA INPUT-FOCUSED DESIGN: EO 13360 AND DOD STRATEGIC PLANS.

The Bush-era initiative to improve management of the SDVOSB Program re-emphasized Program outcomes, but ultimately aligned the process with inputs. The October 20, 2004, Executive Order 13360, *Providing Opportunities for Service-Disabled Veteran Businesses to Increase Their Federal Contracting and Subcontracting,*[80] had two overall messages.

The first message was the SDVOSB Program must be administered by the buying agencies in the manner that increases contracting opportunities; the Order sent that message without expressly mentioning business development. EO 13360's Preamble cited as its purpose "to strengthen opportunities in Federal contracting for service-disabled veteran businesses."[81] EO 13360's Section 1 announced: "America honors the extraordinary service rendered to the United States by veterans with disabilities incurred or aggravated in the line of duty during active service with the armed forces. Heads of agencies shall provide the opportunity for service-disabled veteran businesses to significantly increase the Federal contracting and subcontracting of such businesses."[82]

The second message was that the SDVOSB Program, scoped as including the 3 percent goal and the set-aside authorities, will now become mandatory. Section 1 continued in mandatory ("shall") language: "To achieve that objective [of significantly increased

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[79] FAR §19.203 (2011).

[80] George W. Bush, Exec. Order 13,360, *Providing Opportunities for Service-Disabled Veteran Businesses to Increase Their Federal Contracting and Subcontracting*, available at: http://www.gpo.gov/fdsys/pkg/FR-2004-10-26/pdf/04-24098.pdf.

[81] *Id.*

[82] *Id.*

Federal business], agencies shall more effectively implement section 15(g) of the Small Business Act (15 U.S.C. 644(g)), which provides that the President must establish a goal of not less than 3 percent for participation by service-disabled veteran businesses in Federal contracting, and section 36 of that Act (15 U.S.C. 657f), which gives agency Contracting Officers the authority to reserve certain procurements for service-disabled veteran businesses." [83]

In response to EO 13360, OFPP and SBA Administrators issued a memorandum summarizing agency reporting obligations as follows: "the Order requires each agency to: (1) develop a strategy to significantly increase its contracting and subcontracting with small businesses owned and controlled by service-disabled veterans; (2) designate a senior-level official to be responsible for developing and implementing the agency's strategy; and (3) report its progress annually to the Small Business Administration (SBA)."[84] Along with restating the Order, the memo's guidance listed "reserve certain agency contracts exclusively for service-disabled veteran businesses" as one example of actions to include in agency strategies and cautioned of a results-based evaluation.
DOD's implementing plans and policies primarily focused on meeting the goals and improving the flow of information that may be needed by Contracting Officers to favorably exercise their discretion. Substantive output-based process metrics were encouraged, but left to DOD components to generate.

On May 31, 2005, DOD issued its initial 5-year SDVOSB Strategic Plan. The Plan acknowledged the 3 percent goals, but addressed only Fiscal Years 2005 and 2006 with specificity. The Plan contained six elements (objectives) to increase: (1) the number of SDVOSB CCR registrants; (2) "training and outreach of acquisition community to increase use of sole source and restricted competition," including by encouraging DOD components "to initiate credible and aggressive metric based sole-source and restricted competition awards to SDVOSBs"; (3) "SDVOSB participation in the [DOD] Mentor-

[83] *Id.*
[84] OFFICE OF FEDERAL PROCUREMENT POLICY (OFPP) and SBA. Memorandum, *Contracting with Service-Disabled Veter*ans (2005), available at: https://www.sba.gov/offices/headquarters/ogc_and_bd/resources/5526.

Protégé Program"; (4) subcontract awards from large primes; (5) "surety bonding capacity" for construction and environmental remediation SDVOSBs; and (6) enhancements of SDVOSB capabilities and capacities through teaming agreements and joint ventures.[85] The Plan was followed by the April 12, 2007 memorandum from USD AT&L Kenneth Krieg encouraging the use of GSA's SDVOSB Information Technology GWAC, and the May 18, 2007, memorandum from the USD AT&L Office in connection with the DOD being "significantly short" of the 3 percent goal in Fiscal Years 2005 and 2006.[86] Both memoranda referenced the DOD SDVOSB Strategic Plan.

On June 23, 2007, DOD issued another edition of its SDVOSB Strategic Plan covering FY2007 "and out years."[87] The Plan followed the 2005 elements, except that objective 1 now concerned "more effective use of data and databases to perform market research" for SDVOSBs, objective 3 was now the focus on innovative-technology SDVOSBs, and objective 5 concerned working with private lenders on surety bonds.

On January 14, 2009, DOD issued its last SDVOSB Strategic Plan to date, effective through Fiscal Year 2014. This Plan followed the prior six-objective structure, except that the former objective 3, focus on innovative SDVOSBs, became objective 5, while the "communication with stakeholders" became objective 3.[88] The Plan also provided that "[i]t is incumbent of each DOD agency to aggressively develop its own tactical plan to meet the 3 percent goal for prime contracting with SDVOSBs based on its unique product mix."[89] Thus, the last DOD Strategic Plans highlighted the importance of output-related processes, but did not expressly align the SDVOSB Program metrics to business development outcomes.

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[85] USD AT&L, DOD SDVOSB STRATEGIC PLAN (2005).

[86] USD ATL&L, Memoranda, *Service-Disabled Veteran-Owned Small Business Procurement Program* (April 12, 2007), and *GSA GWAC for SDVOSBs in Information Technology* (May 18, 2007), available at: http://www.acq.osd.mil/dpap/policy/policyvault/2007-0828-DPAP.pdf.

[87] USD AT&L, DOD SDVOSB STRATEGIC PLAN (2007).

[88] USD AT&L, DOD SDVOSB STRATEGIC PLAN (2009).

[89] *Id.*

G. THE OBAMA-ERA INPUT-FOCUSED DESIGN: EO 13540 AND THE INTERAGENCY TASK FORCE ON VETERANS SMALL BUSINESS DEVELOPMENT.

President Obama left intact EO 13360 and the 2009 DOD Strategic Plan thus far, but the Obama Administration has pursued its own approach to SDVOSB contracting. Again, however, the stated assumption of these policies was that inputs are a proxy for the business development outcome; therefore, their main thrust was to redirect buyers from increasing the number of outputs to finding existing outputs that can receive more inputs. Yet again, no output- or outcome-aligned designs were adopted. Instead of mandates that bent or guided the exercise of buyers' discretion, the Obama initiatives generally pursued the three-pronged strategy of: (1) studying the SDVOSB supplier base; (2) making it easier for government buyers to exercise their discretion by finding SDVOSB contractors already active in the defense market; and (3) removing bureaucratic barriers from the procurement process.

On April 26, 2010, President Obama signed Executive Order 13540, *Interagency Task Force on Veterans Small Business Development*, "in order to establish an interagency task force to coordinate the efforts of Federal agencies to improve capital, business development opportunities, and pre-established Federal contracting goals for small business concerns owned and controlled by veterans and service-disabled veterans."[90]

On November 1, 2011, the Interagency Task Force (IATF) issued its first *Report to the President: Empowering Veterans through Entrepreneurship*. That report observed, "By increasing the flow of both capital and federal contracting opportunities to veteran-owned small businesses, veterans will have more opportunities to build a new business, expand an existing business, and hire workers. In many cases, this does not require standing up new programs, but instead ensuring that existing programs and resources are more

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[90] Barack H. Obama, Exec. Order 13,540, *Interagency Task Force on Veterans Small Business Development* (April 26, 2010), available at: http://www.gpo.gov/fdsys/pkg/FR-2010-04-29/pdf/2010-10172.pdf. The Order finally implemented the requirement of the Military Reservist and Veteran Small Business Reauthorization and Opportunity Act of 2008, Pub. L. No. 110-186, § 102 (2008), codified in the Small Business Act at 15 U.S.C. §657b(c) (2008), to establish the IATF no later than mid-May 2008.

effective in supporting veteran entrepreneurship."[91] The report further stated that "the [Obama] Administration has made **targeted efforts to specifically enable veterans as successful small business owners** [such as . . . i]ncreasing to the highest level ever the percentage of federal contracts going to service-disabled veteran-owned small businesses in fiscal year 2010"[92] (emphasis in the original). It recommended identifying and removing regulatory barriers to SDVOSB participation, such as common government-wide and VA SDVOSB certifications, implementation of Small Business Jobs Act discretionary set-asides on IDVs, and greater information-sharing between government buyers and veteran groups. The FY2013 National Defense Authorization Act, Public Law 112-239, enacted on January 3, 2012,[93] made statutory goals presumptively binding on agencies unless lower goals were justified.

On November 29, 2012, the Task Force issued its second report, *Heroes on the Home Front: Supporting Veteran Success as Small Business Owners.* It recommended three actions, resurrecting the SBA's 2005 limitation of the Program to "established" firms: "(1) Create an easier process for Contracting Officers to utilize established SDVOSBs so businesses will have greater access to available Federal contracts"; (2) "Create an online reference guide for the Federal government contracting community and an educational video to support Federal Contracting Officers in how to conduct market research and work with SDVOSBs"; and (3) "Identify and share best practices in how agencies maximize the effective use of SDVOSBs" so that Contracting Officers are "trained and incented to do business with SDVOSBs."[94] The report also commended DOD for being a

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[91] INTERAGENCY TASK FORCE ON VETERANS SMALL BUSINESS DEVELOPMENT (IATF), *Report to the President: Empowering Veterans Through Entrepreneurship* (Nov. 1, 2011), available at: https://www.sba.gov/sites/default/files/FY2012-Final%20Veterans%20TF%20Report%20to%20President.pdf.

[92] INTERAGENCY TASK FORCE ON VETERANS SMALL BUSINESS DEVELOPMENT (IATF), *Report to the President: Empowering Veterans Through Entrepreneurship* (Nov. 1, 2011), available at: https://www.sba.gov/sites/default/files/FY2012-Final%20Veterans%20TF%20Report%20to%20President.pdf.

[93] National Defense Authorization Act (NDAA) for Fiscal Year 2013, Pub. L. 112-239, §1631 (2012).

[94] INTERAGENCY TASK FORCE ON VETERANS SMALL BUSINESS DEVELOPMENT (IATF), *Heroes on the Home Front: Empowering Veterans Success as Small Business Owners* (November 2012), https://www.sba.gov/sites/default/files/files/Veterans_Report_FINAL.pdf.

leader in “[s]treamlining the process for Contracting Officers to use established SDVOSBs.”[95] The report cited the 2011 and 2012 memoranda of Secretary Leon Panetta (first-ever by a Secretary of the Defense) stressing the importance of small business (including SDVOSB) goals in management performance, and the DOD OSBP guidance recommending the use of the MAXPRAC tool, a giant spreadsheet with contract awards data from across DOD that allowed buyers in one DOD component to locate small and other socio-economic contractors doing business with another component: “DOD’s Office of Small Business Programs and Defense Procurement Acquisition Policy (DPAP) issued several directives and guidance to Contracting Officers to (1) utilize market research (MAX PRAC) to identify opportunities for small businesses; (2) utilize existing MACs, IDIQ contracts and small business set asides to satisfy near term procurement opportunities; and (3) maximize small business contracting opportunities below the simplified acquisition procedures threshold (SAT) and above the micro-purchase threshold, in accordance with FAR 13.003(b)(1).”[96] Both reports called for agency-level assessments of SDVOSB goal achievement, participation, and barriers.

The so-called MAXPRAC model is essentially a spreadsheet with DOD-wide small business contracting data used for finding established small business suppliers.[97] Thus, the Task Force Reports encouraged Contracting Officers to achieve the input goals through a process that had the admitted effect of reducing Program outputs.

H. THE EFFECT OF ADMINISTRATIVE AND JUDICIAL PRECEDENTS ON THE SDVOSB PROGRAM’S DESIGN.

The three tribunals with jurisdiction over bid protests, namely, the Government Accountability Office (GAO), the Court of Federal Claims (COFC), and the Court of

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[95] INTERAGENCY TASK FORCE ON VETERANS SMALL BUSINESS DEVELOPMENT (IATF), *Heroes on the Home Front: Empowering Veterans Success as Small Business Owners* (November 2012), https://www.sba.gov/sites/default/files/files/Veterans_Report_FINAL.pdf.

[96] *Id.*

[97] U.S. DEPARTMENT OF DEFENSE OFFICE OF SMALL BUSINESS PROGRAMS (DOD OSBP), *Small Business Maximum Practicable (MaxPrac) Opportunity Analysis Model*, http://www.acq.osd.mil/osbp/gov/index.shtml#MaxPrac.

Appeals for the Federal Circuit (CAFC), have their own SDVOSB Program designs through precedents.

The GAO adopted a process-focused model that is concerned with ensuring thorough participation opportunity for individual outputs. The courts have adopted what, at first glance, appears to be two different process designs: one favoring and one disfavoring SDVOSBs. On closer examination, they are really one inputs-focused design. The GAO's design, originated in three 2007-2008 decisions, concerned the quality and thoroughness of market research process and acquisition strategies for the benefit of one or two outputs; it did not concern strategic alignment of process with outputs at large.

In the March 28, 2007 decision *MCS Portable Restrooms*, the GAO interpreted the meaning of Contracting Officer's discretion under the 2005 SBA and FAR SDVOSB Program Final Rules to (1) reject SDVOSBs from consideration for set-asides, and (2) make sole source awards. The GAO formulated the following test: "[T]he contracting officer 'may,' but is not required, to set aside the acquisition for SDVOSBCs, even where it is found that two or more SDVOSBCs are interested in submitting bids and award is anticipated to be made at a fair market price. However, as indicated above, applicable SBA regulations provide that a contracting officer should consider the propriety of setting aside an acquisition for SDVOSBCs before proceeding with a small business set-aside and it is implicit in this regulation that such consideration be reasonable."[98] Applying this test, the GAO required consultation with the SBA as well as consideration of incumbency and expression of interest by an SDVOSB outside the formal "sources sought" market research process. The GAO also held that SDVOSB sole sources were "permitted any time the contracting officer does not have a reasonable expectation that two or more SDVOSBs would submit bids," not simply where the agency can find capable but uninterested SDVOSBs.[99]

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[98] U.S. GOVERNMENT ACCOUNTABILITY OFFICE (GAO), *MCS Portable Restroom Service*, B-299291 (2007), available at: http://www.gao.gov/assets/380/379168.pdf.

[99] *Id.*

In the February 21, 2008 decision *IBV, Ltd.*, the GAO addressed: (1) whether SDVOSB set-asides are mandatory, and (2) when must an SDVOSB be considered for a sole source.[100] The GAO held that consideration of SDVOSB set-asides is mandatory: "Prior to proceeding with a small business set-aside, a procuring agency is required to make reasonable efforts to ascertain whether an SDVOSBC set-aside is appropriate."[101] The GAO also announced a four-part process for SDVOSB sole sources under FAR §19.406 (2008): "While an agency may make a sole-source award to an SDVOSBC, four conditions must be met: only one SDVOSBC can satisfy the requirement; where, as here, the requirement falls under a nonmanufacturing NAICS code, the anticipated award price will not exceed $3 million; the SDVOSBC has been determined responsible with respect to performance; and award can be made at a fair and reasonable price."[102] The GAO then allowed the contracting officer to disregard an SDVOSB interested in a sole source where multiple SDVOSBs demonstrated availability to compete by actually submitting proposals, and all of those proposals substantially exceeded statutory sole source cap as well as fair market price metrics (lowest non-SDVOSB proposal values, independent government estimates, and RFP estimated price).[103]

However, in the May 1, 2008 decision *DAV Prime, Inc.*,[104] the GAO expressly reversed its holdings in *MCS Portable Restrooms* and *IBV, Ltd.* The GAO held there was a duty to consider set-asides and no duty to do market research in search of SDVOSBs. However, where Federal buyers chose to exercise this discretion, they would now be subject to extra scrutiny and GAO precedents: "While there was no requirement that an agency consider setting aside a procurement for SDVOSB concerns prior to proceeding with a

[100] U.S. GOVERNMENT ACCOUNTABILITY OFFICE (GAO), *IBV, Ltd*., B-311244 (2008), available at: http://www.gao.gov/decisions/bidpro/311244.pdf.

[101] U.S. GOVERNMENT ACCOUNTABILITY OFFICE (GAO), *IBV, Ltd*., B-311244 (2008) (interpreting FAR §19.406 (2008), available at: http://www.gao.gov/decisions/bidpro/311244.pdf.

[102] U.S. GOVERNMENT ACCOUNTABILITY OFFICE (GAO), *IBV, Ltd*., B-311244 (2008), available at: http://www.gao.gov/decisions/bidpro/311244.pdf.

[103] *Id.*

[104] U.S. GOVERNMENT ACCOUNTABILITY OFFICE (GAO), *DAV Prime, Inc.*, B-311420 (2008), available at: http://www.gao.gov/decisions/bidpro/311420.pdf.

small business set-aside, if the agency performs an SDVOSB set-aside analysis, the conclusions the agency draws from that analysis must be reasonable."[105] Thus, the 2007-2008 GAO design focused on process for the sake of one or more outputs, but not on increasing inputs.

In the February 13, 2012 decision, of *Kingdomware Technologies; SDV Technologies, LLC*,[106] the GAO permitted a regional installation contracting office of the U.S. Marine Corps to avoid an SDVOSB set-aside by means of decreasing the dollar value of a reprocurement to below the Simplified Acquisition Threshold (SAT). The Marine Corps accomplished this decrease not only by reducing its needs, but also by actions which at least arguably favored more established non-SDVOSB firms as opposed to emerging SDVOSBs. These actions included reducing allowable reimbursement for "training-related travel costs" in the expectation of offer from firms that won't need such training (including offers from non-SDVOSB firms), and by treating a certain expensive feature as an "industry standard" which offerors may be expected to provided cheaper than before.[107] Further, in a footnote, the GAO observed: "Agencies are required to set aside acquisitions valued at or below the simplified acquisition threshold for small businesses where the agency expects to receive fair and reasonable offers from two or more small business concerns, although 8(a), HUBZone, SDVOSB, and woman-owned small business set-asides are not "precluded." 13 C.F.R. § 125.19(b)(1); FAR § 19.203(b)."[108] At the time, the DON overall unquestionably did not meet the SDVOSB statutory goal. SDVOSB set-aside would have counted towards small business goals, but the GAO clearly viewed the SAP small business reservation as a tool that favored small firms in general. The implication of the GAO decision was to hold that FAR §19.203 market research and goal achievement progress factors required for analysis of "which

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[105] U.S. Government Accountability Office (GAO), *DAV Prime, Inc.*, B-311420 (2008), available at: http://www.gao.gov/decisions/bidpro/311420.pdf.

[106] U.S. Government Accountability Office (GAO), *Kingdomware Technologies; SDV Security, LLC*, B-406122; B-406122.2 (2012), available at: http://www.gao.gov/assets/590/588507.pdf.

[107] *Id.*

[108] *Id.*, n. 1.

socioeconomic program to use" were inapplicable to SAT level contracts.[109] The GAO did not mention another possible resolution that would have accommodated agency price competition interest and SDVOSBs' concerns, namely, an SDVOSB set-aside at level below SAT. Finally, the GAO chastised the SDVOSB firm for not citing specific legal authority for its insistence that SDVOSB set-aside be considered once an SDVOSB firm expressed interest in the procurement. The GAO stopped short of saying no such authority existed. Instead, the GAO endorsed the lack of registration by an interested SDVSOB under the solicitation's NAICS as a valid technicality ground for refusing a SDVSOB set-aside despite two or more SDVOSBs' declared interest in the work. In terms the Cohen-Eimicke framework, this decision suggested that agencies need not focus on either SDVOSB Program inputs or outputs below SAT, and that SAP could be actually be viewed as a tool for SDVOSB Program avoidance altogether.

The GAO reinstated the SDVOSB set-aside consideration obligation at the level above SAT in its June 25, 2012 decision *Split Rock-Costs* [110] since the SBA added this obligation in its amended regulations. The case arose because the SBA continued allowing Federal buyers not to consider SDVOSB set-asides before small business set-asides, despite the amendments.[111] The GAO thus realigned its design to be input-focused, but retained the additional scrutiny for consideration of individual outputs.

The courts began with an inputs-focused approach that favored also output- and outcome-related considerations related to business development of SDVOSBs. In the 2007 *Knowledge Connections v. United States* litigation, the COFC considered whether buying agencies were obligated to shape their acquisition planning in ways that would meet the 3 percent SDVOSB goal by attracting niche SDVOSB vendors. That case concerned the VETS Government-Wide Acquisition Contract (GWAC), which EO 13360 mandated to be "reserved for participation" by (i.e., set aside for,) SDVOSBs. In the April 3, 2007

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[109] FAR § 19.203 (2011).

[110] U.S. GOVERNMENT ACCOUNTABILITY OFFICE (GAO), *Split Rock, Inc.-Costs*, B-404892.2 (2012), available at: http://www.gao.gov/products/P00891.

[111] *Id.*

decision, the court deferred to the 2001 FAR Council view that, by itself, the original 3 percent statutory goal had "no regulatory purpose for agencies" because "only the goal negotiated with the SBA [wa]s relevant to that agency."[112] However, the court took the position that EO 13360 was legally enforceable, in that it turned the achievement of the 3 percent statutory goal and the attraction of the ever-greater number of niche and new SDVOSB set-aside recipients into mandatory, judicially reviewable criteria.

The court's pro-business development position was not to last long, however. On December 19, 2007,[113] the court rejected the government's argument that EO 13360 is a non-enforceable internal management order, and held that it was enforceable because it was implementing the President's Small Business Act duty to set agency goals in pursuit of the 3 percent government-wide goal. The COFC also found judicially reviewable DOD policies such as the 2007 Krieg Memorandum on the use of the VETS GWAC and the DOD-GSA consultations undertaken as part of acquisition planning. However, the court gave buyers wide discretion to structure acquisitions in ways that excluded new or niche SDVOSBs in order to reconcile EO 13360 with other policies, such as the Anti-Bundling Initiative, that favored firms with broader experience because contracts with broad requirements that are set aside for small firms are not considered legally bundled under the Small Business Act. Thus, the program process design was to favor greater program outputs unless the agency could utilize greater program inputs on lesser number of outputs.

In the June 15, 2009 opinion, *Totolo/King, JV v. United States*, the COFC attempted to set standards for something it described as a "meaningful winnowing process to determine the availability of eligible, capable veteran-owned small-business contractors" under both the VA and the government-wide SDVOSB Programs.[114] The court held that, unlike Veterans First, the government-wide SDVOSB Program does not impose a

[112] *Knowledge Connections, Inc., v. United States*, 76 Fed.Cl. 6 (2007) (*Knowledge Connections I)*.

[113] *Knowledge Connections, Inc., v. United States,*79 Fed.Cl. 750 (2007) *(Knowledge Connections II).*

[114] *Totolo/King, JV v. United States*, 87 Fed. Cl. 680 (2009).

mandate to restrict competition to SDVOSBs. However, the court also stated: "The general duties and requirements under each respective statute are not mutually exclusive."[115] Otherwise, the court mixed Vets First priority standards with FAR small business and SDVOSB market research standards, treating them interchangeably at various times. The court acknowledged that, under FAR § 19.202-2 (2011), "[t]he contracting officer must, to the extent practicable, encourage maximum participation by small business, veteran-owned small business, service-disabled veteran-owned small business . . . in acquisitions by taking the following actions: (a) Before issuing solicitations, make every reasonable effort to find additional small business concerns. . . ." However, an "*ad hoc* superficial search" by the contracting officer of a contractors' registration database was deemed to be non-prejudicial on the grounds that registration in the database does not equal interest in the procurement. Indeed, no contemporaneous evidence of a search was produced. The court also implicitly questioned whether subsection (b) of that regulation, concerning mandatory publicity for solicitations and contract actions, requires any specific or customary disclosures of bonding information. The court noted that Federal agency buyers have "wide discretion" to make SDVOSB set-asides as a matter of the Contracting Officer's "business judgement," and further appeared to equate set-aside discretion standards with standards for determining responsibility. The court eventually concluded that the "public interest in providing fair opportunities" for SDVOSB would not be served by directing the VA to redo its market research and Sources Sought Notice because the SDVOSB joint venture was unable to prove unreasonableness or arbitrariness of government actions despite proof of inconsistent and superficial agency actions and despite irreparable financial harm to the SDVOSB joint venture. From the Cohen-Eimicke model perspective, the court did not view the SDVOSB Program as affirmatively benefitting its outputs, increasing program inputs, or improving its outcomes, but merely as providing some very minimal process obligations and minimal protections. On June 6, 2011, however, the CAFC on appeal ordered to dismiss the case as moot because of the death of the qualifying SDV owner.[116]

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[115] *Totolo/King, JV v. United States*, 87 Fed. Cl. 680 (2009).

[116] *Totolo/King, JV v. United States*, 31 Fed. Appx. 895 (Fed. Cir. 2011).

Three years after *Knowledge Connections* case, on September 22, 2011, the court again allowed an SDVOSB to seek judicial enforcement of EO 13360 mandates in *BlueStar Energy Services v. United States.*[117] The claims for relief were described as follows:

> *In protesting both the GSA and DLA [Defense Logistics Agency] Solicitations as improper, the plaintiff alleged that the agencies failed to make any attempts to encourage participation by SDVOSBs in contravention of Executive Order 13,360, Exec. Order No. 13,360, 69 Fed. Reg. 62,549 (Oct. 20, 2004), and 15 U.S.C. § 644(g)(1), which set minimum goals for participation by small businesses in procurement contracts. Additionally, in its protest of the DLA Solicitation, plaintiff alleged that the Solicitation was improper in that it required all SDVOSBs and SBCs to satisfy the NMR [Non-Manufacturer Rule] [on a contract with a service NAICS where such NMR requirement was made a condition of participation in an SDVOSB set-aside]. According to plaintiff, these improprieties rendered the Solicitations unlawful, necessitating a rebidding.*[118]

Thus, the court in *BlueStar* appeared to allow for judicial enforcement of some kind of duty to align program process with inputs and outputs. However, the court held that the EO 13360 claim was moot because of the SDVOSB firms' loss of status certification or qualification, and the NMR claim was moot because of the dissolution of the set-aside.

In the 2012-2014 timeframe, the program management standards for agency buyer discretion to conduct SDVOSB set-asides were further muddled in the COFC and CAFC *Kingdomware* opinions. Although their holdings are outside this study's scope as they concern the VA's Veterans First SDVOSB Program, *dicta* in both *Kingdomware* opinions also discussed the Small Business Act's SDVOSB goals and set-aside authorities. In the Cohen-Eimicke program management sense, *dicta* in this case raised important questions on the future of government-wide and DOD SDBOSB set-asides now that the DOD is meeting its 3 percent goal. At issue in *Kingdomware* was VA's refusal to set aside a

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[117] *See BlueStar Energy Services v. United States,* 100 Fed.Cl. 607 (2011).

[118] *BlueStar Energy Services v. United States,* 100 Fed.Cl. 607 (2011).

contract for SDVOSBs as VA declined to conduct a Rule of Two analysis or sole source analysis for purposes of a SDVOSB set-aside. Instead, VA chose to proceed with a Federal Supply Schedule (FSS, a type of MAC) order award to a non-SDVOSB.

In the November 27, 2012 opinion, the COFC found that the FAR exempted the FSS purchases from the government-wide SDVOSB set-aside authority, and that "[a]gency discretion to use the FSS is usually unrestricted," "unfettered," or "ambiguous" even in light of SDVOSB goals.[119] Notably, the court ruled so two years after enactment of the 2010 Small Business Jobs Act discretionary set-aside authorities for FSS and other IDVs. Further, in the June 3, 2014 opinion, the CAFC stated that, traditionally, "agencies are not required to implement small business set-aside programs before or while using the FSS," including the Rule of Two analysis.[120] Both COFC and CAFC held that Veterans First mandatory set-asides were effective any time before the 3 percent goal floor is met but not if it is already exceeded, and that the Federal SDVOSB Program is always discretionary. In particular, CAFC worried that requiring the Rule of Two consideration in all procurements will make SDVOSBs too successful and make the 3 percent goal "whatever number the Rule of Two produces."[121] Thus, the courts held that an agency has discretion to wholly exclude FSS purchases from set-aside if it decides to meet the goals in other way, and that convenience of FSS ordering procedures justifies ignoring the Rule of Two even if two or more qualified SDVOSBs are present.

The dissent argued that neither Congress nor the FAR consider it "bad policy" to exceed SDVOSB goals, that Federal Contracting Officers have an "existing obligation under the [FAR} to conduct a Rule of Two analysis in nearly every acquisition exceeding $3,000," and that "the majority opinion would saddle Contracting Officers with the obligation in every acquisition to determine the status of the agency's small business goals – expressed as percentages of total awarded contract dollars—but does not elaborate on how

[119] *Kingdomware Technologies, Inc. v. United States*, 107 Fed. Cl. 226 (Fed. Cl. 2012).

[120] *Kingdomware Technologies, Inc. v. United States*, 754 F.3d 93 (Fed. Cir. 2014).

[121] *Id.*

individual Contracting Officers can prove and determine that these goals have been conclusively 'met' before or even after the end of the fiscal year."[122]

This study should not be construed to address in any way the litigation merits of the VA *Kingdomware* case, which is now being appealed to the U.S. Supreme Court.[123] Moreover, conformance to contract management theory or model is not an element of statutory interpretation. Yet, it may be useful to acknowledge, from the Cohen-Eimicke model perspective, that these COFC and CAFC decisions could have significant program management implications on the government-wide SDVOSB Program if their reasoning were to be extrapolated beyond the VA Veterans First SDVOSB Program. Specifically, any expansions of these decisions would impose an inputs-based cap on the Federal/DOD/DON SDVOSB Program, thereby potentially limiting the mandatory consideration of SDVOSB set-asides required by COFC in *Knowledge Connection* per EO 13360. They would also introduce additional unguided discretion into the process, and sever the set-aside process from assistance to outputs entirely. They would, likewise, curtail the GAO's SDVOSB Program design scope contemplated in *Split Rock.*

The result of SDVOSB Program's years of management by litigation is a stark tension between some tribunals' emphasis on the Program's policy intent and others' emphasis on minimum compliance duties. Unsurprisingly, no coherent alignment was reached between the Program's inputs, process, outputs, and outcomes. The GAO and the courts appear unsuitable to resolve the systemic, strategic conflicts in the Program's design.

I. COUNTERVAILING OUTCOMES, CONSIDERATIONS, AND PROCESSES FACED BY CONTRACTING OFFICERS EXERCISING SDVOSB SET-ASIDE DISCRETION.

Contracting Officers have the responsibility to use the sensitive discretionary power to navigate through the acquisition process for the end result of supporting the mission of

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[122] *Kingdomware Technologies, Inc. v. United States*, 754 F.3d 93 (Fed. Cir. 2014).

[123] *See* U.S. SUPREME COURT, Order List 576 U.S. 2 (June 22, 2015), available at: http://www.supremecourt.gov/orders/courtorders/062215zor_2bo2.pdf.

the DOD. Under FAR Parts 5, 6, 7, 10, 11, and 16.5, the highly scrutinized use of discretionary power requires the applied effort of Contracting Officers to produce justifications supported by in-depth market research and business case analysis. The process of using sole source (direct) and/or competitive set-asides to create opportunities for new SDVOSB suppliers by exclusively assigning the power to Contracting Officers is leaving the power with the wrong people, because it requires additional specialized expertise in business development and risk analysis, imposes expansive market research standards, and causes unnecessary dilemmas for Contracting Officers between support for SDVOSBs and policies promoting competition, best value, and impartiality. These countervailing considerations are brought into stark contrast with each other by various *Better Buying Power*[124] memoranda from Under Secretaries of Defense for Acquisition, Technology and Logistics (USD AT&L) Ashton Carter and Frank Kendall, which sought to bend Contracting Officer discretion towards competition and reducing risks for taxpayers. For SDVOSBs, these issues may also create a cultural conflict between the arms' length posture of Contracting Officers vis-à-vis prospective vendors and the all-hands, mission-focused, mutually supportive culture encouraged in military units, particularly combat units.

By the very nature of the job function, Contracting Officers already have heavy shoulders to support the mission of the DOD by performing a balancing act of the a program's cost, schedule, and performance within the cumbersome acquisition process. An element of the current burden lies within the status of the workforce and weakness of the actual requirements. As stated by the Honorable Frank Kendall, USD AT&L:

> *Defense acquisition professionals have a special body of knowledge and experience that is not easily acquired. . . . This characteristic applies equally to professionals in program management, engineering, contracting, test and evaluation, and product support, to name our most obvious examples. One should no more expect a lay person to make good judgments about something in these acquisition fields—be it a program structure, a risk mitigation approach, or the*

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[124] See generally, U.S. DEPARTMENT OF DEFENSE, *What is Better Buying Power?* (2015), available at: http://bbp.dau.mil/.

incentive structure of a contract—than one would expect an amateur to tell a lawyer how to argue a case, or a brain surgeon how to do an operation, or a brigade commander how to organize an attack. No one should expect an amateur without acquisition experience to be able to exercise professional judgments in acquisition without the years of training and experience it takes to learn the field. Like these other highly skilled professions, our expertise sets us apart.[125]

Working with small businesses, particularly SDVOSBs, requires additional skills to assess business capabilities, veterans' professional experience, and to balance risks of going with new firms against rewards of business development. Those skills are practiced by the SBA Business Development Specialists, but are not widely taught to DOD Contracting Officers. Contracting Officers are also the sole authorized entity to conduct business with industry regarding Government requirements. Also noted by Under Secretary Kendall, "Requirements development . . . has been identified as a weakness in the department and has led to cost and schedule overruns on many programs. . . . Requirements development is paramount to successful acquisition outcomes."[126] Unclear requirements lead to Contracting Officers functioning on a compressed timeline in regards to procurement acquisition lead time (PALT) and the impact is shorter time frames for market research. In a fiscally time sensitive environment, Contracting Officers are pressed with tight award deadlines and often the tools of sources sought, industry days, and the other tools to identify small businesses and socio economical small businesses are cut short to allow for the contract award according to the program

[125] Frank Kendall, Under Secretary of Defense for Acquisition, Technology, and Logistics (USD AT&L). Memorandum, *Continuing Efforts to Strengthen the Acquisition Workforce* (April 28, 2015), available at: http://hci.dau.mil/docs/10_04_28_15_Mr_Kendall_Memo_Continue_Strengthening_Acq_Workforce.pdf; *What Does It Mean to be a "Defense Acquisition Professional?,"* 153 DEFENSE AT&L No. 2 (Defense Acquisition University (DAU) 237) 2-3 (March-April 2014), available at: http://www.dau.mil/publications/DefenseATL/DATLFiles/Mar-Apr2014/Mar-Apr2014DATL.pdf.

[126] Frank Kendall, Principal Deputy Under Secretary of Defense, Acquisition, Technology, and Logistics, Memorandum, *Improving Department of Defense Acquisition Requirements Development* (Nov. 19, 2010), available at: http://www.dhra.mil/pso/docs/usa005879-10-signed.pdf. DOD Emphasizes education, requirements in acquisition reform improvements in employee training, contracting and buying practices under scrutiny. *See* Amber Corrin, *The Business of Federal Technology*, Federal Computer Week (January 3, 2011), available at: http://fcw.com/articles/2011/01/03/dod-acquisition-reform-for-training-and-requirements.aspx.

schedule. The reality is that Contracting Officers are the only ones that can procure the goods and services to support the mission. If the requirement holder does not plan, there is Government program delay, or funding is an issue, the mission must still be supported, even if diminished market research to identify SDVOSBs is the collateral damage.

Direct awards to newly established SDVOSB cause Contracting Officers to experience a dilemma in obtaining healthy competition within the acquisition process. In a recent memorandum, the Honorable Frank Kendall reminds the acquisition workforce about the importance of competition: "Competition is the most valuable means we have to motivate industry to deliver effective and efficient solutions for the Department of Defense (DoD). When we create and maintain a competitive environment, we are able to spur innovation, improve quality and performance, and lower costs for the supplies and services we acquire. Over the past four years, the Department has not met its competition goals. In fact, we have experienced a declining competition rate, and we must take action to reverse this trend."[127] Then again, in the 2014 *Guidelines for Creating and Maintaining a Competitive Environment for Supplies and Services in the Department of Defense,* the acquisition workforce is simply reminded why competition is important: "[B]ecause it works. Competition, direct or indirect, is the most effective motivator for industry to reduce costs and improve performance. The Competition in Contracting Act (CICA) was enacted in 1984 to promote competition and thus reduce costs and improve performance. CICA established full and open competition as the standard for most procurement actions while at the same time allowing for a number of exceptions, some of which require that agencies request offers from as many potential sources as is practicable under the circumstances. For example, one noteworthy exception is giving priority to small business set asides (see Federal Acquisition Regulation (FAR) 19.201(a), 19.202-1, and 19.203(e))."[128] Small business set asides are an effective competitive tool to stimulate

[127] Frank Kendall, Under Secretary of Defense for Acquisition, Technology and Logistics (USD AT&L), Memorandum, *Actions to Improve Department of Defense Competition* (April 21, 2014), available at: http://bbp.dau.mil/docs/USA004313-14.pdf.

[128] OFFICE OF THE UNDERSECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY, AND LOGISTICS (USD AT&L), *Guidelines for Creating and Maintaining a Competitive Environment for Supplies and Services in the Department of Defense* (Aug. 2014), available at: http://bbp.dau.mil/docs/BBP%202-0%20Competition%20Guidelines%20(Published%2022%20Aug%202014).pdf.

small business. The current process of utilizing the Contracting Officers ability to direct awards to existing or newly established SDVOSB's to meet a three percent goal creates an unnecessary dilemma when competition with small businesses of all types is a possibility and no standards are given when to pick SDVOSBs over other small firms.

Further, Contracting Officers must be impartial and fair in regards to interactions with industry, especially during the solicitation process. Contracting Officers must at all cost protect the integrity of the acquisition and be equally responsive to all potential bidders, small and large alike. FAR § 1.602-2, Responsibilities of Contracting Officers, provides:

> *Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, Contracting Officers should be allowed wide latitude to exercise business judgment. Contracting Officers shall -- (a) Ensure that the requirements of [FAR §] 1.602-1(b) have been met, and that sufficient funds are available for obligation; (b) Ensure that contractors receive impartial, fair, and equitable treatment. . . .*[129]

Newly established SDVOSBs may lack the understanding and business development to properly respond to the solicitation. Should Contracting Officers choose to "hand hold" potential contractors, this may causes an appearance of unfair advantage and raise questions as to the integrity of the acquisition. Engaging in supportive assistance to the SDVOSBs places Contracting Officers close to potential violation of FAR § 3.104-3 and -4, which prohibit disclosure of source selection information:

> *(a) Prohibition on disclosing procurement information (41 U.S.C. § 2102). (1) A person described in paragraph (a)(2) of this subsection must not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates… Disclosure, Protection, and Marking*

[129] FAR § 1.602-2 (2014).

of Contractor Bid or Proposal Information and Source Selection Information. (a) Except as specifically provided for in this subsection, no person or other entity may disclose contractor bid or proposal information or source selection information to any person other than a person authorized, in accordance with applicable agency regulations or procedures, by agency head or the contracting officer to receive such information. . . .[130]

SDVOSBs without a proper business development process and support are at risk of not being technically acceptable due to lack of knowledge about the level of detail needed in bid, proposal, or quotation submissions, while Contracting Officers may be powerless to help.

Lastly, when market research, FAR Part 10, supports a SDVOSB direct award, two of the five elements of FAR § 19.1406, Sole Source Awards to Service-disabled Veteran-owned Small Business Concerns, are notable as dilemmas for Contracting Officers. FAR § 19.1406(a)(3), states that direct award to an SDVOSB cannot be for an 8(a) exclusive requirement, while FAR § 19.1406(a)(4) states that the SDVOSB have to be determined responsible:

(a) A contracting officer shall consider a contract award to a SDVOSB concern on a sole source basis (see 6.302-5(b)(6)), before considering small business set-asides (see 19.203 and Subpart 19.5) provided none of the exclusions of 19.1404 apply and--(3) The requirement is not currently being performed by an 8(a) participant under the provisions of Subpart 19.8 or has been accepted as a requirement by SBA under Subpart 19.8; (4) The service-disabled veteran-owned small business concern has been determined to be a responsible contractor with respect to performance. . .[131]

[130] FAR § 3.104-3 and -4 (2014).

[131] FAR § 19.1406 (2014).

Further, Contracting Officers' discretion is conflicted between the newly established or existing SDVOSBs and the non-SDVOSB 8(a) Program Small Disadvantaged Businesses (SDBs). If there is a single 8(a) participant contractor that does not already exclusively hold the particular requirement, but is capable of fulfilling said requirement, and there is a newly established SDVOSB that is also capable of fulfilling the requirement, a Contracting Officer knows that the 8(a) contractor has been through a robust business development program on the front end. The newly established SDVOSB has the regulatory support of FAR Part 19.6, Certificates of Competency (COC) and Determinations of Responsibility, but only on the back end, once it is found non-responsible by the Contracting Officer:

> *Subpart 19.601 – General (Certificates of Competency and Determinations of Responsibility) (a) A Certificate of Competency (COC) is the certificate issued by the Small Business Administration (SBA) stating that the holder is responsible (with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, tenacity, and limitations on subcontracting) for the purpose of receiving and performing a specific Government contract…(b) The COC program empowers the Small Business Administration (SBA) to certify to Government Contracting Officers as to all elements of responsibility of any small business concern to receive and perform a specific Government contract. The COC program does not extend to questions concerning regulatory requirements imposed and enforced by other Federal agencies…(c) The COC program is applicable to all Government acquisitions. A contracting officer shall, upon determining an apparent successful small business offeror to be nonresponsible, refer that small business to the SBA for a possible COC, even if the next acceptable offer is also from a small business.…*[132]

With or without the COC, Contracting Officers still have to make determinations of responsibility per FAR subpart 9.1 that the contractor "has adequate financial resources, a

[132] FAR § 19.601 (2014).

satisfactory performance record, can comply with the standards for support services, possesses a satisfactory record of integrity and business ethics, and has the necessary organization, experience, accounting, and technical skills to perform this requirement."[133] In a mission-focused reality, Contracting Officers are pulled between contractors that have been in a business development program, i.e. the 8(a) Program, and set-aside awards to established and/or newly established SDVOSBs.

The current process of the SDVOSB Program is singularly focused on discretion authority of the DOD Contracting Officer, thereby placing the responsibility for Program outcomes with the wrong people. Ideally, Contracting Officers need an SDVOSB business development program providing assurance that the SDVOSB firms are deemed responsible and capable in advance, beyond a COC. Neither the PTAC system, nor the SBA's Small Business Development Centers, nor the VA's Vocational Rehabilitation assistance provide that kind of program.[134]

Contracting Officers have neither the sufficient strategic perspective not the business development skills to ensure SDVOSBs at large are growing through an increasing volume of DOD contract awards. In the acquisition workforce, the role of Contracting Officers as business development funders and counselors would be too preoccupied and conflicted, such that the current process could likely be causing a disservice leading to disillusionment of those SDVs that seek DOD work.

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[133] FAR Subpart 9.1 (2014).

[134] The U.S. DEPARTMENT OF VETERANS AFFAIRS (VA) M28R VOCATIONAL REHABILITATION AND EMPLOYMENT SERVICE MANUAL, Part IV, Section C, Chapters 8 and 9 (Rev. March 2014), make it appear that participation in competitive procurements, even competitive set-asides, is an undesirable factor for SDVs seeking VA-approved self-employment plans; on the contrary, commitment from buying agencies for sole source awards would appear advantageous for SDVs seeking such plans. This creates a conundrum for SDVOSBs seeking a break or pathway into the Federal contracting market.

V. UNDERSTANDING THE SDVOSB PROGRAM OPERATIONS THROUGH THE COHEN-EIMICKE CONTRACT MANAGEMENT PERFORMANCE MODEL.

A. SDVOSB PROGRAM TAXONOMY: INPUTS – OVERALL TRENDS ON DOD AND DON SPENDING WITH SDVOSBS.

To understand the business development value or sustainment value of the SDVOSB Program, in the broader context of opportunity for SDVOSBs, it is important to examine not only the goaling data, but also the net and the new spending received by SDVOSB firms. Data below illustrates DOD and DON contract spending trends on SDVOSBs. In this paper, all references to "New Awards" or "Awards" are interchangeable. For purposes of SDVOSB Program, its legal and management authorities concern New Awards, not contract modifications. Therefore, for purposes of evaluating the design and performance of the SDVOSB Program, primary focus will be on New Awards. New Awards can be thought of as the sustainment value of the SDVOSB Program.

The Goaling Report spending data is FPDS-NG data reported in FPDS annual government-wide small business goaling reports;[135] this data contains new awards and accretive modifications such as options.[136] Certain actions have been excluded from this data because of place of award or performance and other goaling exclusions.[137] This is the data on which DOD and DON are rated for goaling compliance. Specifically, goaling reports omit deductive modifications, such as deductive changes, cancellations, or terminations. Therefore, goaling reports data typically exceed the net business development value of Federal contract spending, but usually not by much.

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[135] U.S. GENERAL SERVICES ADMINISTRATION (GSA), FEDERAL PROCUREMENT DATA SYSTEM-NEXT GENERATION (FPDS-NG) (2015), available at: https://www.fpds.gov.

[136] *See* U.S. SMALL BUSINESS ADMINISTRATION (SBA), *Goaling Guidelines for Small Business Preference Programs* (2003), available at: https://www.sba.gov/sites/default/files/goals_goaling_guidelines.pdf.

[137] *See* Max V. Kidalov and Keith F. Snider, *Once More, with Feeling: Federal Small Business Contracting Policy in the Obama Administration*, 22 PUB. PROC. L. REV. 1 (2013).

The New Awards data shows the value of all DOD SDVOSB contract actions identified "Modification 0"; this is the value of opportunity theoretically open to SDVOSBs new to defense contracting. The Net Total Spending data shows the net sum of all SDVOSB contract spending regardless of goaling exclusions and including modifications with additive or deductive changes, cancellations, or terminations. This is the business development value of the Program for SDVOSBs. Again, the Small Business Act describes the SDVOSB Program in terms of set-aside authority for what must be New Awards, while the Small Business Act also describes SDVOSB goals in terms of the total value of agency contracts that includes New Awards as well as Accretive Modifications.[138] In general, all references to the SDVOSB Program below mean the combined SDVOSB sole source and competitive set-asides, whether in Open Market or under IDVs; on some occasions, references will be made to the SDVOSB Program within the meaning of FAR Part 19 Open Market authorities.

1. DOD and DON SDVOSB Spending Trends.

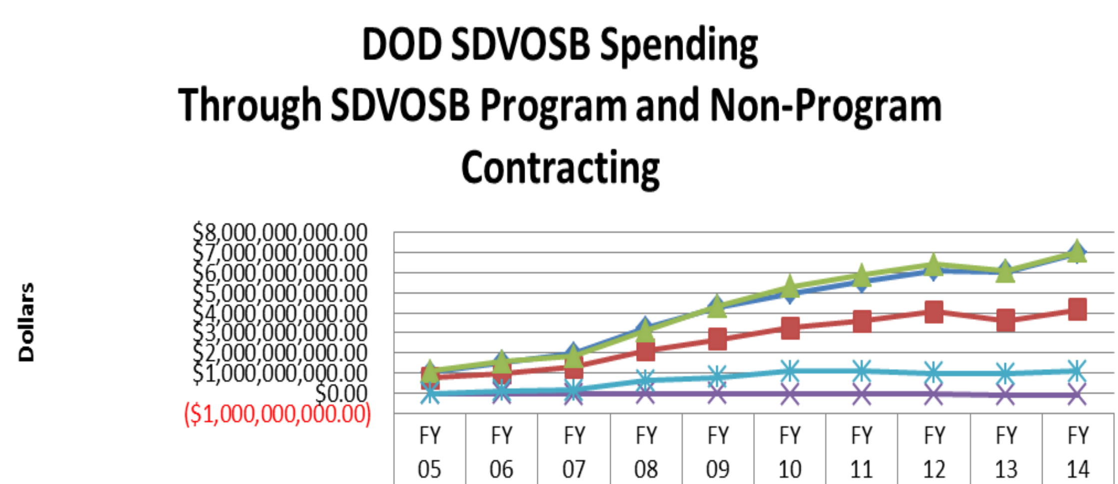
From the program management perspective, it is critical to examine whether the SDVOSB Program operates to its avowed justification as a tool to help DOD and DON in meeting the 3 percent statutory spending goal. Data in two Figures and two Tables below shows trends in DOD and DON SDVOSB spending, including New Awards, Accretive Modifications such as options or changes, and SDVOSB Program set-asides. Accretive Modifications are represented in the two Figures by the difference between New Awards and Net Total Spending (or Goaling Spending).

DOD SDVOSB Net Total Spending and Goaling Spending have been growing every year except for FY2013. The most striking trend, however, is the significant growth of Accretive Modifications spending in relation to New Awards. The volume of set-aside awards dollars has essentially stalled over the last 5 fiscal years; the volume of New Awards spending in FY2014 is less than 4 years ago. In FY2014, Accretive Modifications reached a record of approximately $3 billion in SDVOSB spending, or approximately 42 percent of Goaling Report Spending and 40 percent in Net Total

[138] *Compare* 15 U.S.C. §§ 644 *with* 657(f) (2014).

SDVOSB Spending. On the other hand, data also shows that revenue losses experienced by some SDVOSBs on DOD contracts have also grown. The volume of such losses has grown twenty-three (23) times since Fiscal Year 2004, though it is but one percent of SDVOSB spending.

DON SDVOSB Net Total Spending and Goaling Spending indicators have been growing every year except for FY2012-2013. SDVOSB set-aside New Awards spending in FY2014 stands below that of FY2011. And, again, the Net Spending and Goaling Spending are increased primarily with Accretive Modifications. In FY2014, such modifications represent approximately 50 percent of Goaling Report Spending and approximately 53 percent of Net Total SDVOSB Spending. With regard to Net Losses, it appears that SDVOSB firms in the DON market have experienced greater volume of losses in FY2013 due to sequestration than in the DOD market overall.



	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14
Net Total Spending	$1,052,	$1,554,	$1,993,	$3,250,	$4,278,	$4,952,	$5,516,	$6,095,	$6,036,	$6,977,
New Awards Spending (Revenue)	$761,87	$1,004,	$1,314,	$2,155,	$2,672,	$3,249,	$3,588,	$4,039,	$3,631,	$4,165,
Goaling Report Spending	$1,106,	$1,585,	$1,860,	$3,114,	$4,325,	$5,303,	$5,843,	$6,407,	$6,049,	$7,015,
Net Revenue Losses	-$2,889	-$6,656	-$13,23	-$5,226	-$6,323	-$23,93	-$28,53	-$21,54	-$45,84	-$59,47
SDVOSB Set-Aside New Awards Spending (Revenue)	$5,235,	$127,86	$188,55	$626,37	$807,67	$1,108,	$1,118,	$1,016,	$970,49	$1,111,

Figure 1. DOD SDVOSB Spending Through SDVOSB Program and Non-Program Contracting.

DOD SDVOSB Spending Through SDVOSB Program and Non-Program Contracting					
Fiscal Year	**Net Total Spending**	**New Awards Spending (Revenue)**	**Goaling Report Spending**	**Net Revenue Losses**	**SDVOSB Set-Aside New Awards Spending (Revenue)**
FY 05	$1,052,478,593.16	$761,878,459.16	$1,106,784,586.32	-$2,889,355.00	$5,235,662.21
FY 06	$1,554,272,140.92	$1,004,843,765.25	$1,585,568,137.60	-$6,656,892.22	$127,864,822.10
FY 07	$1,993,588,680.08	$1,314,191,156.39	$1,860,328,366.19	-$13,231,188.94	$188,551,350.19
FY 08	$3,250,731,728.83	$2,155,293,725.19	$3,114,178,647.93	-$5,226,331.58	$626,375,475.21
FY 09	$4,278,496,405.19	$2,672,712,772.53	$4,325,412,040.62	-$6,323,325.78	$807,676,507.98
FY 10	$4,952,672,557.40	$3,249,104,512.90	$5,303,035,295.34	-$23,936,954.42	$1,108,479,164.06
FY 11	$5,516,220,623.87	$3,588,515,457.17	$5,843,937,110.51	-$28,536,034.45	$1,118,807,288.17
FY 12	$6,095,690,311.19	$4,039,320,447.66	$6,407,309,374.24	-$21,546,854.01	$1,016,670,339.99
FY 13	$6,036,362,912.94	$3,631,900,147.23	$6,049,070,516.98	-$45,842,951.70	$970,494,193.20
FY 14	$6,977,239,135.52	$4,165,210,148.79	$7,015,585,365.61	-$59,479,586.18	$1,111,110,741.55

Table 1. DOD SDVOSB Spending Through SDVOSB Program and Non-Program Contracting.

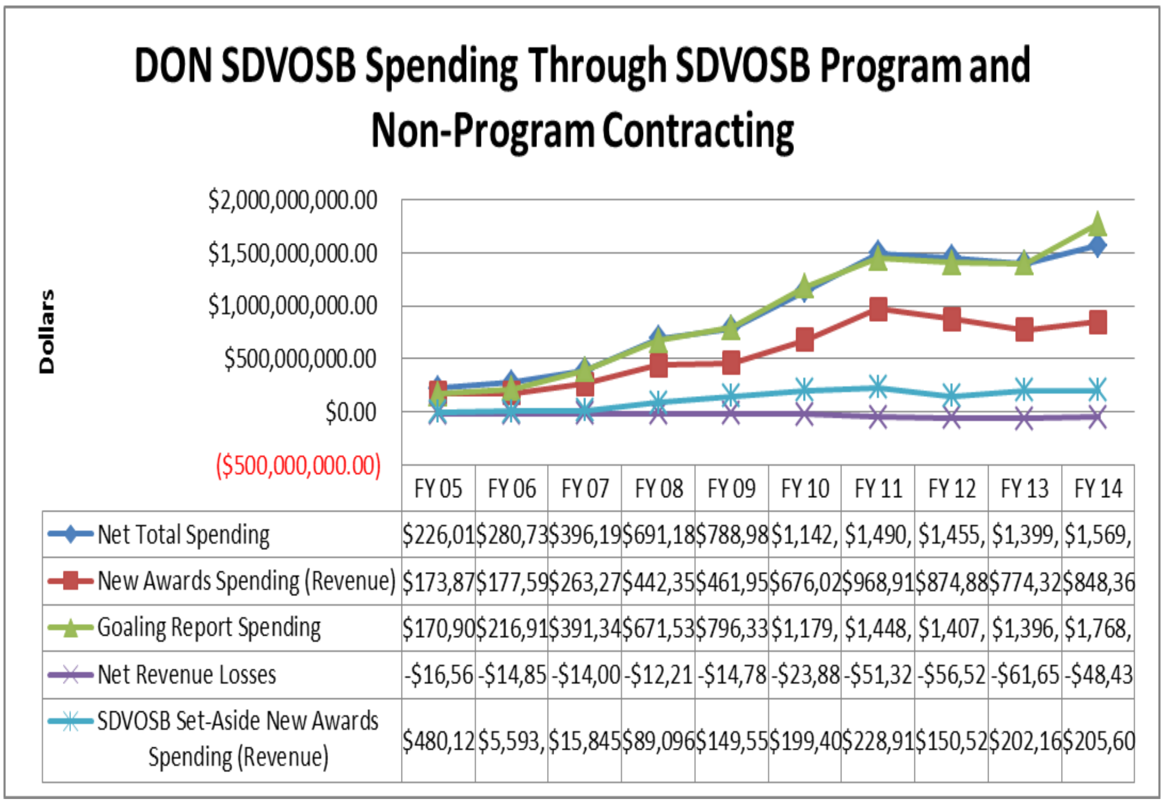


Figure 2. DON SDVOSB Spending Through SDVOSB Program and Non-Program Contracting.

DON SDVOSB Spending Through SDVOSB Program and Non-Program Contracting					
Fiscal Year	Net Total Spending	New Awards Spending (Revenue)	Goaling Report Spending	Net Revenue Losses	SDVOSB Set-Aside New Awards Spending (Revenue)
FY 05	$226,015,573.95	$173,876,981.48	$170,906,769.61	-$16,564,489.00	$480,126.21
FY 06	$280,739,892.20	$177,599,959.36	$216,915,659.14	-$14,859,441.62	$5,593,236.41
FY 07	$396,190,742.56	$263,270,094.01	$391,340,524.43	-$14,009,392.88	$15,845,626.68
FY 08	$691,186,314.12	$442,357,229.47	$671,530,170.74	-$12,215,934.24	$89,096,003.05
FY 09	$788,989,659.18	$461,951,179.24	$796,337,568.37	-$14,780,257.46	$149,555,398.54
FY 10	$1,142,476,957.42	$676,029,864.27	$1,179,774,621.25	-$23,885,252.36	$199,401,453.66
FY 11	$1,490,203,571.27	$968,919,292.09	$1,448,369,388.46	-$51,325,908.55	$228,912,449.95
FY 12	$1,455,244,518.39	$874,889,959.46	$1,407,329,740.60	-$56,525,605.81	$150,529,438.65
FY 13	$1,399,174,253.81	$774,329,918.96	$1,396,030,002.74	-$61,654,549.74	$202,161,239.86
FY 14	$1,569,204,210.59	$848,366,113.62	$1,768,749,049.22	-$48,437,426.31	$205,609,669.30

Table 2. DON SDVOSB Spending Through SDVOSB Program and Non-Program Contracting.

<u>Findings:</u> DOD and DON Contracting Officers appear to be giving up on using the SDVOSB Program set-aside awards as means to increase SDVOSB spending inputs (either in terms of Goaling Report spending or other types of spending). Indeed, DON Contracting Officers have been reducing all New Awards SDVOSB spending. This trend began in FY2011, the first full year when DOD stopped issuing its SDVOSB Strategic Plan. For meeting statutory goals, DOD and DON have come to increasingly rely on accretive modifications (including options and changes). Those modification funds are going to SDVOSBs already holding contract awards. Accretive Modifications are taken into account for goal-achievement purposes; but for these modifications, DOD would have been unable to finally make its 3 percent goal in FY2014. It appears that Contracting Officers are finding mechanisms other than the SDVOSB Program set-aside awards to meet the SDVOSB goal. Despite recent growth in Net Revenue Losses, it also appears that most SDVOSB spending goes to firms that have the capacity to succeed in DOD/DON contracting markets without much or any SDVOSB-focused assistance. That said, the growth in Net Losses suggests there may be contract administration problems or SDVOSB capacity problems that require further study.

2. DOD and DON SDVOSB Spending Realignment from Open Market to IDVs.

Data in two Figures and two Tables below compare DOD and DON New Awards spending with SDVOSBs on the Open Market against such spending through task or delivery orders under the Indefinite Delivery Vehicles (abbreviated in FPDS as IDVs, and also known as Multiple-Award Contracts (MACs) or Indefinite-Delivery, Indefinite-Quantity (IDIQ) Contracts). Data shows that both DOD and DON SDVOSB spending have undergone significant realignment in favor of IDV spending, whether inside or outside the SDVOSB Program. The realignment is particularly stark at DON, where recent IDV spending has been on the rise while Open Market spending has been sharply dropping. At DOD, both IDV and Open Market spending have declined since FY2012, but Open Market spending took a sharper dive. Because IDVs typically require years of experience and breadth of capabilities, this realignment appears to favor more established firms over new or niche firms.

Further, SDVOSB Program New Awards spending, both as Open Market set-asides and as IDV set-asides, decreased since FY2010 and F20Y11, respectively. The same trend held at DON and DOD.

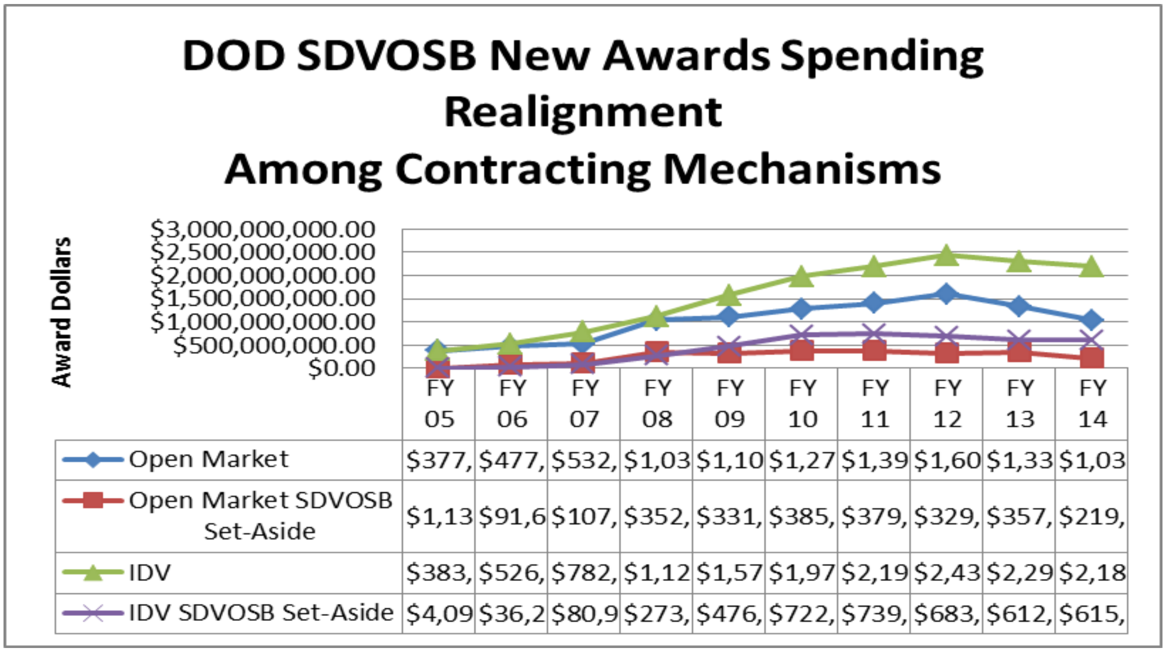


Figure 3. DOD SDVOSB New Awards Spending Realignment Among Contracting Mechanisms.

DOD SDVOSB New Awards Spending Realignment Among Contracting Mechanisms				
FISCAL YEAR	**Open Market**	**Open Market SDVOSB Set-Aside**	**IDV**	**IDV SDVOSB Set-Aside**
FY 05	$377,972,604.42	$1,137,854.21	$383,905,854.74	$4,097,808.00
FY 06	$477,984,555.60	$91,626,297.10	$526,859,209.65	$36,238,525.00
FY 07	$532,176,914.58	$107,609,531.69	$782,014,241.81	$80,941,818.50
FY 08	$1,034,338,361.61	$352,576,344.72	$1,120,955,363.58	$273,799,130.49
FY 09	$1,100,735,272.58	$331,297,487.21	$1,571,977,499.95	$476,379,020.77
FY 10	$1,275,678,762.08	$385,524,204.66	$1,973,425,750.82	$722,954,959.40
FY 11	$1,397,633,436.29	$379,678,544.27	$2,190,882,020.88	$739,128,743.90
FY 12	$1,602,058,307.72	$329,421,049.09	$2,437,262,139.94	$683,657,637.83
FY 13	$1,334,049,605.49	$357,859,855.76	$2,297,850,541.74	$612,634,337.44
FY 14	$1,039,536,612.50	$219,856,203.41	$2,189,355,646.12	$615,352,445.24

Table 3. DOD SDOVSB New Awards Spending Realignment Among Contracting Mechanisms.

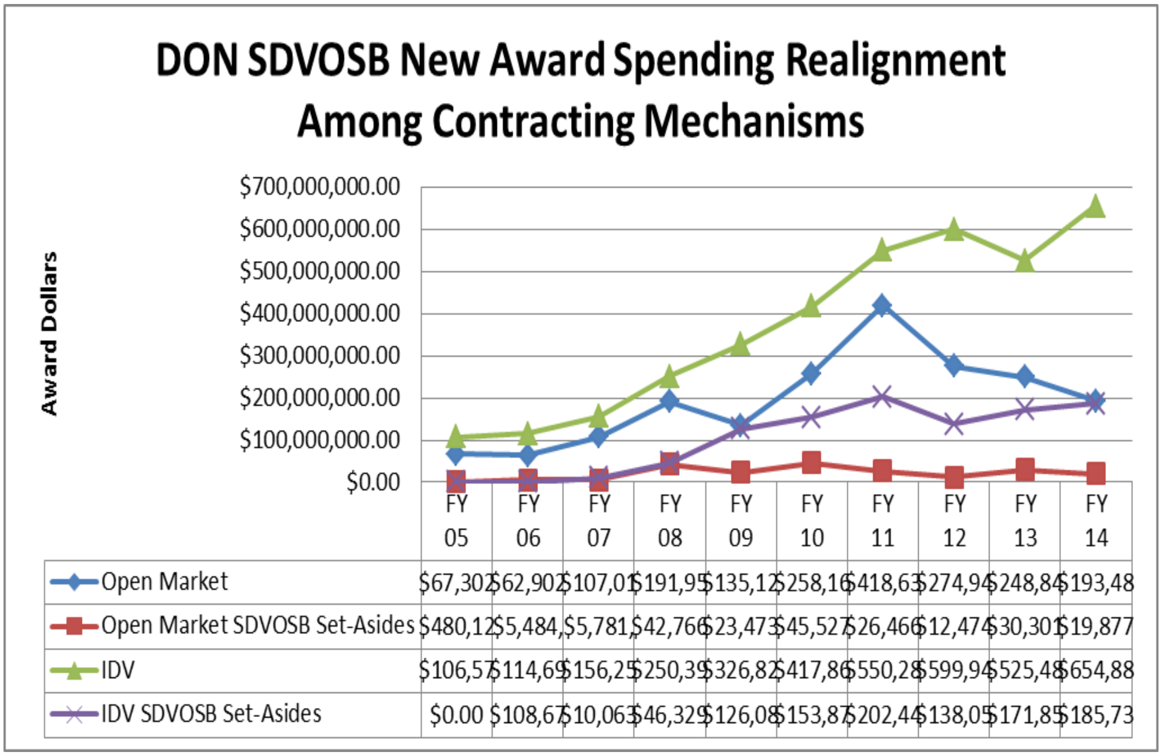


Figure 4. DON SDVOSB New Award Spending Realignment Among Contracting Mechanisms.

DON SDVOSB New Award Spending Realignment Among Contracting Mechanisms				
FISCAL YEAR	**Open Market**	**Open Market SDVOSB Set-Asides**	**IDV**	**IDV SDVOSB Set-Asides**
FY 05	$67,302,506.46	$480,126.21	$106,574,475.02	$0.00
FY 06	$62,902,948.37	$5,484,560.41	$114,697,010.99	$108,676.00
FY 07	$107,012,741.88	$5,781,922.16	$156,257,352.13	$10,063,704.52
FY 08	$191,959,402.66	$42,766,818.10	$250,397,826.81	$46,329,184.95
FY 09	$135,129,897.16	$23,473,954.84	$326,821,282.08	$126,081,443.70
FY 10	$258,164,606.03	$45,527,873.46	$417,865,258.24	$153,873,580.20
FY 11	$418,633,980.37	$26,466,190.98	$550,285,311.72	$202,446,258.97
FY 12	$274,942,000.46	$12,474,068.52	$599,947,959.00	$138,055,370.13
FY 13	$248,846,002.75	$30,301,341.17	$525,483,916.21	$171,859,898.69
FY 14	$193,485,392.75	$19,877,858.33	$654,880,720.87	$185,731,810.97

Table 4. DON SDVOSB New Awards Spending Realignment Among Contracting Mechanisms.

Findings: **Over the years, DOD and DON SDVOSB New Awards spending trends have undergone significant realignments decidedly in favor of IDVs and against Open Market contractors. This favoring of IDV is much pronounced at the DON.**

While these trends are a positive testament to capabilities of current SDVOSB contractors, such spending trends may depress the business development aspects of the SDVOSB Program in particular by using channeling even more set-aside spending to already successful SDVOSB firms. These trends appear to validate the criticism of the Program on entrenchment grounds, unless increased participation and business development in the Open Market could be otherwise demonstrated. These trends coincide with policy and decisional pronouncements, such as the December 2007 *Knowledge Connections II* decision addressing the VETS GWAC acquisition strategy and the 2011-2012 Interagency Task Force Reports, which favored input-based design and established firms.

3. DOD and DON SDVOSB Program Spending Trends.

From the program management perspective, it is important to examine general SDVOSB Program spending trends as well as to examine which parts of the SDVOSB Program process generate greatest contributions to program inputs. Data in two Figures and two Tables below examines the composite elements of SDVOSB Program New Awards spending at DOD and DON. Trends in this data suggest that competitive non-SAP SDVOSB set-asides are the largest driver of SDVOSB Program New Awards spending at both DOD and DON. On the other hand, SDVOSB sole sources have peaked in FY2008 and are presently in such decline that they make only a marginal contribution.

From FY2011 on, the absolute levels and the direction of SDVOSB set-aside New Awards spending at both DOD and DON has been declining or stagnant (except DOD FY2014). Further, DON's sharp drop in SDVOSB Program New Awards spending in FY2012 and the subsequent spending plateau appears to have depressed this spending category DOD-wide. DOD enjoys a surge in all SAP SDVOSB set-asides spending which overtook all SDVSOB sole source set-asides spending.

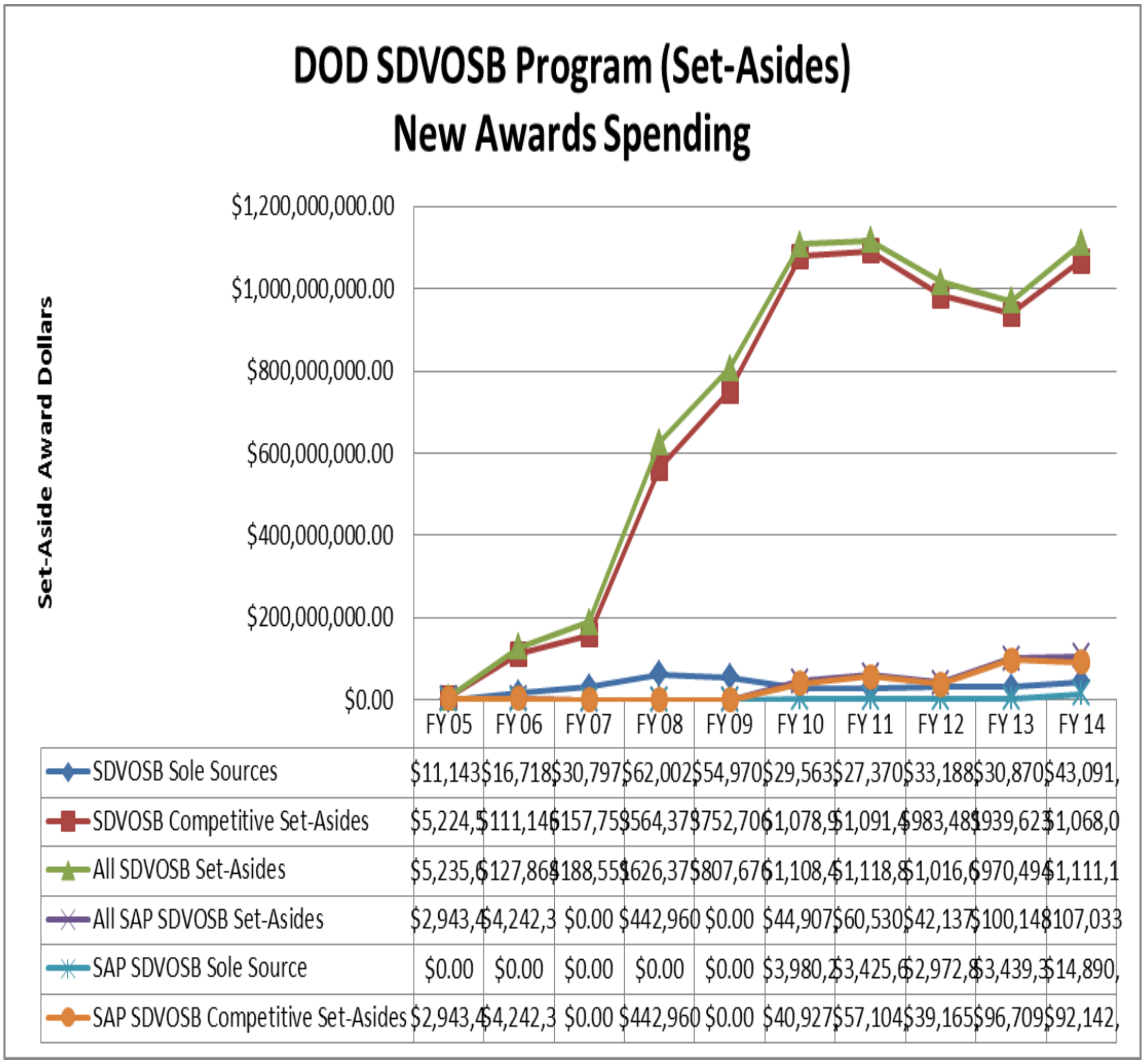


Figure 5. DOD SDVOSB Program (Set-Asides) New Awards Spending.

DOD SDVOSB Program (Set-Asides) New Awards Spending						
FISCAL YEAR	SDVOSB Sole Sources	SDVOSB Competitive Set-Asides	All SDVOSB Set-Asides	All SAP SDVOSB Set-Asides	SAP SDVOSB Sole Source	SAP SDVOSB Competitive Set-Asides
FY 05	$11,143.00	$5,224,519.21	$5,235,662.21	$2,943,401.21	$0.00	$2,943,401.21
FY 06	$16,718,813.00	$111,146,009.10	$127,864,822.10	$4,242,398.00	$0.00	$4,242,398.00
FY 07	$30,797,418.88	$157,753,931.31	$188,551,350.19	$0.00	$0.00	$0.00
FY 08	$62,002,225.78	$564,373,249.43	$626,375,475.21	$442,960.00	$0.00	$442,960.00
FY 09	$54,970,337.86	$752,706,170.12	$807,676,507.98	$0.00	$0.00	$0.00
FY 10	$29,563,592.75	$1,078,915,571.31	$1,108,479,164.06	$44,907,498.19	$3,980,217.40	$40,927,280.79
FY 11	$27,370,260.15	$1,091,437,028.02	$1,118,807,288.17	$60,530,394.19	$3,425,625.10	$57,104,769.09
FY 12	$33,188,898.78	$983,481,441.21	$1,016,670,339.99	$42,137,961.88	$2,972,800.48	$39,165,161.40
FY 13	$30,870,226.70	$939,623,966.50	$970,494,193.20	$100,148,889.91	$3,439,389.69	$96,709,500.22
FY 14	$43,091,617.15	$1,068,019,124.40	$1,111,110,741.55	$107,033,001.10	$14,890,211.05	$92,142,790.05

Table 5. DOD SDVOSB Program (Set-Asides) New Awards Spending.

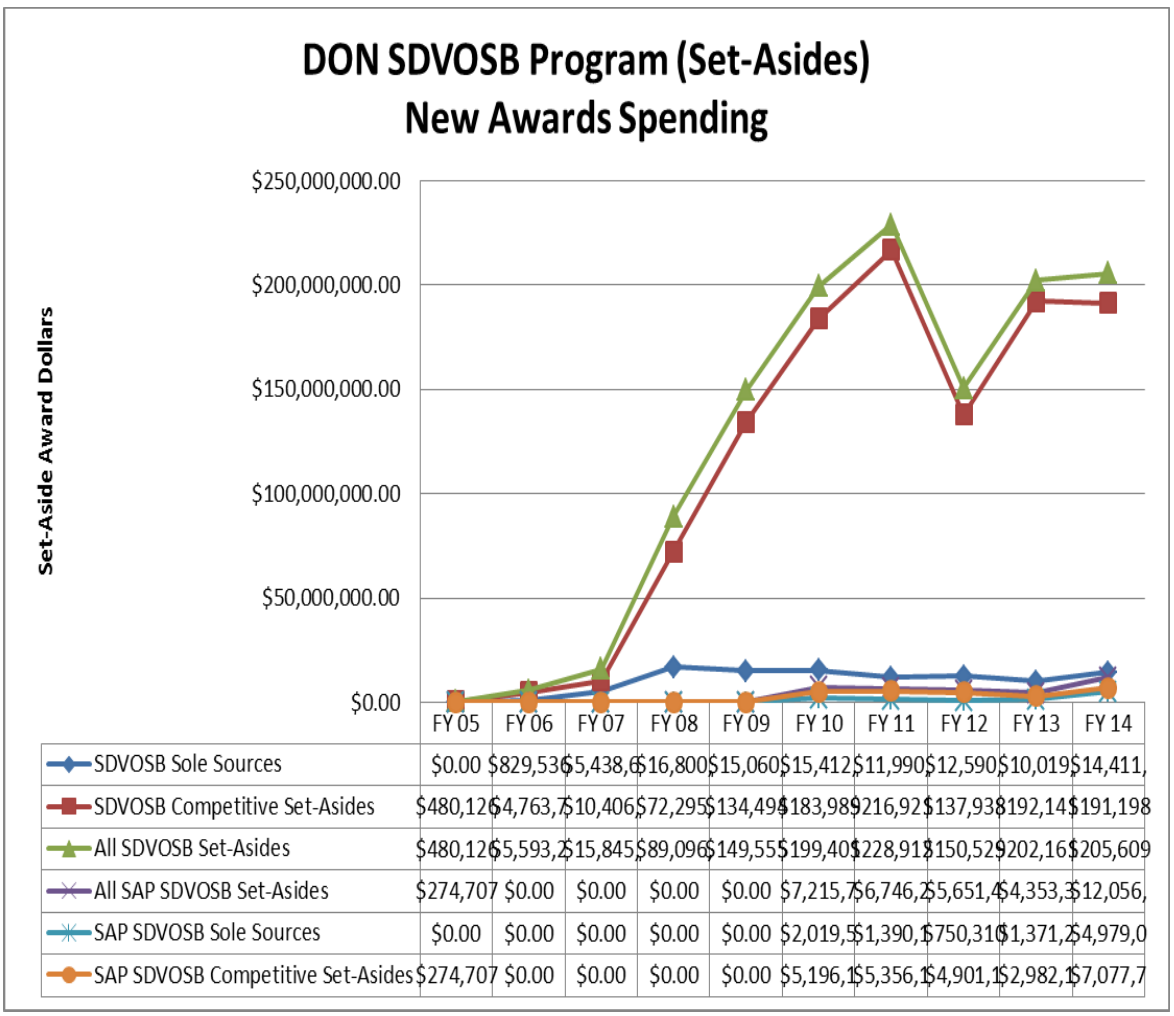


Figure 6. DON SDVOSB Program (Set-Asides) New Awards Spending.

DON SDVOSB Program (Set-Asides) New Awards Spending						
FISCAL YEAR	SDVOSB Sole Sources	SDVOSB Competitive Set-Asides	All SDVOSB Set-Asides	All SAP SDVOSB Set-Asides	SAP SDVOSB Sole Sources	SAP SDVOSB Competitive Set-Asides
FY 05	$0.00	$480,126.21	$480,126.21	$274,707.21	$0.00	$274,707.21
FY 06	$829,536.00	$4,763,700.41	$5,593,236.41	$0.00	$0.00	$0.00
FY 07	$5,438,650.16	$10,406,976.52	$15,845,626.68	$0.00	$0.00	$0.00
FY 08	$16,800,432.05	$72,295,571.00	$89,096,003.05	$0.00	$0.00	$0.00
FY 09	$15,060,451.85	$134,494,946.69	$149,555,398.54	$0.00	$0.00	$0.00
FY 10	$15,412,014.58	$183,989,439.08	$199,401,453.66	$7,215,709.44	$2,019,564.95	$5,196,144.49
FY 11	$11,990,664.23	$216,921,785.72	$228,912,449.95	$6,746,265.14	$1,390,131.97	$5,356,133.17
FY 12	$12,590,951.63	$137,938,487.02	$150,529,438.65	$5,651,443.11	$750,310.67	$4,901,132.44
FY 13	$10,019,820.59	$192,141,419.27	$202,161,239.86	$4,353,394.03	$1,371,284.47	$2,982,109.56
FY 14	$14,411,041.65	$191,198,627.65	$205,609,669.30	$12,056,809.65	$4,979,012.02	$7,077,797.63

Table 6. DON SDVOSB Program (Set-Asides) New Awards Spending.

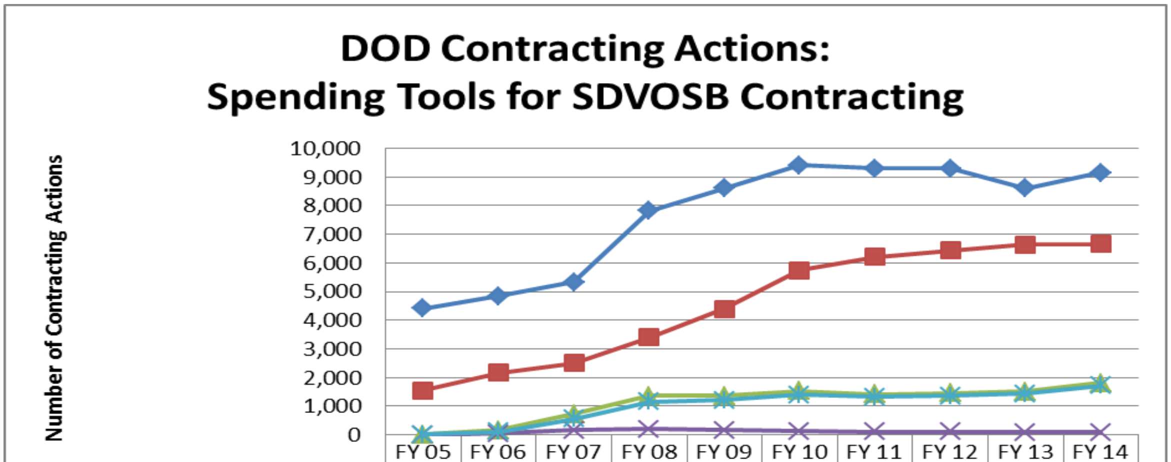
Findings: **Neither DOD nor DON are growing the spending volume of SDVOSB Program New Awards, though there may be modest attempts at reversal of this trend. Thus far, such spending at DOD and DON is below the FY2011 levels. Because competitive set-asides are the predominant driver of this spending, there appears to be a growing lack of interest in putting funds and requirements towards SDVOSB set-aside competitions. Both DOD and DON are experiencing long-term drop in SDVOSB sole source New Awards spending. SAP SDVOSB set-aside spending at DOD and DON is trending in the same growth direction, but DOD's growth is much stronger relative to DON's, as well as to other DOD spending such as SDVOSB sole source set-asides. This suggests that DON Contracting Officers may be more risk-averse and more reluctant to commit funds through the SAP discretionary SDVOSB set-aside authority than Contracting Officers across DOD at large.**

B. SDVOSB PROGRAM TAXONOMY: PROCESS – TRENDS ON CONTRACTING OFFICERS' DISCRETION TO USE SDVOSB SET ASIDES AND OTHER CONTRACTING MECHANISMS.

To understand whether DOD and DON buyers have used their discretion to target work specifically to SDVOSBs, it is necessary to examine SDVOSB contracting action trends. It is also necessary to examine DOD and DON utilization of sole source and competitive set-aside tools, which EO 13360 and 2005-2009 DOD Strategic Plans directed to increase as a share of other SDVOSB spending and participation measures.

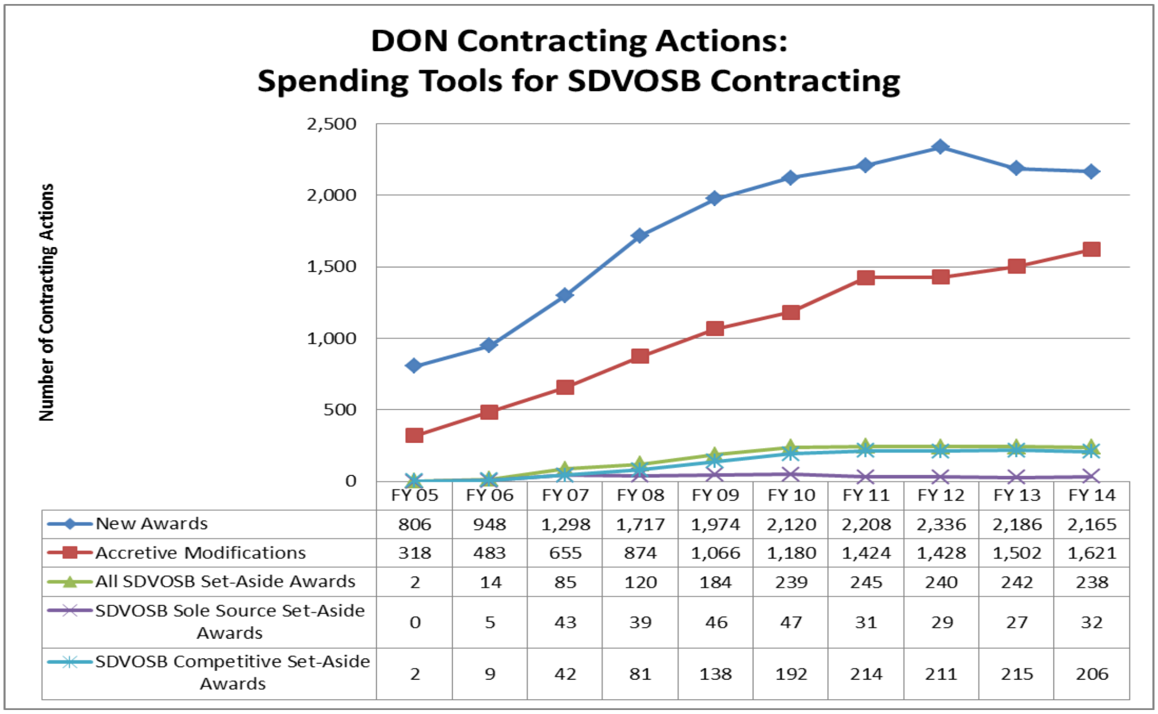
1. DOD and DON Contracting Actions with SDVOSBs.

Data in two Figures below shows that the number of DOD New Awards overall remains declining or stagnant (taking into account the FY2014 level), while the number of DON New Awards have decreased over the last two years to the level below FY2011. The number of DOD and DON Accretive Modifications steadily increases. This indicates greater propensity to fund pre-existing contract awardees. Data below also shows that SDVOSB set-asides of both types are not particularly popular tools for SDVOSB contracting at either DOD or DON.



	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14
New Awards	4,409	4,836	5,323	7,818	8,599	9,414	9,295	9,289	8,601	9,146
Accretive Mods	1,556	2,173	2,503	3,408	4,389	5,745	6,204	6,436	6,638	6,666
All SDVOSB Set-Asides	10	158	718	1,361	1,367	1,535	1,420	1,463	1,521	1,818
SDVOSB Sole Source Set-Asides	1	44	163	196	162	135	104	104	87	94
SDVOSB Competitive Set-Asides	9	114	555	1,165	1,205	1,400	1,316	1,359	1,434	1,724

Figure 7. DOD Contracting Actions: Spending Tools for SDVOSB Contracting.



	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14
New Awards	806	948	1,298	1,717	1,974	2,120	2,208	2,336	2,186	2,165
Accretive Modifications	318	483	655	874	1,066	1,180	1,424	1,428	1,502	1,621
All SDVOSB Set-Aside Awards	2	14	85	120	184	239	245	240	242	238
SDVOSB Sole Source Set-Aside Awards	0	5	43	39	46	47	31	29	27	32
SDVOSB Competitive Set-Aside Awards	2	9	42	81	138	192	214	211	215	206

Figure 8. DON Contracting Actions: Spending Tools for SDVOSB Contracting.

<u>Findings:</u> Instead of giving SDVOSBs New Awards, DOD and DON Contracting Officers prefer to give those firms Accretive Modifications, such as options and change orders. By itself, this trend is not necessarily negative; it could simply mean that SDVOSBs are now getting better at making multi-year option proposals or expanding their performance capacity once projects get under way. However, there is also another trend: DOD and DON Contracting Officers appear to roundly disfavor the making of SDVOSB Program set-aside awards despite legislative and regulatory grants of discretion, and despite the GAO and EO 13360 mandates that such discretion be exercised. This trend is more pronounced at DON, as is the drop in New Awards. Together, these two trends suggest that Contracting Officers drift to other contract mechanisms which may not be as tailored to SDVOSB business development, but which are much easier or less risker to undertake.

2. DOD and DON SDVOSB Sole Source Set-Aside Awards and Their Impact.

Data in two Tables below illustrates DOD and DON utilization of SDVOSB sole source set-asides. This data includes IDV as well as Open Market awards. Such awards quickly increased within the first 4 years of the Program (at DOD) or 3 years (at DON). Further, at DOD, the number of SDVOSB sole source awards is now less than half of what it was in FY2008; at DON, this number is below the FY2007-FY2011 levels. Since FY2009, SDVOSB sole sources have accounted for less than 2 percent of DOD SDVOSB New Awards; the same is the case at DON since FY2011. Since FY2009, DON has lead DOD in terms of SDVOSB set-aside sole source share of total agency New Awards, but the lead has been at the level of percentile fractions.

DOD and DON New Awards spending on sole source SDVOSB set-asides has made a drop in FY2009 from its peak in FY2008, and has not recovered as of FY2014. SDVOSB participation in new SDVOSB sole source set-asides at DOD has been declining every year since FY2008, and is now at the level below FY2007-FY2012 levels. At DON, participation peak was in FY2010, and the present participation is below FY2007-FY2011 levels.

DOD SDVOSB PROGRAM/NEW SDVOSB SOLE SOURCE SET-ASIDE AWARDS: IMPACT ON MARKET ENTRY AND SPENDING								
FISCAL YEAR	SDVOSB Sole Source Set-Aside Awards	Share of All New Awards	SDVOSB Sole Source Awardees	Share of New Awardees under All Methods	SDVOSB Sole Source Spending	Share of New SDVOSB Awards Spending	Share of Total SDVOSB Spend	Share of Goaling Report Spending
FY 05	1	0.02%	1	0.07%	$11,143.00	0.00%	0.00%	0.00%
FY 06	44	0.91%	44	2.77%	$16,718,813.00	1.66%	1.08%	1.05%
FY 07	163	3.06%	126	7.40%	$30,797,418.88	2.34%	1.54%	1.66%
FY 08	196	2.51%	158	7.03%	$62,002,225.78	2.88%	1.91%	1.99%
FY 09	162	1.88%	138	5.57%	$54,970,337.86	2.06%	1.28%	1.27%
FY 10	135	1.43%	115	4.18%	$29,563,592.75	0.91%	0.60%	0.56%
FY 11	104	1.12%	88	3.21%	$27,370,260.15	0.76%	0.50%	0.47%
FY 12	104	1.12%	89	3.38%	$33,188,898.78	0.82%	0.54%	0.52%
FY 13	87	1.01%	81	3.59%	$30,870,226.70	0.85%	0.51%	0.51%
FY 14	94	1.03%	79	3.22%	$43,091,617.15	1.03%	0.62%	0.61%

Table 7. DOD New SDVOSB Sole Source Set-Aside Award Trends; Impact on Market Entry and SDVOSB Spending.

DON SDVOSB PROGRAM/NEW SDVOSB SOLE SOURCE SET-ASIDE AWARDS: IMPACT ON MARKET ENTRY AND SPENDING								
FISCAL YEAR	SDVOSB Sole Source Set-Aside Awards	Share of All New Awards	SDVOSB Sole Source Awardees	Share of New Awardees under All Methods	SDVOSB Sole Source Spending	Share of New SDVOSB Awards Spending	Share of Total SDVOSB Spending	Share of Goaling Report Spending
FY 05	0	0.00%	0	0.00%	$0.00	0.00%	0.00%	0.00%
FY 06	5	0.53%	5	1.10%	$829,536.00	0.47%	0.30%	0.38%
FY 07	43	3.31%	33	5.94%	$5,438,650.16	2.07%	1.37%	1.39%
FY 08	39	2.27%	31	4.73%	$16,800,432.05	3.80%	2.43%	2.50%
FY 09	46	2.33%	41	5.31%	$15,060,451.85	3.26%	1.91%	1.89%
FY 10	47	2.22%	36	4.19%	$15,412,014.58	2.28%	1.35%	1.31%
FY 11	31	1.40%	25	2.68%	$11,990,664.23	1.24%	0.80%	0.83%
FY 12	29	1.24%	23	2.39%	$12,590,951.63	1.44%	0.87%	0.89%
FY 13	27	1.24%	24	2.92%	$10,019,820.59	1.29%	0.72%	0.72%
FY 14	32	1.48%	30	3.16%	$14,411,041.65	1.70%	0.92%	0.81%

Table 8. DON New SDVOSB Sole Source Set-Aside Award Trends; Impact on Market Entry and SDVOSB Spending.

<u>Findings:</u> Over the years, DOD and DON Contracting Officers appeared to increasingly disfavor SDVOSB set-aside awards. As a result, those set-asides' impact on DOD and DON SDVOSB contract spending and contracting

participation is marginal at best. The DOD Strategic Plans' alignment of SDVOSB sole source set-aside awards to contracting-opportunity objectives of EO 13360 appears to have been abandoned or severed in practice. This is not at all surprising in light of the lack of standards for Contracting Officer's discretion to make SDVOSN sole source awards as well as the pressures from countervailing FAR and DOD *Better Buying Power* policies emphasizing competition and contractor responsibility. But, without aggressively expanding the FY2014 increase in SDVOSB sole source awards, this set-aside authority risks becoming illusory. Thus, disabled veterans who pursue DOD/DON contracting in reliance on being informed about this set-aside authority may be at increasing risk of becoming disillusioned with the SDVOSB Program because of this authority's actual non-use.

3. DOD and DON SDVOSB Competitive Set-Aside Awards and Their Impact.

Data in two Tables below illustrates DOD and DON utilization of SDVOSB competitive set-asides. This data includes IDV as well as Open Market awards. New competitive set-aside awards have peaked in FY2010 both at DOD and DON. Such awards have been declining for three years since FY2010, but, at DOD, they have experienced a reversal in FY2013 and major growth in FY2014.

SDVOSB competitive set-aside's contribution to agency SDVOSB spending is generally higher at DOD than DON, though the New Awards spending share is comparable. SDVOSB competitive set-asides account for about a 50 percent higher share of contributions to DOD Goaling spending than to DON Goaling spending. In terms of participation, competitive set-asides account for almost twice the share of New Award recipients at DOD than at DON.

DOD SDVOSB PROGRAM/NEW SDVOSB COMPETITIVE SET-ASIDE AWARDS: IMPACT ON MARKET ENTRY AND SPENDING								
FISCAL YEAR	SDVOSB Competitive Set-Aside Awards	Share of All New Awards	SDVOSB Competitive Set-Aside Awardees	Share of New Awardees Under All Methods	SDVOSB Competitive Set-Aside Spending	Share of New SDVOSB Awards Spending	Share of Total SDVOSB Spending	Share of Goaling Report Spending
FY 05	9	0.20%	9	0.62%	$5,224,519.21	0.69%	0.50%	0.47%
FY 06	114	2.36%	123	7.75%	$111,146,009.10	11.06%	7.15%	7.01%
FY 07	555	10.43%	404	23.74%	$157,753,931.31	12.00%	7.91%	8.48%
FY 08	1165	14.90%	666	29.63%	$564,373,249.43	26.19%	17.36%	18.12%
FY 09	1205	14.01%	712	28.76%	$752,706,170.12	28.16%	17.59%	17.40%
FY 10	1400	14.87%	763	27.72%	$1,078,915,571.31	33.21%	21.78%	20.35%
FY 11	1316	14.16%	728	26.59%	$1,091,437,028.02	30.41%	19.79%	18.68%
FY 12	1359	14.63%	700	26.60%	$983,481,441.21	24.35%	16.13%	15.35%
FY 13	1434	16.67%	638	28.29%	$939,623,966.50	25.87%	15.57%	15.53%
FY 14	1724	18.85%	707	28.79%	$1,068,019,124.40	25.64%	15.31%	15.22%

Table 9. DOD New SDVOSB Competitive Set-Aside Award Trends; Impact on Market Entry and SDVOSB Spending.

DON SDVOSB PROGRAM/NEW SDVOSB COMPETITIVE SET-ASIDE AWARDS: IMPACT ON MARKET PARTICIPATION AND SPENDING								
FISCAL YEAR	SDVOSB Competitive Set-Aside Awards	Share of All New Awards	SDVOSB Competitive Set-Aside Awardees	Share of New Awardees under All Methods	SDVOSB Competitive Set-Aside Spending	Share of New SDVOSB Awards Spending	Share of Total SDVOSB Spending	Share of Goaling Report Spending
FY 05	2	0.25%	2	0.46%	$480,126.21	0.28%	0.21%	0.28%
FY 06	9	0.95%	7	1.54%	$4,763,700.41	2.68%	1.70%	2.20%
FY 07	42	3.24%	39	7.01%	$10,406,976.52	3.95%	2.63%	2.66%
FY 08	81	4.72%	65	9.91%	$72,295,571.00	16.34%	10.46%	10.77%
FY 09	138	6.99%	75	9.72%	$134,494,946.69	29.11%	17.05%	16.89%
FY 10	192	9.06%	95	11.06%	$183,989,439.08	27.22%	16.10%	15.60%
FY 11	214	9.69%	134	14.35%	$216,921,785.72	22.39%	14.56%	14.98%
FY 12	211	9.03%	123	12.79%	$137,938,487.02	15.77%	9.48%	9.80%
FY 13	215	9.84%	119	14.48%	$192,141,419.27	24.81%	13.73%	13.76%
FY 14	206	9.52%	120	12.63%	$191,198,627.65	22.54%	12.18%	10.81%

Table 10. DON New SDVOSB Competitive Set-Aside Award Trends; Impact on Market Entry and SDVOSB Spending.

<u>Findings:</u> DOD and DON Contracting Officers favor SDVOSB competitive set-aside awards much more than they do the sole source set-asides. As a result, the competitive set-asides' impact on DOD and DON SDVOSB contract spending and

contracting participation is also much greater. However, it is still only a minor share of total DOD and DON SDVOSB New Awards. Moreover, over the last several years, these set-asides' contribution to DOD and DON SDVOSB participation and spending appears to have stalled or declined. The DOD Strategic Plans' alignment of SDVOSB competitive set-aside awards to contracting-opportunity objectives of EO 13360 appears to have been barely maintained. This is also not surprising, in light of the 2009 date of the last DOD SDVOSB Strategic Plan. However, DOD appears to be much farther ahead of DON in terms of using competitive SDVOSB set-asides and expanding participation in them. This may help explain DOD's goal achievement success which DON is yet to achieve. DOD is poised to increase this gap still further in light of recent competitive set-aside increases, unless DON takes aggressive action to catch up.

4. DOD and DON Combined SDVOSB Set-Aside Awards (Total SDVOSB Program) and Their Impact.

Data in two Tables below illustrates DOD and DON utilization of the total SDVOSB Program, i.e. the combined sole source and competitive SDVOSB set-asides. This data includes IDV as well as Open Market awards. Data shows declined or stagnated use of SDVOSB Program's New Awards authorities at both DOD and DON as a share of all New Awards (with the exception of FY2013 and 2014 DOD use).

Data also shows that, as a means for helping service-disabled veterans break into the defense contracting market, the usefulness of SDVOSB Program set-asides has plateaued half-way into the assessment period. Despite the EO 13360, the 2009 DOD Strategic Plan and related training and outreach initiatives, the share of SDVOSB set-asides in total SDVOSB net spending as well in New Awards and Goaling spending has been in long-term decline at DOD since FY2010. At DON, this decline commenced in either FY2009 or FY2010, depending on the spending category.

DOD SDVOSB PROGRAM/ALL NEW SDVOSB SET-ASIDE AWARDS: IMPACT ON MARKET ENTRY AND SPENDING								
FISCAL YEAR	All SDVOSB Set-Aside Awards	Share of All New Awards	All SDVOSB Set-Aside Awardees	Share of New Awardees Under All Methods	All SDVOSB Set-Aside Spending	Share of New SDVOSB Awards Spending	Share of Total SDVOSB Spending	Share of Goaling Report Spending
FY 05	10	0.23%	10	0.69%	$5,235,662.21	0.69%	0.50%	0.47%
FY 06	158	3.27%	158	9.95%	$127,864,822.10	12.72%	8.23%	8.06%
FY 07	718	13.49%	493	28.97%	$188,551,350.19	14.35%	9.46%	10.14%
FY 08	1361	17.41%	774	34.43%	$626,375,475.21	29.06%	19.27%	20.11%
FY 09	1367	15.90%	810	32.71%	$807,676,507.98	30.22%	18.88%	18.67%
FY 10	1535	16.31%	845	30.69%	$1,108,479,164.06	34.12%	22.38%	20.90%
FY 11	1420	15.28%	790	28.85%	$1,118,807,288.17	31.18%	20.28%	19.14%
FY 12	1463	15.75%	766	29.10%	$1,016,670,339.99	25.17%	16.68%	15.87%
FY 13	1521	17.68%	690	30.60%	$970,494,193.20	26.72%	16.08%	16.04%
FY 14	1818	19.88%	761	30.99%	$1,111,110,741.55	26.68%	15.92%	15.84%

Table 11. DOD New SDVOSB All Set-Aside Award Trends; Impact on Market Entry and SDVOSB Spending.

DON SDVOSB PROGRAM/ALL NEW SDVOSB SET-ASIDE AWARDS: IMPACT ON MARKET PARTICIPATION AND SPENDING								
FISCAL YEAR	All SDVOSB Set-Aside Awards	Share of All New Awards	All SDVOSB Set-Aside Awardees	Share of New Awardees under All Methods	All SDVOSB Set-Aside Spending	Share of New SDVOSB Awards Spending	Share of Total SDVOSB Spending	Share of Goaling Report Spending
FY 05	2	0.25%	2	0.46%	$480,126.21	0.28%	0.21%	0.28%
FY 06	14	1.48%	12	2.64%	$5,593,236.41	3.15%	1.99%	2.58%
FY 07	85	6.55%	68	12.23%	$15,845,626.68	6.02%	4.00%	4.05%
FY 08	120	6.99%	89	13.57%	$89,096,003.05	20.14%	12.89%	13.27%
FY 09	184	9.32%	112	14.51%	$149,555,398.54	32.37%	18.96%	18.78%
FY 10	239	11.27%	129	15.02%	$199,401,453.66	29.50%	17.45%	16.90%
FY 11	245	11.10%	157	16.81%	$228,912,449.95	23.63%	15.36%	15.80%
FY 12	240	10.27%	145	15.07%	$150,529,438.65	17.21%	10.34%	10.70%
FY 13	242	11.07%	141	17.15%	$202,161,239.86	26.11%	14.45%	14.48%
FY 14	238	10.99%	147	15.47%	$205,609,669.30	24.24%	13.10%	11.62%

Table 12. DON New SDVOSB All Set-Aside Award Trends; Impact on Market Entry and SDVOSB Spending.

<u>Findings:</u> In relative terms, DOD at large utilizes the SDVOSB Program New Awards with much greater frequency and participation, and with greater spending

impact than DON. This may well help explain DOD's and DON's relative standing in terms of SDVOSB goal achievement. However, both DOD and DON, however, have overseen a long-term decline in the SDVOSB Program New Awards' contribution to Goaling spending. This trend suggests disconnect between the statutory justification for the SDVOSB Program authorities and their actual use in the field. Significantly, this trend occurs in the years during which DOD has ceased to issue any more SDVOSB Strategic Plans after the January 2009 DOD Strategic Plan. It appears that Contracting Officers and executives in the field may have interpreted the cessation of new Strategic Plans as change in direction and/or leadership vacuum regarding the use of the SDVOSB Program. Neither the confirmations of buyer discretion stemming from the 2010 Small Business Jobs Act nor the GAO mandate for exercise of this discretion in the 2012 *Split Rock* case appear to have been insufficient by themselves to reverse this trend.

5. DOD and DON SDVOSB Simplified Acquisition Procedures (SAP) Awards and Their Impact.

Data in two Figures below suggests that another process, FAR Part 13 Simplified Acquisitions, has generally played a more positive role in bringing in new SDVOSBs into DOD and DON contracting than the SDVOSB Program. Since FY2011, a majority of SDVOSB New Awardees at DOD received SAP awards. At DON, however, only in FY2013 did the majority of SDVOSB New Awardees received SAP awards. At DOD, SAP now accounts for the majority of New Awards; DON is less SAP-friendly in that regard. In term of New Awards, Total, and Goaling Report spending categories, SAP New Awards exceed SDVOSB sole source awards in every category.

DOD SAP AWARDS AND THEIR IMPACT ON SDVOSB MARKET ENTRY AND SDVOSB SPENDING								
Fiscal Year	SAP SDVOSB New Awards	Share of All SDVOSB New Awards	SAP SDVOSB Awardees	Share of All New Awardees	SAP Awards Spending with SDVOSBs	Share of New SDVOSB Awards Spending	Share of Total SDVOSB Spending	Share of Goaling Report Spending
FY 05	2398	54.39%	1039	72.05%	$169,117,905.21	22.20%	16.07%	15.28%
FY 06	464	9.59%	857	53.97%	$122,053,714.76	12.15%	7.85%	7.70%
FY 07	28	0.53%	11	0.65%	$2,835,360.21	0.22%	0.14%	0.15%
FY 08	11	0.14%	10	0.44%	$1,347,737.60	0.06%	0.04%	0.04%
FY 09	6	0.07%	6	0.24%	$995,452.71	0.04%	0.02%	0.02%
FY 10	1886	20.03%	1002	36.40%	$198,879,487.81	6.12%	4.02%	3.75%
FY 11	3248	34.94%	1464	53.47%	$288,016,823.61	5.19%	5.22%	4.93%
FY 12	3765	40.53%	1483	56.34%	$284,690,662.76	7.05%	4.67%	4.44%
FY 13	4416	51.34%	1331	59.02%	$416,013,773.62	11.45%	6.89%	6.88%
FY 14	5120	55.98%	1346	54.80%	$468,344,284.31	12.78%	7.63%	6.68%

Table 13. DOD SAP Awards and Their Impact on SDVOSB Market Entry and SDVOSB Spending.

DON SAP AWARDS AND THEIR IMPACT ON SDVOSB MARKET ENTRY AND SDVOSB SPENDING								
Fiscal Year	SAP SDVOSB New Awards	Share of All SDVOSB New Awards	SAP SDVOSB Awardees	Share of All SDVOSB New Awardees	SAP New Awards Spending with SDVOSBs	Share of New SDVOSB Awards Spending	Share of Total SDVOSB Spending	Share of Goaling Report Spending
FY 05	490	60.79%	306	70.02%	$31,905,485.21	18.35%	14.12%	18.67%
FY 06	464	48.95%	239	52.64%	$15,751,617.76	8.87%	5.61%	7.26%
FY 07	15	1.16%	2	0.36%	$546,690.00	0.21%	0.14%	0.14%
FY 08	1	0.06%	1	0.15%	$15,300.00	0.00%	0.00%	0.00%
FY 09	0	0.00%	0	0.00%	$0.00	0.00%	0.00%	0.00%
FY 10	444	20.94%	233	27.12%	$39,515,448.08	5.85%	3.46%	3.35%
FY 11	824	37.32%	435	46.57%	$49,713,048.39	5.13%	3.34%	3.43%
FY 12	942	40.33%	450	46.78%	$51,930,315.08	5.94%	3.57%	3.69%
FY 13	873	39.94%	428	52.07%	$52,654,789.03	6.80%	3.76%	3.77%
FY 14	943	43.56%	450	47.37%	$75,794,667.01	8.93%	4.83%	4.29%

Table 14. DON SAP Awards and Their Impact on SDVOSB Market Entry and SDVOSB Spending.

<u>Findings:</u> SAP became a broad-based path into DOD and DON contracting for SDVOSB firms, overtaking the SDVOSB Program in terms of participation and SDVOSB sole sources in terms of spending. This trend appears to validate the 2005 amendment to include SDVOSB opportunities into the purpose of FAR Part 13.

However, DON should increase its SAP awards with SDVOSBs to match or exceed DOD levels.

C. SDVOSB PROGRAM TAXONOMY: OUTPUTS – TRENDS ON SDVOSBS PARTICIPATION IN DOD AND DON CONTRACTING.

To examine the significance of participation in the SDVOSB Program, it is important not only to examine participation trends, but to put those trends in the context of SDVOSB population at large. Then, participation trends by agency and various contract types should be examined.

1. SDV Self-Employment and Contracting Registration Trends.

According to the National Center for Veterans Analysis and Statistics (NCVAS),[139] over the last decade the United States has experienced a swelling SDV population which has growing needs for professional and societal integration as well as economic independence. Specifically, between FY2004 and FY2013, the number of SDVs has grown from approximately 2.5 million to approximately 3.8 million in 2012, a 152 percent increase. On the contrary, the overall veteran population declined from about 26 million to about 21 million during the same time period. Thus, SDVs have come to account for over 18 percent of the total veteran population instead of just over 10 percent. As of FY12, the number of 0-20 percent rated SDVs have remained relatively constant at slightly over 1.3 million people, while the numbers of higher-rated SDVs has increased, with 70-100 percent rating population approaching 1 million, the 30-40 percent rating population reaching about 0.6 million, and the 50-60 percent rating population reaching about 0.4 million. The support expenditures have far outpaced the SDV population growth. By comparison, the SDVOSB Program is much smaller in fiscal outlays and in the target portion of SDV population.

[139] U.S. DEPARTMENT OF VETERANS AFFAIRS, NATIONAL CENTER ON VETERANS ANALYSIS AND STATISTICS, http://www.va.gov/vetdata/docs/QuickFacts/Utilization_trends_2014.pdf; http://www.va.gov/vetdata/docs/QuickFacts/SCD_quickfacts_FY2012.pdf; http://www.va.gov/vetdata/Quick_Facts.asp.

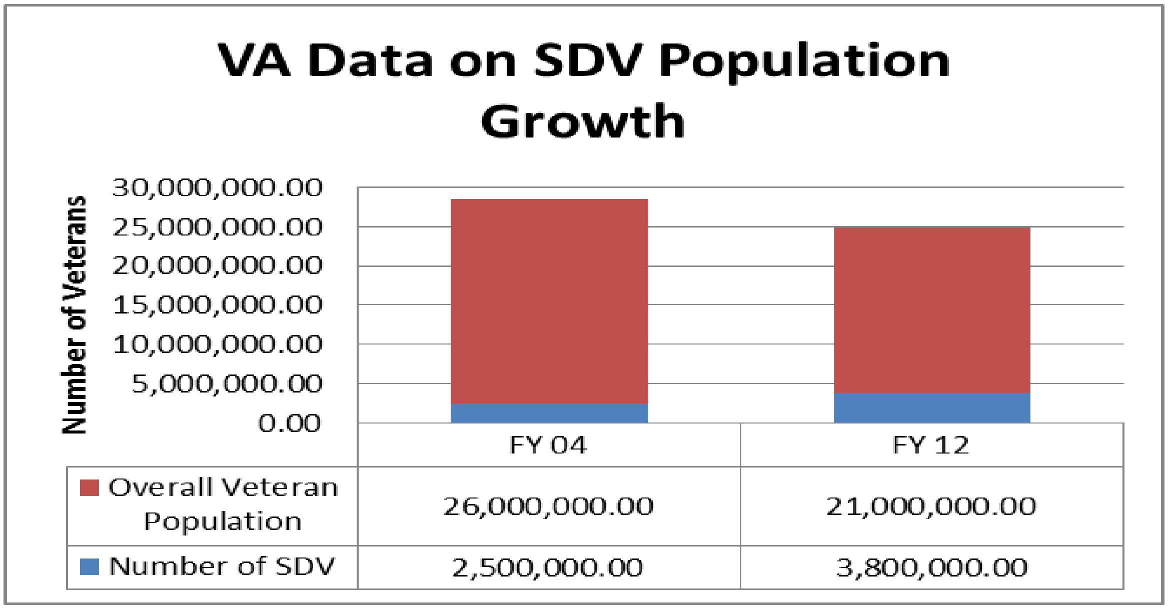


Figure 9. Department of Veterans Affairs (VA) Data on Service-Disabled Veteran Population Growth.

According to the September 2014 U.S. Department of Labor, Bureau of Labor Statistics data,[140] there have been 1,379,000 SDVs in the workforce as of August 2013. SDVs have a lower self-employment participation rate than non-SDVs (5.8 percent to 7.4 percent), but, even so, there were 79,982 SDVOBs in the country as of that time. The SBA Office of Advocacy, relying on the 2007 Census data collected for June 2011, reported there were 196,760 SDVOBs at that time, 41,245 of which had employees and 155,515 of which had none.[141]

[140] U.S. Department of Labor, Bureau of Labor Statistics, *Economic News Release, Table 8. Employer Persons 18 Years and Over by Veteran Status, Presence of Service-Connected Disability, Period of Service, and Class of Worker, August 2012, Not Seasonally Adjusted* (Sept. 08, 2014), available at: http://data.bls.gov/cgi-bin/print.pl/news.release/vet.t08.htm.

[141] U.S. SBA Office of Advocacy, Veteran-Owned Businesses and Their Owners: Data From the Census Bureau's Survey of Business Owners 59 (March 2012), available at: https://www.sba.gov/sites/default/files/393tot.pdf.

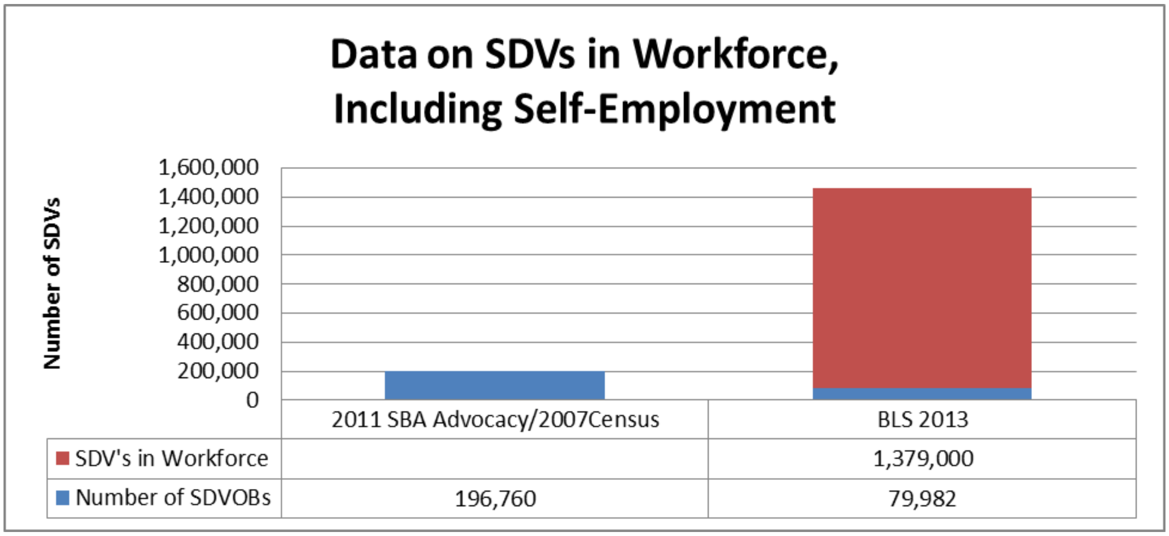


Figure 10. SBA, Census, and Bureau of Labor Statistics Data on SDV Population in the Workforce, Including Self-Employment.

SDVOSB registration data suggests that the Federal and DOD SDVOSB Procurement Programs are well-known in the SDV entrepreneur community, but that disillusionment with them may be widespread. From July 2004 to January 2015, the SDVOSB population registered to do business with the Federal Government in the CCR/SAM databases has grown from 5,600 active registrations to 15,751 active and 35,324 inactive registrations, along with 61 active and inactive registrations that have been legally excluded from government contracting.[142] When registrations are compared to the number of SDVOBs (admittedly, with a difference in timing of data collection), a real picture of disillusionment emerges. Using the BLS numbers, it appears that two-thirds of all SDVOBs have tried Federal contracting, but that only about 20 percent stayed active while about 44 percent dropped out of looking for contracts or subcontracts. For every remaining SDVOB firm looking for Federal contracts or subcontracts, 2.24 SDVOSBs are no longer looking. Some of the inactive registrations may be due to business sales, life events, outgrowth of business size, etc., but the sheer numbers lead to further questions concerning the historical participation in the DOD SDVOSB Program. Using the SBA/Census numbers, just 8 percent of SDVOBs are looking, while 18 percent stopped looking.

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[142] *See* U.S. GENERAL SERVICES ADMINISTRATION, Central Contractor Registration (CCR), formerly available at: https://www.ccr.gov, and transitioned on July 30, 2012 to the System for Award Management (SAM), available at: https://www.sam.gov.

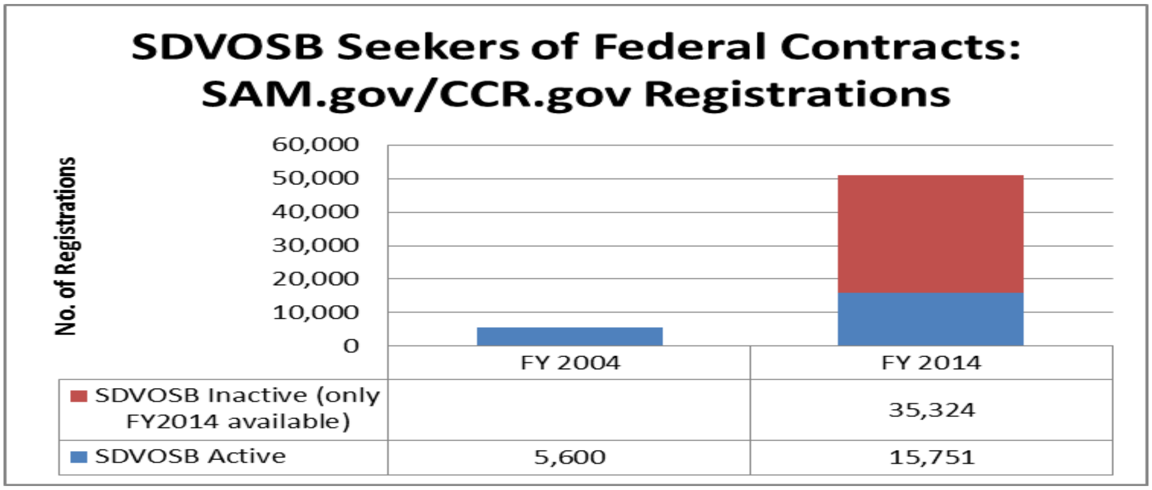


Figure 11. SDVOSB Seekers of Federal Contracts: SAM.gov/CCR Registrations.

<u>Findings:</u> Self-employed service-disabled veterans (SDVs) appear to be largely bypassing the Federal SDVOSB Program; of those SDVs that tried it, a substantial majority has eventually given up.

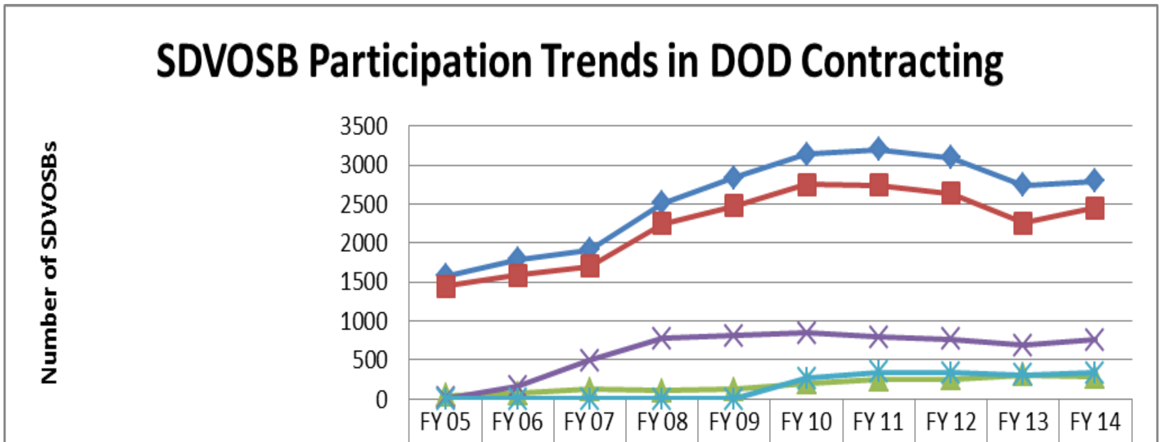
2. SDVOSB Participation in DOD and DON Contracting Overall.

Data below illustrates the participation rates of SDVOSBs in the DOD and DON SDVOSB contracting overall as well as the SDVOSB Program. Participant categories include New Awardees (recipients of all SDVOSB contract actions identified as "Modification 0" in FPDS during a given Fiscal Year); Net Revenue Earner Firms (SDVOSBs that received net positive contract revenue in a given Fiscal Year from new awards and/or accretive modifications, taking into account any deductive modifications such as close-outs of unexpended funds, cancellations, terminations, or deductive changes); and Negative and Neutral Revenue Firms (firms that received net negative or net zero contract revenue in a given Fiscal Year).

Data in two Figures below, as compared with data from the previous section, shows that just under 4 percent of total SDVOSB population participate in the DOD SDVOSB Procurement Program. This amounts to a little less than 20 percent of those actively looking. Just about 7 percent of the actively looking SDVOSB population participates in DON procurement market.

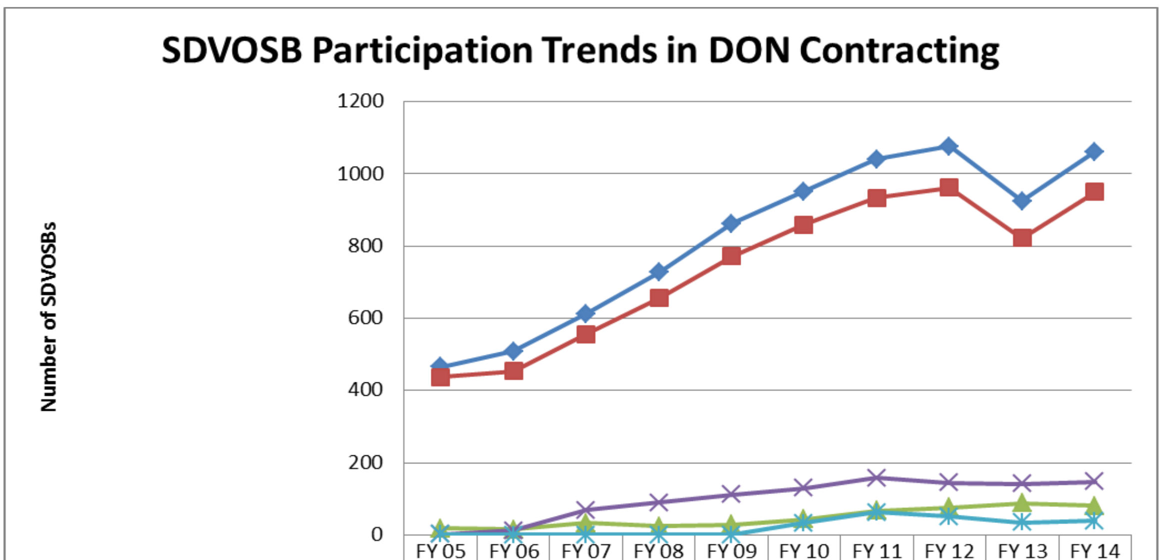
Participation in the DOD SDVOSB Program has peaked in FY2010 for New Awardees and in FY2011 for Net Revenue Earners, and has been dropping until FY2014. But the FY2014 upturn was slight: less SDVOSBs have received new DOD contracts that year than in the years FY2009, FY2010, FY2011, and FY2012; the number of Net Revenue Earners is still at level below FY2010, FY2011, and FY2012. Participation in the DON SDVOSB Program has peaked in FY2012 for both New Awardees and Net Revenue Earners; in FY2014, it is still below that level.

A comparative match to earlier spending Figures would provide valuable perspective here. The number of SDVOSB participants in either category has never doubled from FY05, even though SDVOSB spending has grown approximately six (6) times in terms of new award revenues and approximately seven (7) times in terms of net SDVOSB spending. At DON, New Awardee and Net Revenue Earner numbers have more than doubled from FY2005, while the Net Total Spending increased about 6 times and New Awards spending grew about 5 times. The DOD and DON SDVOSB Program appears to begin concentrating the spending among a limited number of firms. The number of SDVOSBs with negative and neutral revenues, on the other hand, has peaked in FY2013 for both DOD and DON. The share of DOD New Awardees (FY2005 and FY2014 data) as part of closest available active registrations (2004 and 2015 calendar years data) has dropped from approximately 25 percent to approximately 15 percent. This may mean that SDVOSBs are diversifying to other agencies, but may also mean that new awards are now harder to come by and veterans are walking away from the Program.



	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14
Firms with Earned Revenue	1582	1789	1911	2516	2840	3135	3197	3093	2742	2794
New Awardees	1442	1588	1702	2248	2476	2753	2738	2631	2255	2454
Negative and Neutral Revenue Firms	46	70	127	103	127	205	250	252	309	279
All SDVOSB Set-Aside Awardees	10	158	493	774	810	845	790	766	690	761
All SDVOSB SAP Set-Aside Awardees	4	1	0	1	0	268	341	333	306	337

Figure 12. SDVOSB Participation Trends in DOD Contracting Overall.



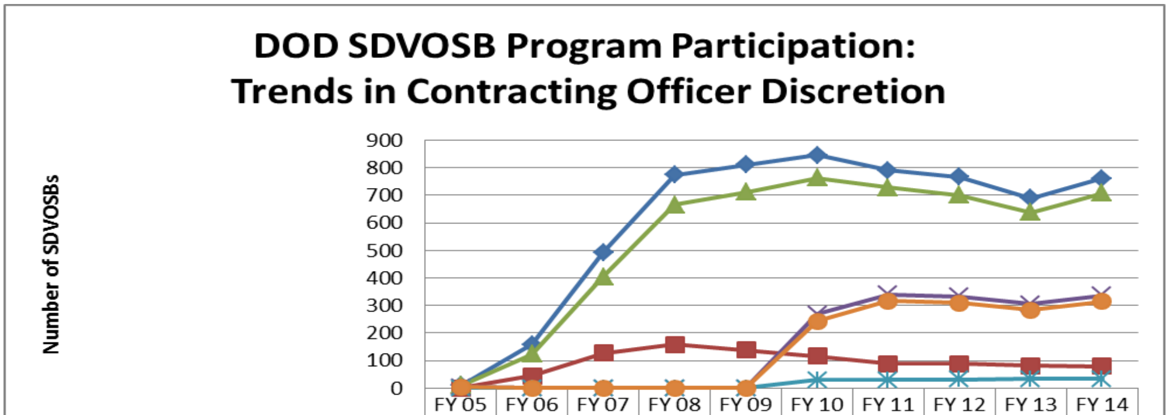
	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14
Net Earned Revenue Firms	465	509	613	727	863	951	1041	1077	925	1062
New Awardees	437	454	556	656	772	859	934	962	822	950
Net Negative and Neutral Revenue Firms	18	15	33	24	29	43	67	76	88	81
All SDVOSB Set-Aside Awardees	2	12	68	89	112	129	157	145	141	147
All SDVOSB SAP Set-Aside Awardees	1	0	0	0	0	33	62	51	34	39

Figure 13. SDVOSB Participation Trends in DON Contracting Overall.

<u>Findings:</u> DOD and DON are experiencing a decline in SDVOSB participation in their respective contracting markets; in other words, DOD and DON may well begin running out of SDVOSB contractors in the near future. This trend is much more serious and pronounced at DOD, while DON's trend appears substantially influenced by sequestration. At the same time, the SDVOSB Program is not a major contributor to encouraging SDVOSB participation in DOD and DON contracting markets. DON even experienced reduced participation in SAP set-asides, which correlates with the aftermath of the Marine Corps *Kingdomware* case. Not only are these trends contrary to broad-based business development, but they also raise doubts over the strategic ability of DOD and DON to meet or exceed the 3 percent SDVOSB statutory goal in the long term.

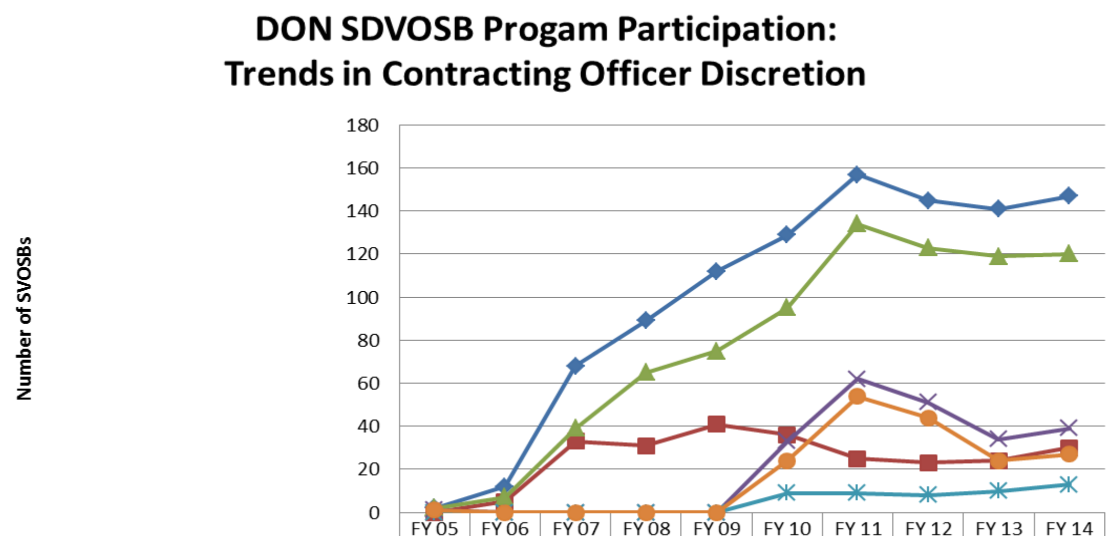
3. SDVOSB Program Participation at DOD and DON.

Data below illustrates the SDVOSB Program participation trends as a consequence of Contracting Officer's discretion to set aside or not set aside work for SDVOSBs on a competitive or sole source basis. The participation trends show a declining and/or stagnating level of Program outputs, depending on the effect given the FY2014 data. The number of SDVOSB sole source awardees has been declining at DOD since FY2008 and DON since FY2009. The number of SAP SDVOSB sole source awardee has generally stagnated since FY2010, with recent slight increases. The only hopeful trend, with the potential to redirect the Program's overall performance, is the growth in the number of SAP competitive SDVOSB set-aside awardees at DOD. At DON, SAP set-aside awardees numbers have been dropping. Overall, this data shows that DOD and DON Contracting Officers are not exercising discretion to increase the total count of SDVOSBs in the SDVOSB Program.



	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14
All SDVOSB Set-Aside Awardees	10	158	493	774	810	845	790	766	690	761
SDVOSB Sole Source Awardees	1	44	126	158	138	115	88	89	81	79
SDVOSB Competitive Set-Aside Awardees	9	123	404	666	712	763	728	700	638	707
All SDVOSB SAP Set-Aside Awardees	4	1	0	1	0	268	341	333	306	337
ALL SAP SDVOSB Sole Source Awardees	0	0	0	0	0	30	30	31	33	33
SAP SDVOSB Competitive Awardees	4	1	0	1	0	242	316	309	284	315

Figure 14. DOD SDVOSB Program Participation: Trends in Contracting Officer Discretion.



	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14
All SDVOSB Set-Aside Awardees	2	12	68	89	112	129	157	145	141	147
SDVOSB Sole Source Awardees	0	5	33	31	41	36	25	23	24	30
SDVOSB Competitive Set-Aside Awardees	2	7	39	65	75	95	134	123	119	120
All SDVOSB SAP Set-Aside Awardees	1	0	0	0	0	33	62	51	34	39
ALL SAP SDVOSB Sole Source Awardees	0	0	0	0	0	9	9	8	10	13
SAP SDVOSB Competitive Awardees	1	0	0	0	0	24	54	44	24	27

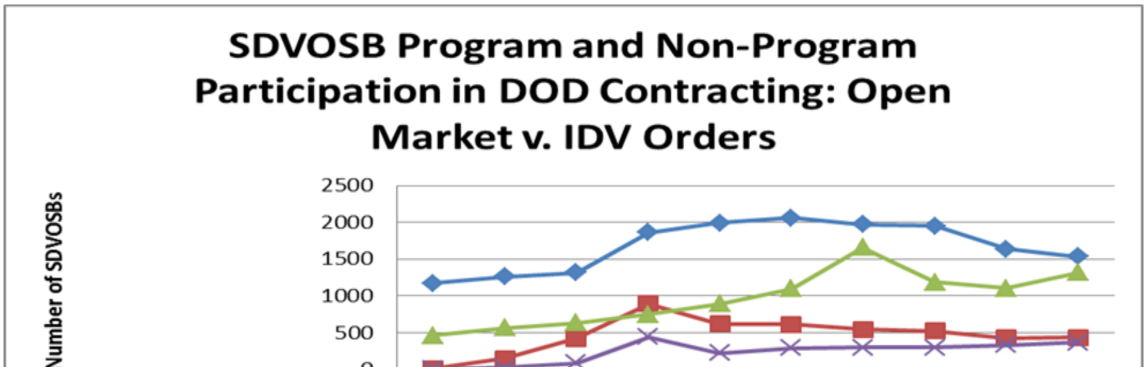
Figure 15. DON SDVOSB Program Participation: Trends in Contracting Officer Discretion.

<u>Findings:</u> There is a crisis of participation in DOD and DON SDVOSB Program. Except for SAP sole source awardees, all Program participation indicators have stagnated or decreased over time. With the exception of DOD SDVOSB SAP set-asides, the SDVOSB Program does not appear to be serving as the entryway into DOD or DON markets. DON should take urgent action to reverse these trends.

4. SDVOSB Program and Non-Program Participation: Open Market versus IDVs.

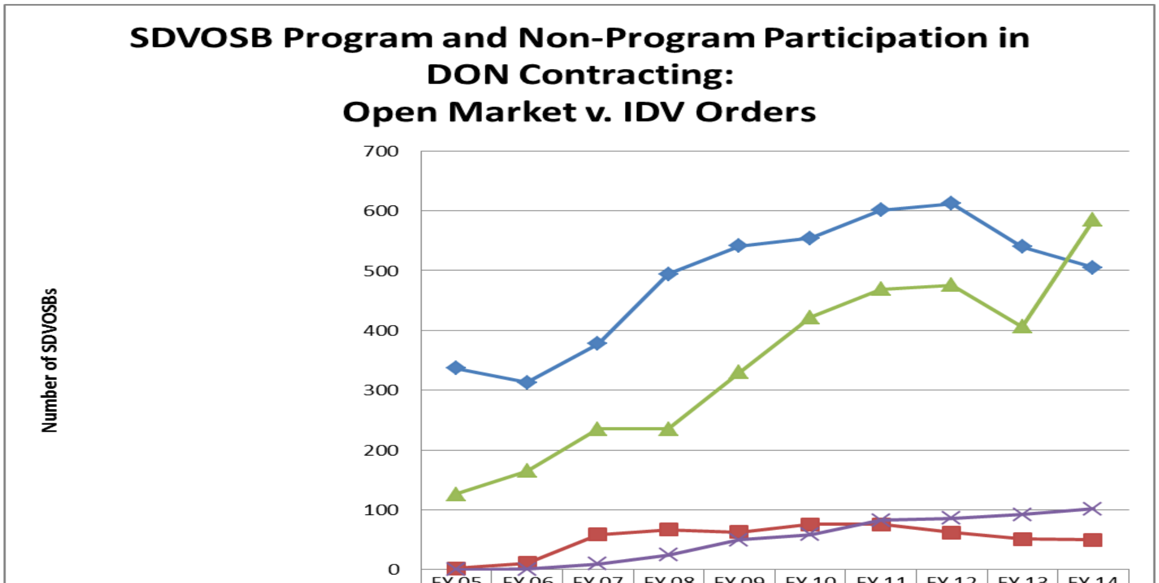
Another Program and non-Program participation data set shows substantial gap between the number of Open Market awardees and Open Market SDVOSB set-aside awardees. The same data set also shows favorable trends in the number of IDV order awardees winning work outside the SDVOSB set-asides. DOD data suggests that the 2010 Small Business Jobs Act legislation confirming discretionary IDV SDVOSB set-asides authority had a much smaller effect than the effect of precedential decisions, Task Force

Reports, and regulations favoring established firms regardless of set-asides. At DON, however, there appears to be a realignment of SDVOSBs form Open Market to IDVs in terms of overall awards. In terms of SDVOSB set-asides, this realignment occurred at both DOD and DON. Data also suggests that DOD and DON, operating under initial DOD Strategic Plans, succeeded in increasing Open Market SDVOSB set-aside participation so that SDVOSBs can use it as past performance record for future IDV participation.



	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14
Open Market Awardees	1175	1262	1317	1861	1996	2060	1971	1952	1634	1537
Open Market SDVOSB Set-Aside Awardees	6	142	422	890	620	611	543	524	426	436
IDV Awardees	457	564	634	747	893	1098	1659	1187	1101	1317
IDV SDVOSB Set-Aside Awardees	4	21	85	441	218	289	299	298	328	361

Figure 16. SDVOSB Program and Non-Program Participation in DOD Contracting: Open Market v. IDV Orders.



	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14
Open Market Awardees	337	313	378	494	541	554	601	612	540	505
Open Market SDVOSB Set-Aside Awardees	2	11	59	67	63	76	76	62	51	50
IDV Awardees	126	165	235	235	330	422	469	476	406	585
IDV SDVOSB Set-Aside Awardees	0	1	10	25	50	59	83	86	92	102

Figure 17. SDVOSB Program and Non-Program Participation in DON Contracting: Open Market v. IDV Orders.

<u>Findings:</u> Once the 2010 Small Business Jobs Act confirmed legal authority for IDV SDVOSB set-asides, DOD and DON buyers began favoring SDVOSB set-aside seekers holding IDVs over set-aside seekers in the Open Market. There is also a tendency to match (at DOD) or exceed (at DON) the number of SDVOSB IDV contractors as compared to the number of SDVOSB Open Market contractors. These trends may suggest greater success of SDVOSBs at the pursuit of IDVs, but may also be indicative of the Program's entrenchment problem raised by academic critics.

D. SDVOSB PROGRAM TAXONOMY: OUTCOMES – TRENDS RELATED TO SDVOSB CAPACITY AND POST-PROGRAM STAYING POWER.

Except for provisions in the 1999 and the 2003 legislation that were relegated to U.S. code notes and the April 2007 (subsequently limited) *Knowledge Connections* COFC opinion, there appears to be no existing law, regulation, order, plan, policy, or court precedent that creates an outputs-centric or outcome-centric SDVOSB Procurement Program design. Instead, the overriding focus is on the inputs (meeting goals), even to the exclusion of new, developing, or multiple SDVOSBs. The market research and source selection processes are so uncertain that they make it difficult for buyers to exercise discretion in favor of SDVOSB set-asides. As the above authorities show, growing the pool of capable SDVOSBs is not a recognized factor in award decisions, and is a limited, easily-superseded factor in acquisition strategies. Business development for specific SDVOSBs or groups of SDVOSBs is not a stated factor at all. Although there are no stated business development metrics for SDVOSB contracting or the SDVOSB Program, some possible metrics are addressed below.

1. DOD and DON Awards Capacity-Related Trends.

One possible business development outcome metric concerns the size of possible award capacity expectations on the part of SDVOSB firms (as well as Contracting Officers looking for SDVOSB firms with experience). To examine possible expectation trends, the two Figures and two Tables below contain measures of actual award averages (means) and medians across contract award types. The average values are influenced by extreme data points (i.e., the very high or the very low awards), while the medians simply provide the middle award data value from among all awards made but not the range of distribution of the award values. From the standpoint of statistics, there are many measurements of central tendency that could be applied to explain DOD and DON SDVOSB contracting practices. The choice of these measurements usually depends on the perceived accuracy of the precise typical or representative award values that those measurements produce. Such comparisons are beyond the scope of this study. Data below does not seek to represent or determine typical award values; rather, its purpose is to illustrate the differences in award values across Open Market and IDV contract award types even with the extreme-value influences.[143]

[143] For a representative discussion of related statistics principles, *see generally* Paul von Hippel, *Mean, Median, and Skew: Correcting a Textbook Rule*, 13 JOURNAL OF STATISTICS EDUCATION, No. 2 (2005), available at: http://www.amstat.org/publications/jse/v13n2/vonhippel.html; UNIVERSITY OF TEXAS, *Common Mistakes in Using Statistics: Summary Statistics for Skewed Distributions* (2015), available at: http://www.ma.utexas.edu/users/mks/statmistakes/skeweddistributions.html; and LAERD STATISTICS, *Measures of Central Tendency* (2015), available at: https://statistics.laerd.com/statistical-guides/measures-central-tendency-mean-mode-median.php.

Data below suggests that neither Open Market awards nor Open Market set-asides provide comparable experience to SDVOSBs in terms of award value as that provided by IDVs. On the contrary, IDV set-aside orders historically provided comparable or greater experience in terms of IDV award values. Once firms were successful enough to land an IDV, their success was reinforced. There are drastic disparities in median SDVOSB set-aside values, particularly at DOD. **This suggests a very positive trend in terms of availability of low-dollar set-asides suitable for initial agency market entry, but also a negative trend in terms of capacity-building for firms seeking transition from Open Market to IDVs.**

Since FY2008 for DON and FY2009 for DOD, the differences between Open Market and IDV projects size generally held fairly constant. This data demonstrates that SDVOSBs are fully capable of participating in the IDVs alongside the most experienced firms in other small and large business categories. (Note, however, that IDV New Award values may reflect artificially low minimum ordering quantities.) In terms of assistance, data appears to support the academic predictions of greater business development assistance for already successful vendors.

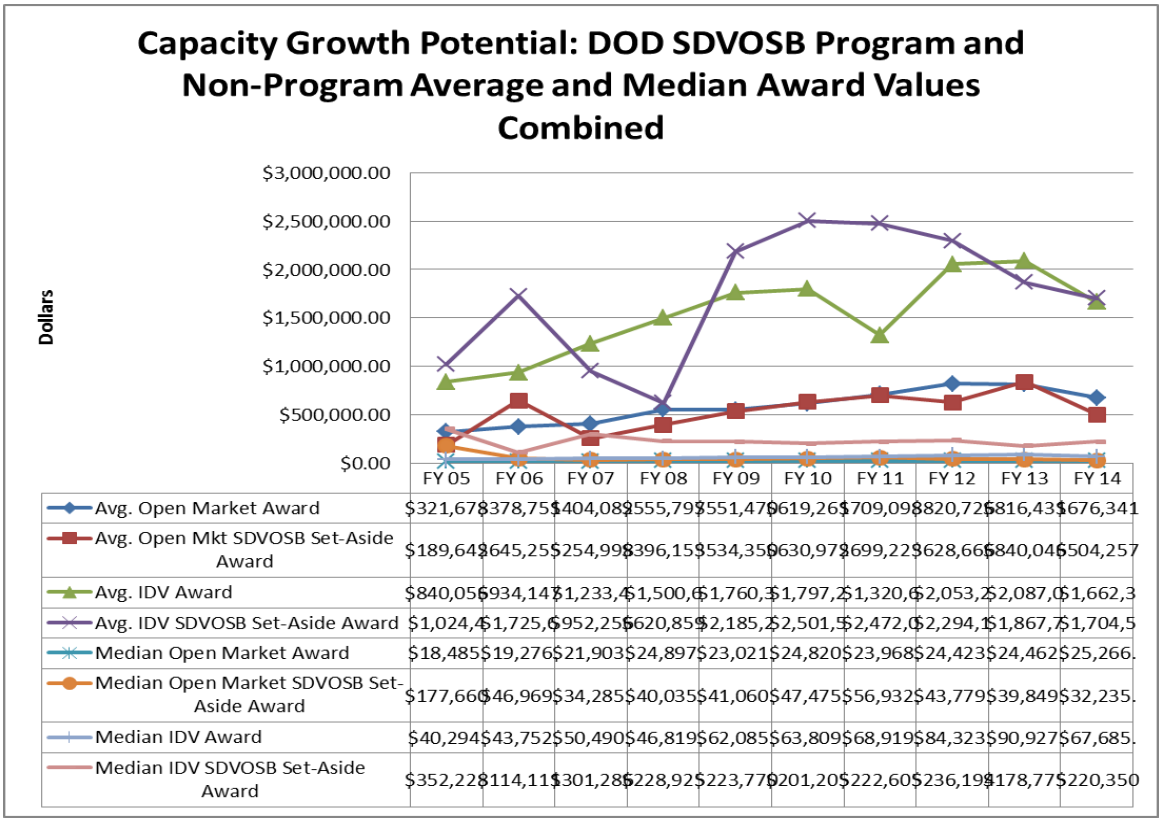


Figure 18. Capacity Growth Potential: DOD SDVOSB Program and Non-Program Average and Median Award Values.

Capacity Growth Potential: DOD SDVOSB Program and Non-Program Average and Median Award Values Combined								
FISCAL YEAR	Avg. Open Market Award	Avg. Open Mkt SDVOSB Set-Aside Award	Avg. IDV Award	Avg. IDV SDVOSB Set-Aside Award	Median Open Market Award	Median Open Market SDVOSB Set-Aside	Median IDV Award	Median IDV SDVOSB Set-Aside Award
FY 05	$321,678.81	$189,642.37	$840,056.57	$1,024,452.00	$18,485.50	$177,660.00	$40,294.00	$352,228.00
FY 06	$378,751.63	$645,255.61	$934,147.53	$1,725,644.05	$19,276.00	$46,969.00	$43,752.50	$114,111.00
FY 07	$404,082.70	$254,998.89	$1,233,460.95	$952,256.69	$21,903.50	$34,285.00	$50,490.00	$301,286.00
FY 08	$555,797.08	$396,153.20	$1,500,609.59	$620,859.71	$24,897.00	$40,035.00	$46,819.00	$228,925.50
FY 09	$551,470.58	$534,350.79	$1,760,333.15	$2,185,224.87	$23,021.83	$41,060.00	$62,085.56	$223,770.73
FY 10	$619,261.53	$630,972.51	$1,797,291.21	$2,501,574.25	$24,820.00	$47,475.00	$63,809.76	$201,205.24
FY 11	$709,098.65	$699,223.84	$1,320,603.99	$2,472,002.49	$23,968.47	$56,932.60	$68,919.78	$222,605.33
FY 12	$820,726.59	$628,666.12	$2,053,295.82	$2,294,153.15	$24,423.34	$43,779.42	$84,323.47	$236,194.51
FY 13	$816,431.83	$840,046.61	$2,087,057.71	$1,867,787.61	$24,462.50	$39,849.06	$90,927.07	$178,775.73
FY 14	$676,341.32	$504,257.35	$1,662,380.90	$1,704,577.41	$25,266.00	$32,235.50	$67,685.07	$220,350.04

Table 15. Capacity Growth Potential: DOD SDVOSB Program and Non-Program Average and Median Award Values Combined.

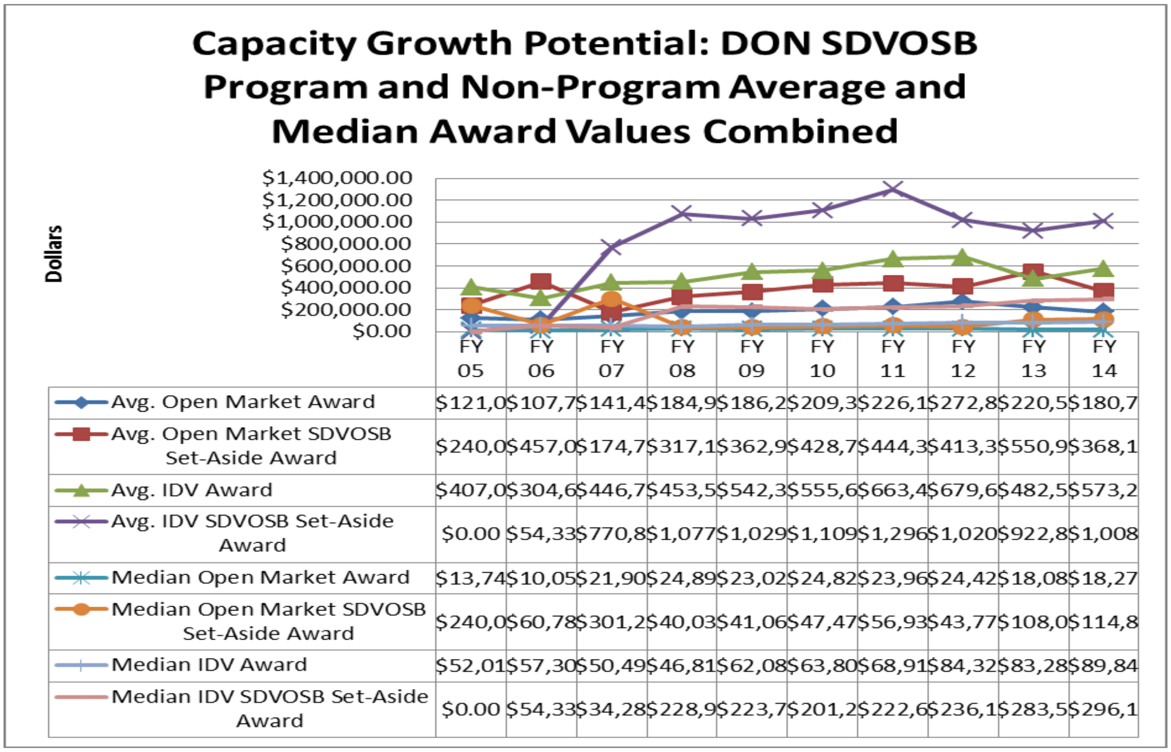


Figure 19. Capacity Growth Potential: DON SDVOSB Program and Non-Program Average and Median Award Values.

Capacity Growth Potential: DON SDVOSB Program and Non-Program Average and Median Award Values Combined								
FISCAL YEAR	Avg. Open Market Award	Avg. Open Market SDVOSB Set-Aside Award	Avg. IDV Award	Avg. IDV SDVOSB Set-Aside Award	Median Open Market Award	Median Open Market SDVOSB Set-Aside Award	Median IDV Award	Median IDV SDVOSB Set-Aside Award
FY 05	$121,025.59	$240,063.11	$407,086.67	$0.00	$13,743.50	$240,063.11	$52,012.00	$0.00
FY 06	$107,740.41	$457,046.70	$304,684.35	$54,338.00	$10,051.50	$60,784.00	$57,308.50	$54,338.00
FY 07	$141,476.56	$174,797.38	$446,771.01	$770,845.89	$21,903.50	$301,286.00	$50,490.00	$34,285.00
FY 08	$184,994.80	$317,117.77	$453,513.83	$1,077,535.95	$24,897.00	$40,035.00	$46,819.00	$228,925.50
FY 09	$186,279.76	$362,949.56	$542,318.56	$1,029,845.28	$23,021.83	$41,060.00	$62,085.56	$223,770.73
FY 10	$209,301.46	$428,712.92	$555,606.47	$1,109,421.85	$24,820.00	$47,475.00	$63,809.76	$201,205.24
FY 11	$226,193.78	$444,317.03	$663,481.80	$1,296,442.53	$23,968.47	$56,932.60	$68,919.78	$222,605.33
FY 12	$272,826.42	$413,374.99	$679,605.36	$1,020,012.53	$24,423.34	$43,779.42	$84,323.47	$236,194.51
FY 13	$220,596.19	$550,933.48	$482,560.65	$922,848.92	$18,080.03	$108,000.00	$83,289.78	$283,516.79
FY 14	$180,760.34	$368,108.49	$573,200.13	$1,008,886.65	$18,270.00	$114,807.25	$89,846.64	$296,141.73

Table 16. Capacity Growth Potential: DON SDVOSB Program and Non-Program Average and Median Award Values Combined.

Findings: Clearly, there are SDVOSBs able to handle high-capacity work. Open Market New Awards, including SDVOSB set-aside awards, tend to require (and provide) less contract capacity than IDV New Awards. The disparities between

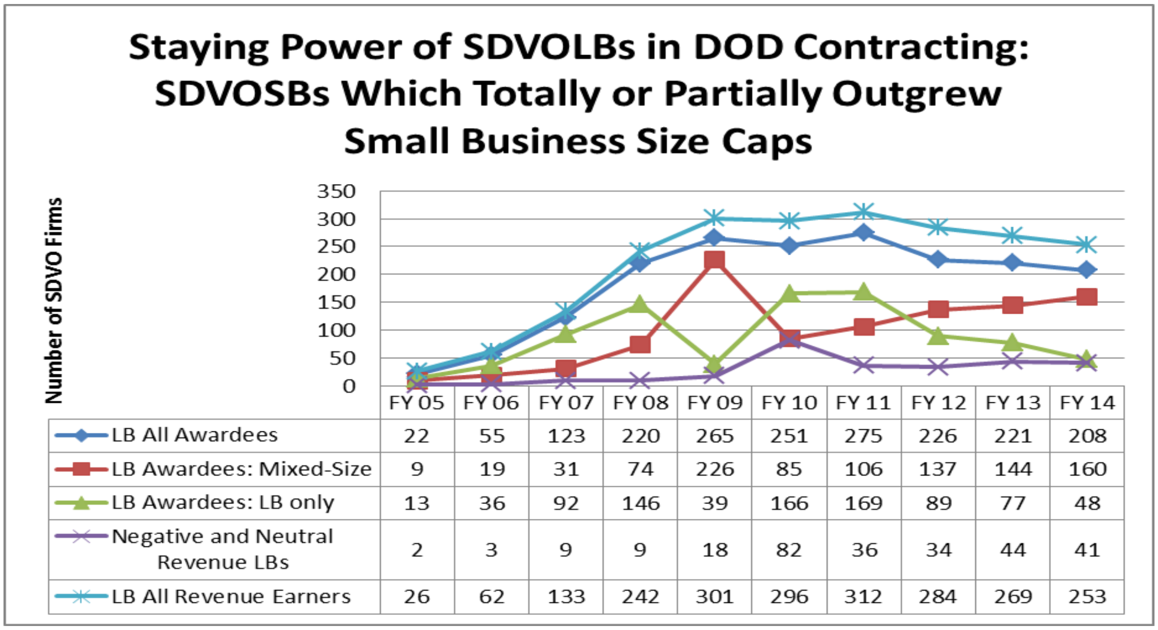
average and median award values for SDVOSB unrestricted and set-aside awards in the Open Market and on IDVs raise questions as to whether there SDVOSBs are afforded adequate capacity-building through the SDVOSB Program.

In terms of capacity-building, DON SDVOSB set-asides on IDVs appear to have been used backwards (this also occurred at DOD at large from time to time). Instead of using IDV SDVOSB set-asides to expand the capacity of SDVOSB firms to handle unrestricted IDV work, DON buyers appear to have required success at unrestricted IDV work first before significant work under IDV SDVOSB set-asides can be obtained. This approach appears consistent with the second, December 2007, COFC opinion in *Knowledge Connections* (but not with the first, April 2007, opinion). However, this means that IDV SDVOSB set-asides appear to function not as a business development mechanism, but as a reward mechanism for already-successful firms.

2. Staying Power of SDVO Contractor Firms that Outgrew Small Business Size Caps.

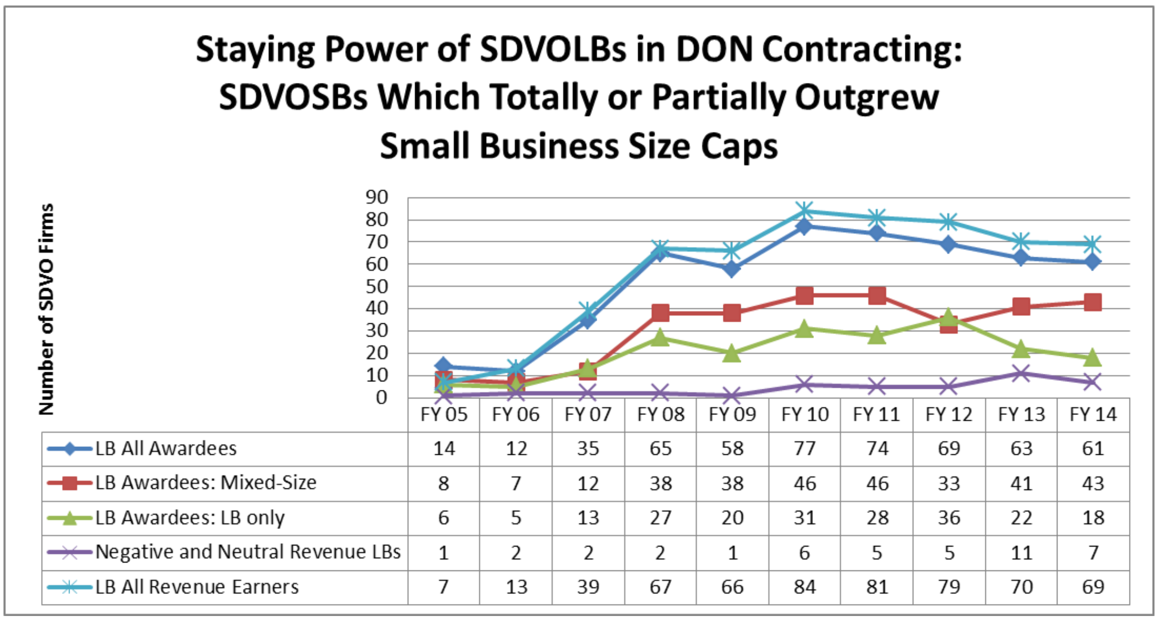
Data in two Figures below illustrates the outcome of the current SDVOSB Program design in terms of building successful SDVO businesses. At issue is the staying power of SDVO firms which were formerly SDVOSBs. Once an SDVO firm outgrows small business size caps, it is no longer eligible to participate in the SDVOSB Program. Essentially, such a firm becomes an SDVOSB Program/SDVOSB contracting graduate.

It appears that the number of SDVO firms receiving large business awards has been decreasing over the last 4 years at DOD and over the last 5 years at DON. Although SDVOLBs and SDVOSBs are not identical populations, the SDVOLBs number can be approximated to 8.5 percent of new SDVOSB awardees at DOD or approximately 6.4 percent at DON. This is not indicative of broad-based business development success, but suggests other possibilities such as the firms' self-imposed growth limits and/or limited ability of the SDVOSB Program to prepare firms for full and open competition.



	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14
LB All Awardees	22	55	123	220	265	251	275	226	221	208
LB Awardees: Mixed-Size	9	19	31	74	226	85	106	137	144	160
LB Awardees: LB only	13	36	92	146	39	166	169	89	77	48
Negative and Neutral Revenue LBs	2	3	9	9	18	82	36	34	44	41
LB All Revenue Earners	26	62	133	242	301	296	312	284	269	253

Figure 20. Staying Power of SDVOLBs in DOD Contracting: SDVOSBs Which Outgrew Small Business Size Caps.



	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14
LB All Awardees	14	12	35	65	58	77	74	69	63	61
LB Awardees: Mixed-Size	8	7	12	38	38	46	46	33	41	43
LB Awardees: LB only	6	5	13	27	20	31	28	36	22	18
Negative and Neutral Revenue LBs	1	2	2	2	1	6	5	5	11	7
LB All Revenue Earners	7	13	39	67	66	84	81	79	70	69

Figure 21. Staying Power of SDVOLBs in DON Contracting: SDVOSBs Which Outgrew Small Business Size Caps.

<u>Findings:</u> The alumni population of the SDVOSB Program (or SDVOSB contracting as a whole) receiving New Awards has been dwindling over the recent years at DOD and DON. This suggests lack of broad-based business development

sufficient to prepare SDVO firms for success outside of Small Business Act contracting. This trend began earlier at DON than at DOD at large.

VI. ANSWERS TO RESEARCH QUESTIONS; RECOMMENDATIONS ON STRATEGIC USE OF SIMPLIFIED ACQUISITIONS.

Thanks to the helpful theoretical framework, this study represents the first known attempt to look at the DOD and DON SDVOSB contracting from the perspective of an individual service-disabled veteran looking to government contracting as a means of successful transition to economic empowerment. The study has succeeded in asking and answering several important questions in that regard.

With regards to the first question, whether the SDVOSB Program's operations, successes, and challenges can be better explained in terms of the generally accepted Cohen-Eimicke Contract Management Performance Model, the answer is a definite "yes." This study validates the significance of distinctions drawn by Cohen and Eimicke between inputs, process, outputs, and outcomes for measuring the performance of contracting program. In total spending terms, this Program has delivered substantial prime contracting dollars to its beneficiary firms. DOD and DON can rightfully take credit for this spending record. However, important collateral issues persist. These issues not only include DON missing the 3 percent goal, but also a number of issues affecting the role, significance, and effects of the SDVOSB Program.

Viewed through the prism of the Cohen-Eimicke model, the DOD/DON SDVOSB Program has operated exactly as it was designed: to deliver funds towards the 3 percent goal through contract spending with most successful firms that need the least targeted assistance. The 2003 Congressional compromise may have enabled the existence of the SDVOSB Program, but at the price of effectiveness in achieving its avowed policy objectives and overall justifications. Neither the Executive Order 13360 nor the DOD Strategic Plans have brought sufficient clarity to discretionary processes or sufficient emphasis on process, output, or outcome measures; nor have the Order and Plans created the contracting capacity required for SDVOSB business development through government contracting. The 2010-2012 Interagency Task Force renewed the focus on delivering the most funds (inputs) to the most successful firms (outputs). Likewise, the Small Business Jobs Act of 2010 and implementing regulations simply confirmed the buying agencies' discretion to fund the already successful firms. **The SDVOSB Procurement Program's Congressional, regulatory, and policy designs emphasize inputs, i.e. the transactionally-easiest delivery of the greatest spending. However, those designs consistently leave unclear the process question of when and why a Contracting Officer would exercise his or her individual discretion to assist particular SDVOSBs. The Program's process design and execution are therefore inherently unstable and contradictory.** Further, significant policy gaps exist in the SDVOSB Program related to various questions that were not immediately foreseen at the time of its creation, such as the impact of sequestration or greater use of Simplified Acquisitions.

The pressure of the SDVOSB firms for interpretation of SDVOSB Program rules in favor of meaningful business development assistance lead to attempts by the GAO and COFC to impose the Program designs through precedents. In 2007-early 2008, those attempts produced favorable precedents, but those precedents were overruled within about a year from issuance. As a result, all current SDVOSB Program designs make it unclear and even undesirable for individual Contracting Officers to undertake set-aside awards. Predictably, DOD and DON Contracting Officers have been making less and less SDVOSB set-aside awards, and even less New Awards of all kinds, in recent years. Only in FY2014 did the DOD increase competitive and New Awards, with the resulting goal achievement success.

Meanwhile, the population of outputs, i.e., the numbers of SDVOSB firms earning DOD contract revenue or receiving New Awards from DOD, has been diminishing over time and is presently stagnant at the 6-year old level. The number of DON SDVOSB revenue earners and New Awardees is below the 3-year old level. **Without more contract awards of the type that can serve as entry paths into DOD/DON procurement and without more participating SDVOSB firms, the SDVOSB Program can be expected to generate more disillusionment within the veteran community even as DOD and**

DON are maintaining or approaching the 3 percent goal achievement. This may be a particularly acute problem for DON.

This study shows that the SDVOSB Program operates less as a veterans' "assistance" program or a business development program, but more as an additional, soft preference for the pool of SDVOSB firms that appear to be generally capable of thriving within the non-SDVOSB procurement processes at DOD and DON. This validates the assessments by Schooner, Sherman, Korsak, McGann, as well as Cox and Moore that the SDVOSB Program's design is geared to benefit established, successful, already-resourced firms. It would be entirely proper for Congress and the Executive Branch to re-align the design elements of the Program so that the process becomes more veteran-centric and so that the Program can become focused on outputs and outcomes, not simply on inputs.

As to the second question, whether broad and unguided individual-level Contracting Officer discretion the right mechanism to support SDVOSB participation in Defense, Navy, and Marine Corps contracting, the answer is a resounding "no." As already stated above, FPDS data demonstrated that DOD and DON Contracting Officers are growing in reluctance to exercise discretion to conduct or fund set-asides, particularly in Open Market acquisitions. These findings refute the criticism of Schooner and Sherman that the SDVOSB Program created a unique, undue burden on the Federal procurement system – but only to the extent the Program appears to be not used. This is for reasons of structural design compromises imposed by Congress, regulators, and tribunals, and not for any lack of care for service-disabled veterans by DOD or DON buyers. The DOD Program's spending volume success is based on the foundation of early successful DOD Strategic Plans, as well as peak awards and peak participation reached half-way into the Program's history. The Interagency Task Force changed the emphasis towards utilizing the same established SDVOSBs across multiple DOD buying activities and commands maximized near-term goal achievement directed in statutory law and EO 13360. However, this approach made little headway in developing the bench of newly capable SDVOSB firms or removing entry barriers for veterans seeking self-employment.

Individual-level discretion in the awarding of new set-asides cannot address challenges in the SDVOSB Program's systemic direction and its cloudy strategic future. The reality is that, over the last four fiscal years, DOD and DON SDVOSB spending has been increasingly maintained not through new awards, but through accretive modifications such as exercised options or added requirements. Because DOD/DON contracts are generally limited to 5 years,[144] the overall DOD/DON spending on SDVOSBs is on track for long-term decline unless new awards are drastically expanded. With regards to all DOD New Awards, all indicators such as spending volume, number of awards, and number of New Awardee firms have been steadily dropping, except for the last year. DON has similar, if less pronounced, trends. With regards to DOD and DON SDVOSB New Awards recipients, participation has been dropping in recent years, while Program New Awards spending has dropped either slowly (DOD) or sharply (DON). **Thus, a decade into the SDVOSB Program's existence, its greatest challenge is once again the creation of a steady, growing pipeline of up-and-coming SDVOSB contractors. The Program is coming full circle.**

In terms if impact on overall SDVOSB awards, market entry, and goaling spending, the SDVOSB Program is a minority contributor. This holds for competitive as well as sole source set-asides individually and combined. **However, the set-aside SDVOSB Program has been consistently a greater contributor at DOD than at DON, which helps explain DOD's goal achievement.**

<u>As to the third question, whether FAR Part 13 Simplified Acquisitions can positively influence SDVOSB Program outcomes, the answer is "yes, and can influence even more with appropriate targeting of buyers' discretion."</u> **SAP New Awards appear to be already supplementing and even supplanting the SDVOSB Program as the key to opening the door for SDVs into the DOD and DON procurement markets.** At the inception of the SDVOSB Program, SAP accounted for the majority of DOD and DON awards. DON was originally leading DOD in the share of SAP awards, but the trend was recently reversed. As a result, SDVOSBs are more likely to gain experience with DOD

[144] For contract length terms and possible extensions, *see generally* 10 U.S.C. §§ 2304a and 2306b (2014).

contracting through SAP than with DON contracting. With improvements discussed below, the role of SAP as a key that opens doors to SDVOSB participation in defense procurement and greater business development could be further strengthened.

This study substantiated its research hypothesis, namely, that the Federal/DOD/DON SDVOSB Procurement Program suffers from fundamentally deficient designs. From the government perspective, the SDVOSB Program operates exactly as it was designed: enabling the buyers to choose the path of least transactional effort and risk in channeling the spending that counts for goal achievement purposes. Such a Program may fall short of the 3 percent goal or reach it after a decade of trying (as the DON and the DOD have done in FY2014, respectively). **But, either way, from the perspective of individual service-disabled veteran entrepreneurs looking to participate in defense contracting, the Program malfunctions and its long-term success is in doubt because of design features that neglect intentional growth of SDVOSB participation.** This is the explanation for the apparent paradox between DOD goal achievement and the academic concerns of participant entrenchment, buyer confusion, and veteran community disillusionment stemming from prior assessments and studies of the SDVOSB Program.

Even as the number of SDVOSBs registered to do business with the Federal government increased 300 percent over the decade since EO 13360, SDVOSB participation in the Program's set-aside authorities and in DOD/DON contracting in general has been on the decline. **In terms of procurement policy, data in this study suggests that there are clear limits to achieving socio-economic objectives through buyer training and buyer empowerment alone.** When buyers are given strict legal mandates for conduct of purchases and granted discretion to deviate from them by initiating additional market research steps, such discretion becomes disfavored even when it serves a high-profile agency cause. **SDVOSB sole sources appear to be particularly disfavored.** Further, this study provides empirical confirmation to Schooner's and Sherman's theoretical argument that strong goals coupled with discretionary set-asides are not the most effective design features for a socioeconomic program catering to small non-traditional suppliers.

DOD and DON SDVOSB contracting also underwent realignments in favor of IDVs, which require experience that only established firms can provide. This realignment is most pronounced at the DON. In terms of spending, it appears that DON buyers in particular have been shifting work from Open Market to IDVs. In terms of participation, IDV awardees now exceed Open Market awardees. **This realignment confirms the need for a broad-based SDVOSB Program that is business development in nature.**

<u>The underlying question of the debate about SDVOSB contracting remains: what is the proper balance between expectations of pre-existing capability and experience on the one hand and the business development needs of a disabled veteran on the other hand?</u> Under current laws, regulations, and precedents, an individual Contracting Officer has no clear legal or procedural basis on which to make this tradeoff. What's worse, an individual service-disabled veteran attracted to the SDVOSB Program by policy pronouncements would eventually discover the same situation. Constant policy calibration based on program management objectives seems to be the answer to the balancing question, not litigation about "consideration" of individual firms or amorphous discretion shunned by the buyers. **Neither individual buyer empowerment nor judicial wrangling about statutory and regulatory interpretation principles can produce the kind of outcome-based change that thoughtful performance management reform can achieve.**

As a matter of policy, there is an urgent need to design an output-based, outcome-based SDVOSB Procurement Program that would better match the Congressional intent going back to the 1999 Congressional Commission recommendations and the authorizations in the pre-2004 SDVOSB procurement legislation. There are two options for assigning responsibility for designing such a Program. <u>One option is for the SBA to create a Section 8(a)-like SDBVOSB Business Development Program.</u> While the SBA would appear to have sufficient statutory authorization for such a Program, such a Program could require additional Congressional funding outlays or reprogramming of existing funds. <u>Another option, however, is to create a DOD and/or DON SDVOSB</u>

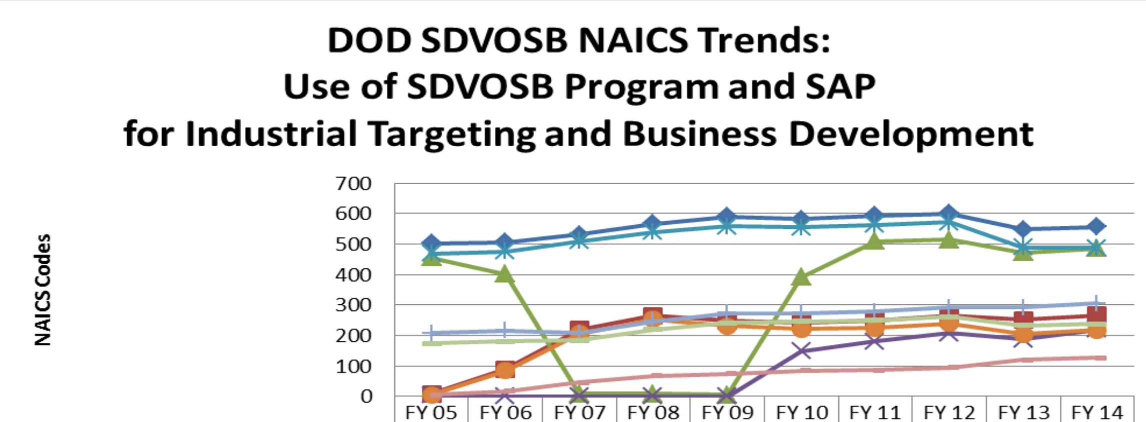
Program focused on business development through the strategic use of Simplified Acquisitions, including particularly the Simplified Acquisition SDVOSB set-asides. Discretion here would be exercised at the DOD or DON level. Pre-2004 legislative authorizations for SDVOSB business development through contracting do not appear to be limited to the SBA. **Either way, there are seven (7) design features advisable for enhancement of this Program.**

First, through better understanding which NAICS and PSCs/FSCs show gaps in participation by new or niche SDVOSBs, DOD and DON should direct their Contracting Officers to give priority consideration of SAP and SAP set-aside authorities in these particular industries and requirements. The immediate objective of this reform to the SDVOSB Program reform at DOD or DON level would be to create a business development pool of contract requirements which are available for developing/emerging SDVOSBs in various industries, particularly where only experienced SDVOSBs are currently performing large or complex requirements. Such pool would effectively "accept" as well as "keep" and/or prioritize for first consideration in, the SDVOSB Program various contracts requirements from across Navy and Marine Corps command, much like is presently done with accepting contract requirements into the 8(a) Program.[145]

NAICS codes are instrumental in market research for purposes of set-asides, since an SDVOSB must be small under the size standard related to the contract-specific NAICS code. Data in the four Figures below show the trends in NAICS and PSC/FSC utilization, along with the gaps in their utilization between SAP and other contracting mechanisms for more experienced firms. Further, data in these four Figures shows that DOD maintained a stable, somewhat diminishing number of NAICS and PSC/FSC codes for set-asides and all awards. On the other hand, DON decreased its NAICS and

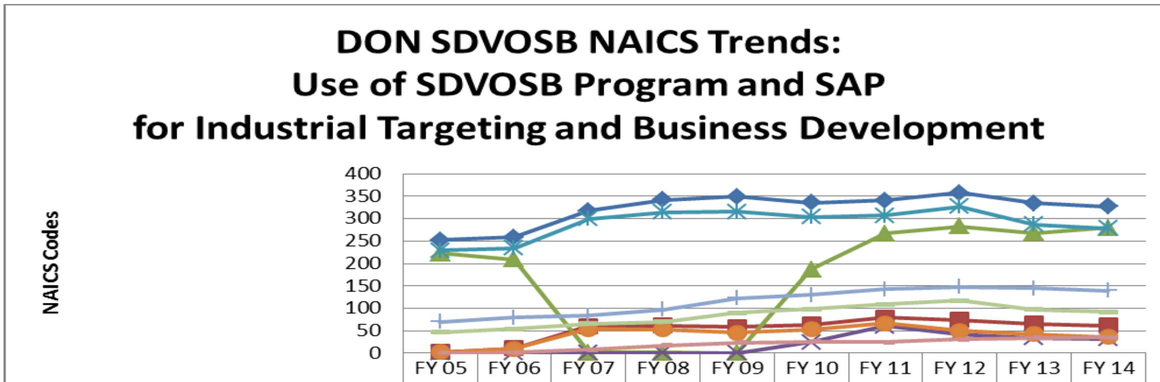
[145] For a description of DOD processes and responsibilities to consider 8(a) Participant capability statements and to match DOD 8(a) Program-retained contract requirements with 8(a) Program participants, see DFARS Subpart 219.8, Contracting with the U.S. Small Business Administration (the 8(a) Program) (2013) and PGI § 219.800 (2013) (incorporating by reference the 8(a) Partnership Agreement between the U.S. Department of Defense and the U.S. Small Business Administration (January 7, 2013), available at: http://www.acq.osd.mil/dpap/policy/policyvault/8(a)_Partnership_Agreement.pdf).

PSC/FSC codes for set-asides and all awards. For Open Market set-asides, the codes of all types are decreasing; for IDVs, the trends are opposite. Again, this confirms the growing refusal of Contracting Officers to utilize the SDVOSB Program despite the statutory and regulatory grants of discretion. However, DON has been growing the number of all types of codes for SAP, while DOD has been reducing the SAP codes.



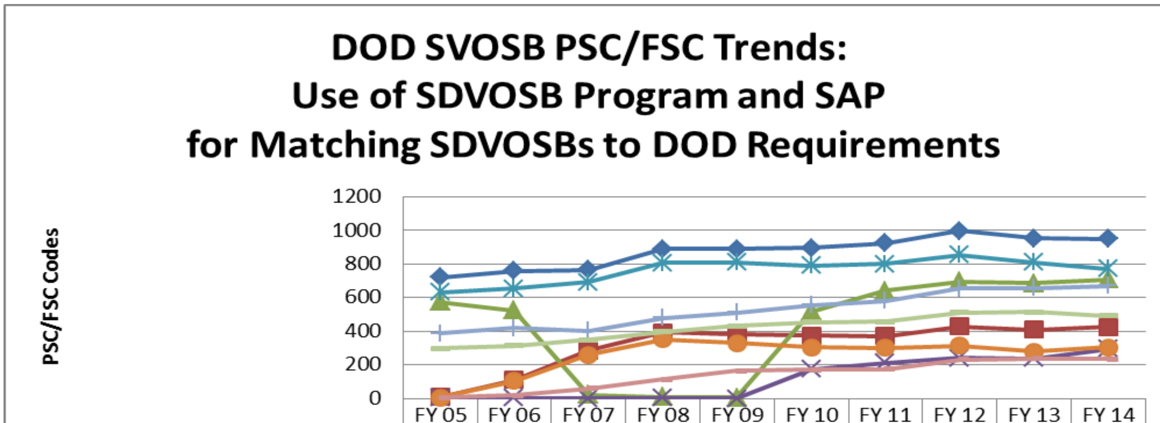
	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14
All Awards	502	506	532	566	590	582	593	601	549	556
All SDVOSB Set-Asides	9	90	220	265	249	241	250	265	251	267
All SAP Awards	455	402	8	8	5	392	510	515	473	486
SAP SDVOSB Set-Asides	3	1	0	1	0	149	180	208	187	220
All Open Market Awards	469	476	509	540	558	555	564	571	490	488
All Open Market SDVOSB Set-Asides	6	85	206	253	232	221	225	240	205	218
All IDV Awards	207	216	207	246	274	273	279	292	292	306
All IDV SDVOSB Set-Asides	5	17	46	67	75	84	87	94	120	127
IDV Awards Only	174	180	184	220	242	246	250	262	233	238

Figure 22. DOD SDVOSB NAICS Trends: Use of SDVOSB Program and SAP for Industrial Targeting and Business Development.



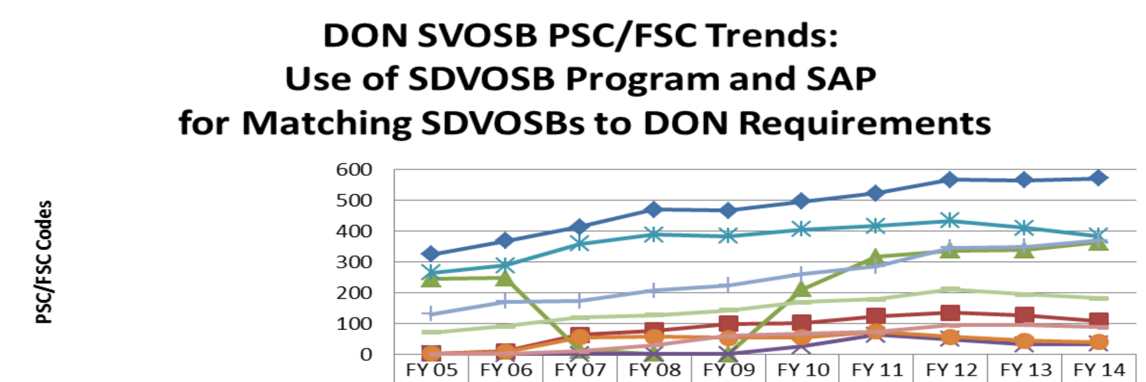
	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14
All Awards	252	259	318	342	349	336	341	358	335	327
All SDVOSB Set-Asides	2	11	60	62	58	64	79	74	66	61
All SAP Awards	223	209	1	1	0	187	267	283	268	280
SAP SDVOSB Set-Asides	1	0	0	0	0	25	60	42	34	32
All Open Market Awards	229	234	300	315	316	304	307	327	287	279
All Open Market SDVOSB Set-Asides	2	10	54	53	46	53	67	50	42	36
All IDV Awards	70	79	84	97	123	130	143	148	145	140
All IDV SDVOSB Set-Asides	0	1	8	17	23	26	25	31	34	35
IDV Only Awards	47	54	66	70	90	98	109	117	97	92

Figure 23. DON SDVOSB NAICS Trends: Use of SDVOSB Program and SAP for Industrial Targeting and Business Development.



	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14
All Awards	721	757	765	887	889	894	922	998	953	948
All SDVOSB Set-Asides	9	111	284	394	383	375	371	428	408	425
All SAP Awards	573	523	22	9	5	518	640	696	684	706
SAP SDVOSB Set-Asides	4	1	0	1	0	175	212	240	238	293
All Open Market Awards	632	652	693	805	808	791	800	854	809	771
All Open Market SDVOSB Set-Asides	5	103	261	352	330	305	301	313	278	305
All IDV Awards	388	419	402	479	512	555	580	655	658	670
All IDV SDVOSB Set-Asides	5	19	61	113	163	171	173	230	238	233
IDV Awards Only	299	314	347	397	431	452	458	511	514	493

Figure 24. DOD SVOSB PSC/FSC Trends: Use of SDVOSB Program and SAP for Matching SDVOSBs to DOD Requirements.



	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14
All Awards	323	367	412	468	465	496	522	566	564	571
All SDVOSB Set-Asides	2	9	62	77	99	102	123	134	126	108
All SAP Awards	244	247	13	1	0	211	316	336	338	363
SAP SDVOSB Set-Asides	1	0	0	0	0	25	62	48	31	33
All Open Market Awards	264	287	358	388	383	404	415	432	409	383
All Open Market SDVOSB Set-Asides	2	8	54	57	53	55	74	57	43	39
All IDV Awards	129	170	172	206	224	260	285	345	349	369
All IDV SDVOSB Set-Asides	0	2	9	29	59	67	72	93	96	87
IDV Only Awards	70	90	118	126	142	168	178	211	194	181

Figure 25. DON SVOSB PSC/FSC Trends: Use of SDVOSB Program and SAP for Matching SDVOSBs to DON Requirements.

DOD and DON should tailor an SDVOSB SAP-based and set-aside-based business development pool through gap analysis. Examples include:

- **the codes which represent the difference between the codes for all SDVOSB awards and the codes for all SDVOSB set-asides;**[146]
- **the codes which are used only in IDV awards, without set-asides and without SAP awards;**[147]
- **the codes which are used exclusively in non-SAP Awards (or non-SAP IDV or Open Market Awards);**[148]

[146] For example, according to the FPDS, just in FY2014 at DOD, there was a 289-code gaps between NAICS used for all SDVOSB awards and all SDVOSB set-asides. It means that in 289 industries, work goes to SDVOSBs but they are somehow not being found as part of Rule of Two or Sole Source market research, or that set-asides to them are somehow undesirable. It also means that, in 289 industries, SDVOSBs have no category-specific pathway into DOD contracting. The gap expands to 336 industries once SDVOSB SAP set-asides are considered, and shrinks to 70 codes once all SAP awards are compared with all awards. This means that in 266 industries, SAP-level set-asides, at least at the sole source level, are immediately possible for purposes of the business development pool. *See* U.S. GENERAL SERVICES ADMINISTRATION (GSA), Federal Procurement Data System-Next Generation (FPDS-NG) (2015), available at: https://www.fpds.gov.

[147] In FY2014, DOD had 242 such NAICS codes. *Id.*

- **the NAICS-PSC/FSC code combinations where either the NAICS or the PSC/FSC are currently used in SAP or set-asides;[149] and/or**

- **other code lists and mixes.**

To this end, DOD and DON could exercise various authorities under the SDVOSB Program, FAR Part 6 industrial mobilization and alternative sources of supply authorities, and FAR Part 13 local trade area vendor solicitation to dedicate procurements in certain NAICS or PSCs/FSCs solely to new or niche SDVOSBs. Relevant amendments could be made to the FAR, DFARS, NMCARS, SBA Regulations, or the Small Business Act if additional authority is thought necessary.

Second, DOD and DON should partner with the SBA and the VA Veterans Benefits Administration, Office of Economic Opportunity, Vocational Rehabilitation & Employment Service, on financing and business development assistance for SDVOSBs seeking work that is set aside for SDVOSBs under SAP. The essence of this partnership would be to grow the number of SDVOSBs by matching financing and business development assistance with dedicated low-dollar, low-paperwork contracting opportunities. The objective here is to reduce Contracting Officers' concerns that awards to emerging SDVOSBs could be risky.

Third, DOD could arrange for a special SAM.gov registration field as a new, nontraditional, or niche SDVOSB contractor, and require Contracting Officers to inform at least one such firm that matches the relevant NAICS or PSC/FSC in any synopsis, solicitation, or Request for Information (RFI) announcements.

Fourth, DOD and DON could conduct a targeted registration campaign for SDVOSBs in related fields NAICS or PSC/FSC codes through the DLA-sponsored Procurement Technical Assistance Centers (PTAC) system.

Fifth, DOD or DON could create a simplified registration database for transitioning servicemembers where they would be able to express interest in Simplified

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[148] However, it appears that significant number of requirements was found suitable for SAP even before they could be considered for set-asides. In the new DOD or DON SDVOSB Program, the initial priority would go to NAICS and PSCs/FSCs where unrestricted IDV order awards were made, but no SAP awards, SAP set-asides, Open Market set-asides, Open Market awards, or IDV set-asides were made. The next five priorities would go to NAICS and PSCs/FSCs next on the list in the prior sentence, in the receding order from latter to former.

[149] The same gap analysis can be undertaken with PSCs/FSCs. For example, at DOD, there is a 523-code gap between all and set-aside awards, a 242-code gap between all and SAP awards, and a 655-code gap between all and SAP set-aside awards. Unlike industries, however, the requirements would need additional, judgemental evaluations of suitability for new or niche SDVOSBs. *See* U.S. GENERAL SERVICES ADMINISTRATION (GSA), Federal Procurement Data System-Next Generation (FPDS-NG) (2015), available at: https://www.fpds.gov.

Acquisitions within broadly defined industrial and requirements areas minimizing the potential for exclusion due to NAICS or PSC/FSC coding and searching issues.

Sixth, as part of business case for creating or re-competing each IDV, DOD and DON should always consider a SDVOSB vendor development plan that would help prepare future SDVOSB vendors, including through ramp-ons, subcontracting, mentor-protégé arrangements, SAP awards, and Open Market set-asides to participate in specific NAICS and PSC/FSC categories for the IDV at issue.

And, seventh, DOD should update its SDVOSB Strategic Plan and create military department-level Strategic Plans. DON should create its own SDVOSB Strategic Plan, perhaps with subsidiary plans at the level of major Navy and Marine Corps commands. Those Plans would:

- **set forth SDVOSB Program outcomes to influence Contracting Officers' discretion;**
- **identify with specificity the business development output targets;**
- **specify the process for exercising Contracting Officer discretion tied to helping expand SDVOSB Program outputs as well as inputs; and,**
- **identify the mix of contracting methods and vehicles the Department at issue will employ to achieve outcome- and output-based Program performance, consistent with accepted contract management theory and SDVOSB procurement policy objectives.**

VII. RECOMMENDATIONS FOR FURTHER RESEARCH.

Further research on SDVOSB contracting topics is recommended, including:

- comparisons of DOD/DON SDVOSB Program practices with those of other military departments;

- trends in contract awards and spending to SDVOSB/SDB firms through the 8(a) Program and/or the HUBZone Program;

- feasibility of designing a Section 8(a)-style Program for SDVOSBs in cooperation between the SBA, VA, and DOD/DON;

- evolution of NAICS and PSC/FSC mixes in DOD/DON contracting;

- examination of SBA SDVOSB status decisions and other related cases;

- examination of SDVOSB performance, responsibility, award of options or change orders and other funding-related problems in DOD/DON SDVOSB contracts; and

- direct comparisons between VA and DOD SDVOSB Programs (to include the likely impact of *Kingdomware* VA litigation pending in the U.S. Supreme Court on the DOD and DON SDVOSB Programs), as well as between the DOD and DON 8(a) Program and the SDVOSB Program.

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