

Supreme Court Takes up Case Addressing Contract Preferences for Veterans

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Government contractors will have reason to pay attention to the Supreme Court argument calendar next term. In a rare occurrence, on June 22, 2015, the Supreme Court agreed to hear a government contracts case, granting the petition for certiorari of a Service-Disabled Veteran-Owned Small Business (SDVOSB) in *Kingdomware Technologies, Inc. v. United States*. The case involves a dispute over the Department of Veterans Affairs' (VA) implementation of the mandatory set-aside provisions in the Veterans Benefits, Health Care and Information Technology Act of 2006 (the Act). The VA contends that the Act does not require Veteran-Owned Small Business (VOSB) set-asides for orders placed against federal supply schedule (FSS) contracts; Kingdomware, and other VOSBs, disagree. The Court's decision to grant cert in this case is noteworthy for several reasons, including that it involves a purely government contracts issue (indeed, one that arose in multiple bid protests); there is not a traditional "circuit split;" and the policy issues at stake relate only to VA contracts.

The case has an interesting history. Kingdomware originally filed multiple protests at the Government Accountability Office (GAO) over the VA's failure to apply the Act's "Rule of Two" set-aside criteria before using the FSS on a full and open basis. GAO sustained a Kingdomware protest, finding that the set-aside requirements were mandatory for all procurements, but the VA did not follow GAO's recommendation. Kingdomware thus filed another protest at the Court of Federal Claims (COFC), which disagreed with GAO and found that the Act had no effect on the VA's use of FSS procurements. After the Federal Circuit affirmed the COFC's ruling, Kingdomware filed its petition for cert asking the Supreme Court to weigh in.

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Since the Federal Circuit is the only appellate court with jurisdiction over this dispute, there is not a traditional “circuit split” for the Supreme Court to resolve. But the conflicting interpretations of the Act by GAO and the Federal Circuit have created a “split,” of sorts, pitting Congress’ watchdog against the federal judiciary and executive branch. Indeed, over the course of a little more than a year, GAO sustained 17 protests based on this issue, recommending each time that the VA apply the mandatory set-aside requirements to FSS purchases in order to comply with the Act. The VA repeatedly declined to follow GAO’s recommendation, and GAO ultimately announced that it would no longer hear bid protests on the issue because of the inability for protestors to obtain meaningful relief.

Since the case involves small business contracting goals and VOSBs, there are certain policy issues at stake. Although the COFC and the Federal Circuit disagreed somewhat over the proper interpretation of the Act, in backing the VA both courts found that Congress intended the VA to have discretion in how it meets annual VOSB contracting goals. The Government has also argued that requiring application of the Rule of Two to FSS purchases would lead to significant delays and economic inefficiencies in the VA’s purchase of the most basic items, such as a griddle and food slicer.

For its part, Kingdomware accuses the Federal Circuit of violating the Supreme Court’s teaching that “shall” is mandatory. (The statute provides, “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.”) Kingdomware also argues that the mandatory set-aside requirement is important to the nation’s veterans and affects billions of dollars in contracting opportunities for VOSBs and SDVOSBs—opportunities that VOSBs and SDVOSBs will be less likely to obtain without the benefit of set-asides. Kingdomware also contends that the VA’s interpretation of the Act contravenes the VA’s own regulations, which support the mandatory nature of the Rule of Two analysis.

The parties will brief the merits over the next several months. The argument will be heard during the Supreme Court’s October 2015 Term.