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Please have a happy and safe 4th of July, from the Southern Alleghenies PTAC!

In looking ahead to the second half of the year (can you believe it?!?), we will have a COSTARS event at Clarion University, government contracting accounting overviews, and some other interesting Government Contracting topics! As we firm up dates, we'll get the information out to you!

Thank you again,
Gloria and James

Federal Contract Spending Dipped 1.5% in 2015, Study Finds

Total federal contract spending in fiscal 2015 came in at \$440.8

Victory! SDVOSBs Win In Kingdomware Supreme Court Decision

SDVOSBs and VOSBs are big winners today, as the Supreme Court unanimously ruled that the VA's "rule of two" is mandatory, and applies to all VA procurements-including GSA Schedule orders.

The [Supreme Court's decision in Kingdomware Technologies, Inc. v. United States, No. 14-916 \(2016\)](#) means that the VA will be required to truly put "Veterans First" in all of its procurement actions - which is what Kingdomware, and many veterans' advocates, have fought for all along.

History of the Kingdomware Case

As followers of *SmallGovCon* and the *Kingdomware* case know, the battle over the VA's "rule of two" began in 2006 (the "VA Act"). The VA Act included a provision requiring the VA Act included a provision requiring the VA to restrict competitions to veteran-owned firms so long as the "rule of two" is satisfied. The VA Act states, at [38 U.S.C. 8127\(d\)](#):

(d) Use of Restricted Competition. - Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

The two exceptions referenced in the statute ("subsections (b) and (c)"), allow the VA to make sole source awards to veteran-owned companies under certain circumstances. Nothing in the statute provides an exception for orders off the GSA Schedule, or under any other government-wide acquisition contract.

Despite the absence of a statutory exception for GSA Schedule

billion, a 1.5 percent decline from that in [fiscal 2014](#), according to the [fifth annual](#) Bloomberg Government 200, released on Tuesday.

Companies among the top 200 government contractors won about the same share of federal contract dollars as last year, some 62 percent, and the study's highest-ranked firms remain unchanged. The top firms witnessed "decreased contracts, enduring budget pressures, continued consolidation and unprecedented mergers and acquisition activity," concluded Donald Thomas, head of the Government Contracting Solutions Business at Bloomberg Government.

Some 91 companies rose in the rankings, while 70 dropped. The top five remained the same as last year: Lockheed Martin, Boeing, General Dynamics, Raytheon and Northrop Grumman.

The recent decline in contract spending "may have bottomed out in 2015 so that fiscal 2016 and 2017 will see more of a rebound," said Bloomberg quantitative analyst Duncan Amos during a preview for reporters. "Contract spending by civilian agencies increased to 38 percent, a 15-year high," he added, noting that services still dominate.

Amos attributed the recent trend toward consolidation of contracts to the Obama administration's pursuit of [category management](#)—an approach to bulk purchasing of common products and some services common in the private sector. "Companies will have to adjust or rely on subcontracts to continue in the federal space," Amos said.

"Even with the improving budget picture, the federal government services sector is still primarily a battle for share," Brian Friel, founder of the consulting firm One Nation Analytics who worked on previous editions of the Top 200 study, told *Government Executive*. "It remains a tough environment for organic growth. Mergers and acquisitions accounts for some of the larger companies' increase in market share. Health also remains a bright spot in federal contracting."

Article posted courtesy of

orders, the VA has long taken the position that it may order off the GSA Schedule without first applying the VA Act's Rule of Two.

In 2011, the issue first came to a head at the GAO. In [Aldevra, B-405271; B-405524 \(Oct. 11, 2011\)](#), the GAO sustained an SDVOSB's bid protest and held that the VA had violated the law by ordering certain supplies through the GSA Schedule without first applying the Rule of Two. The GAO subsequently sustained [many other protests](#) filed by Alderva and others, including Kingdomware.

But there was one problem: the VA refused to abide by the GAO's decisions. GAO bid protest decisions are technically recommendations, and while agencies almost follow the GAO's recommendations, they are not legally required to do so. The VA kept circumventing the Rule of Two notwithstanding the GAO's decisions.

Finally, Kingdomware took the VA to federal court. But in November 2012, the U.S. Court of Federal Claims reached a different conclusion than the GAO. In [Kingdomware Technologies, Inc. v. United States, 106 Fed. Cl. 226 \(2012\)](#), the Court ruled in favor of the VA. Relying on the phrase "for purposes of meeting the goals under subsection (a)," the Court determined that the VA Act was "goal setting in nature," not mandatory. The Court held that the VA need not follow the "rule of two," so long as the VA had met its agency-wide goals for SDVOSB and VOSB contracting (which, to the VA's credit, it had).

Kingdomware appealed to the U.S. Court of Appeals for the Federal Circuit. In June 2014, a three-member panel [upheld the Court of Federal Claims' decision on a 2-1 vote](#). Like the Court of Federal Claims, the Federal Circuit majority held that the VA Act's "rule of two" was a goal-setting requirement, and that the VA need not apply the "rule of two" so long as its SDVOSB and VOSB goals are satisfied. In a sharp dissent, Judge Jimmie Reyna noted that the statute uses the mandatory work "shall" and argued that the phrase "for purposes of meeting in the goals under subsection (a)" was merely "prefatory language" that explained the general purpose of the statute, but did not vary the statute's mandatory nature.

In June 2015, the [Supreme Court agreed to hear Kingdomware's appeal](#). Kingdomware and the Government began filing briefs with the Supreme Court (as did a number of Kingdomware supporters, [including yours truly](#)). But in a surprising twist, in September 2015, the Government [abandoned the "goal setting" argument](#) that had prevailed at two lower courts. The Government conceded that the "rule of two" applies regardless of whether the BA has met its goals—but argued that the statute's use of the term "contract" excludes GSA Schedule orders (as well as orders under other multiple-award vehicles).

The Supreme Court [heard oral arguments on the morning of February 22, 2016](#). At the Court, Kingdomware's counsel focused primarily on the mandatory nature of the statutory language, while the VA's counsel primarily made policy arguments, namely, that it would be difficult and cumbersome for the VA to apply the rule of two in every setting.

[Charles S. Clark](#)

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After February 22, SDVOSBs and VOSBs waited for the Court's decision. Now it's here-and it's a big, big win.

The Supreme Court's *Kingdomware* Decision

The [Supreme Court's opinion](#), written for an 8-0 unanimous Court of Justice Clarence Thomas, begins by recounting the history of the VA Act, the "rule of two," and the *Kingdomware* case itself. The Court then examines whether it has jurisdiction to consider the case (a technical issue [raised earlier in the process](#)), and concludes that it does.

Turning to the merits, the Court gets right to business:

On the merits, we hold that [Section] 8127 is mandatory, not discretionary. Its text requires the Department to apply the Rule of Two to all contracting determinations and to award contracts to veteran-owned small businesses. The Act does not allow the Department to evade the Rule of Two on the ground that it has already met its contracting goals or on the ground that the Department has placed an order through the [Federal Supply Schedule].

The Court explains that any issue of statutory construction begins "with the language of the statute." If the language is unambiguous, and the "statutory scheme is coherent and consistent," the Court's review ends there.

The Court writes that "[Section] 8127 unambiguously requires the Department to use the Rule of Two" before applying other procedures. The Court points out that the statute includes the word "shall," and writes "[u]nlike the work 'may,' which implies discretion, the word 'shall' usually connotes a requirement." Accordingly, "the Department *shall* (or *must*) prefer veteran-owned small businesses when the Rule of Two is satisfied."

The Court then writes that other portions of the statute confirm that Congress "used the word 'shall'...as a command." Therefore, "before contracting with a non-veteran owned business, the Department must first apply the Rule of Two."

Next, the Court turns to the Government's shifting rationales for evading the "rule of two." The Court notes that the Government changed its theory of the case late in the process, but nonetheless addresses the Government's original argument regarding the goal-setting nature of the statute. The Court writes:

[T]he prefatory clause has no bearing on whether [Section] 8127(d)'s requirements is mandatory or discretionary. The clause announces an objective that Congress hoped that the Department would achieve and charges the Secretary with setting annual benchmarks, but it does not change the plain meaning of the operative clause.

The Court next rejects the VA's argument that the word "contracts" means the VA Act doesn't apply to FSS orders. The Court writes that it would ordinarily not entertain an argument that the Government failed to raise at the lower courts, "[b]ut the Department's forfeited argument fails in any event."

The Court explains that "[w]hen the Department places an FSS order, that order creates contractual obligations for each party and is a 'contract' within the ordinary meaning of that term." The Court also explains that an order is a contract "as defined by federal regulations," particularly [FAR 2.101](#). The Court then goes into additional explanation about why FSS orders are types of contracts.

Finally, the Court rejects the Government's argument that the Court should defer to the VA's interpretation of the VA Act. The Court simply writes that "we do not defer to the agency when the statute is unambiguous...[t]hus, we decline the Department's invitation to defer to its interpretation."

The Court concludes:

We hold that the Rule of Two contracting procedures in [Section] 8127(d) are not limited to those contracts necessary to fulfill the Secretary's goal under [Section] 8127(a). We also hold that [Section] 8127(d) applies to orders placed under the FSS. The judgment of the Court of Appeals for the Federal Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

The Aftermath of the *Kingdomware* Decision

For SDVOSBs and VOSBs, the Supreme Court's *Kingdomware* decision is a huge win. Ever since the VA Act was adopted, the VA has taken the position that it may order off the GSA Schedule without prioritizing veteran-owned businesses. That's about to change.

I expect that the *Kingdomware* decision will prove a major boon to SDVOSBs and VOSBs, ultimately resulting in billions of extra dollars flowing to veteran-owned companies. The long batter is over-and SDVOSBs and VOSBs have won.

*Article posted courtesy of:
Steven Koprince*

About Us

The PTAC at SAP&DC is an economic development entity that bridges the gap between supplier and buyer in the government marketplace. The PTAC stands ready to support businesses in the Alleghenies region in their pursuit to secure contracts with local, state and/or federal government agencies nationwide by:

- Identifying niche government markets and specific contract opportunities
- Assisting with bid and proposal preparation
- Preparing the required vendor registrations
- Navigating your company through the requirements and procedures of government contracting
- Enhancing competition by obtaining applicable socio-economic certifications

- Providing guidance to ensure successful post-award contract performance

Due to the generous support of our Commonwealth and Federal funding partners, services provided by the PTAC are free of charge.

Whether you are an experienced contractor or new to the government marketplace, the PTAC will provide one-on-one counseling utilizing the following program resources to increase your share of contact awards.

PTAC Resources

- Electronic Bid Matching for products and services
- Military/Commercial specifications and standards
- Past procurement information and pricing histories
- State and Federal regulations guidance
- Professional training and outreach events
- Quality assurance and packaging guidance

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