

Small Business Notes

Minnesota Department of Employment and
Economic Development (MN DEED)

U.S. Supreme Court Hears Oral Argument on Contract Set-Aside for Veterans

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▪ U.S. Supreme Court Hears Oral Argument on Contract Set-Aside for Veterans

On February 22 the U.S. Supreme Court heard oral argument in the case of *Kingdomware Technologies, Inc. v. The United States* (on appeal from the Court of Appeals for the Federal Circuit) a case involving a veterans' set aside statute specific to contract procurements by the Veterans Administration and which, in both merit briefs and oral argument, involved statutory arguments about what is a contract and whether statutory language requiring a set aside can be interpreted to apply only to achievement of policy goals.

Kingdomware Technologies is a Maryland software and tech services company that is owned and operated by a permanently disabled military veterans and is certified by the Veterans Administration as a "service disabled veteran owned small business." The Veterans Administration maintains a list specifically of such businesses which are then eligible to compete for Veterans Administration set asides for veteran owned businesses.

In 2012 the Veterans Administration gave a contract for an emergency notification system to a non-veteran-owned business and Kingdomware Technologies challenged the award arguing that the clear language of the Veterans Benefits, Health Care, and Information Technology Act of 2006 required a set aside to a veteran owned business. That statutory language establishes the so-called "Rule of Two" providing that a contracting officer "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 could be made at a fair and reasonable price that offers the best value." Kingdomware Technologies argued that the language of the statute—"shall award"—leaves the contracting officer no discretion so long as the Rule of Two is met.

The Veterans Administration argued that the "shall award" language is, instead, related to the achievement of a policy goal of having a specific percentage of its contract awards go to veterans. Where those goals are met, the Veterans Administration argued, it is free also to use the Federal Supply Schedule under which the government negotiates a contract with a vendor

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and then places order under those contracts without having to solicit bids on the open market. At oral argument, Justice Breyer noted that there must be many thousands of veteran owned small businesses and it would appear to him that the language of the statute would result in the Veterans Administration buying all of its products and services from veteran owned businesses. The Veterans Administration response was, in effect, that the dynamics of competition and pricing kept many veteran owned businesses out and hence the need for a policy goals of a percentage of awards to them.

In its merits brief at the Supreme Court and in oral argument the Veterans Administration added a new argument: that the set aside requirement does not apply when the Veterans Administration is not letting a contract on the open market but only placing an order already in place with a vendor under the Federal Supply Schedule. Otherwise, the argument went, the Veterans Administration would have to go through the new contract procedure—including the Rule of Two—every time it wanted to buy something. Such a situation, the Veterans Administration argued, would adversely affect its basic mission of providing high quality medical care since it would require hiring “many more contracting officers and delay the...acquisition of important medical supplies and services.”

There were a half dozen *amicus* briefs filed in support of Kingdomware Technologies’ position including one stating the position of forty one members of the U.S. House of Representatives and U.S. Senate: that the history of this legislation is that Congress intended the Rule of Two to be mandatory for all Veterans Administration contracts and that “there is also a complete lack of legislative indicia suggesting that Congress intended the Veterans Rule of Two to turn on and off based on any sort of post hoc analysis of whether the Veterans Administration met its benchmarks” (for awards to veterans).

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