

# What Everyone Needs to Know About Veteran-Owned Businesses

by Rachel V. Rose and Crystal Ellis



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According to the U.S. Census Bureau's latest report, there are approximately 2.45 million veteran-owned businesses in the United States.<sup>1</sup> After the enactment of the Veterans Entrepreneurship and Small Business Development Act of 1999, the Small Business Administration made research and keeping statistics a priority.<sup>2</sup> "By state, California, Texas, Florida, New York, and Georgia had the largest numbers of veteran-owned businesses. Ranked by the veteran-owned percentage of businesses in the state, the top five states were South Carolina, West Virginia, Virginia, Tennessee, and Alabama."<sup>3</sup> Overall, veterans contribute a great deal to the United States—both during their service and afterward in business.

On June 16, the Supreme Court issued its findings in *Kingdomware Technologies Inc. v. United States*.<sup>4</sup> Justice Clarence Thomas, who delivered the opinion for a unanimous Court, held in favor of Kingdomware Technologies Inc. that the Veterans Benefits, Health Care, and Information Technology Act of 2006<sup>5</sup> "requires the secretary of Veterans Affairs to set annual goals for contracting with service-disabled and other veteran-owned small businesses."<sup>6</sup> While the harm that Kingdomware suffered prior to the case could not be undone, the Court sets a precedent regarding how a U.S. contracting officer shall handle offers when at least two veteran-owned businesses apply for a government contract. Therefore, the purpose of this article is to provide an overview of this case and the application of the "Rule of Two."

## Analysis

The most prudent place to start in any analysis is with the facts. Here, Justice Thomas was both eloquent and brief with the facts and the Court's task. Specifically, he wrote:

Petitioner Kingdomware Technologies Inc., a veteran-owned small business, unsuccessfully vied for a federal contract from the Department of Veterans Affairs to provide emergency-notification services. Kingdomware sued, arguing that the Department violated a federal law

providing that it "shall award" contracts to veteran-owned small businesses when there is a "reasonable expectation" that two or more such businesses will bid for the contract at "a fair and reasonable price that offers best value to the United States." 38 U. S. C. § 8127(d). This provision is known as the Rule of Two.

In this case, we consider whether the Department must use the Rule of Two every time it awards contracts or whether it must use the Rule of Two only to the extent necessary to meet annual minimum goals for contracting with veteran-owned small businesses. We conclude that the Department must use the Rule of Two when awarding contracts, even when the Department will otherwise meet its annual minimum contracting goals.<sup>7</sup>

First, it is important to note that the Rule of Two is the general rule. Like most areas of the law, there are exceptions. Here, the exceptions are narrow and limited to 38 U.S.C. §§ 8127 (b) and (c). Section (b) gives the contracting officer latitude to use procedures other than the Rule of Two if the amount of the contract is \$100,000 or less. Likewise, § (c) enables the contracting officer to avoid the Rule of Two under the following circumstances:

(c) a small business concern owned and controlled by veterans using procedures other than competitive procedures if—

- (1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;
- (2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in § 134 of title 41) but will not exceed \$5,000,000; and
- (3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

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timeline agreed to by the lawyers and enforced by the judge.

A judge cannot do it alone. Part of our job is to effectively train our chambers team to service the cases on our docket. What does that mean specifically? It means you need to meet on a regular basis with your team, review the status of your caseload and prioritize those cases that need the most immediate attention.

Judges are increasingly using law clerks to help with case management. A law clerk's job should be more than just legal research and drafting opinions. Law clerks can assist trial counsel with procedural questions so that when a lawyer has a question, they get an answer quickly. We should train our chambers staff on how to handle phone calls from lawyers, identifying which issues can be dealt with by staff and which require an immediate decision from the judge to keep a case moving.

Having chambers staff prepare these types of "scouting reports" can set cases up for success. This is especially useful before the initial case management conference (CMC). Have the parties discussed the case before the filing of the lawsuit? Do they want to talk settlement at the CMC? Are there jurisdictional issues that need to be addressed before we invest too much time in the case? Has an LLC been properly identified to determine diversity jurisdiction? Can the CMC be held by phone to save time and money? Or should parties and counsel be required to attend in person so counsel, who have never met before, can begin to establish a personal relationship? An effective scouting report will ensure the court sets aside enough time at the CMC for that particular case and the judge is prepared to dive into the issues.

Beyond chambers staff, you have the use of magistrate judges. They need to factor into your chambers equation effectively—whether by handling discovery disputes, settlement conferences, or providing other pre-trial assistance. You also have colleagues in your

division or district. Many courts around the country are collegial and cooperative, helping another judge when that judge's caseload needs it. They are part of the team, too.

The new Federal Civil Rules package effective December 2015 helps the judge to flexibly manage the docket. Chief Justice Roberts called these changes a "big deal," and for some districts it definitely will be a game changer. For other districts, the thrust of these new rules has already been in place, informally, and has proven successful. Efficient case management knows that "one size does not fit all" and that time spent early on in a case can save even more time later. Judges therefore should be prepared to address each case—not unlike a manager who approaches each baseball game with a strategy and perhaps a different lineup. The new rules, with an emphasis on collegiality among counsel, proportionality in discovery, and an engaged judge, provide an opportunity to greatly improve our civil justice system with the judge playing a key role.

Another common question we receive as judges is: "What's the best part of your job?" For many, it is holding a trial with good trial lawyers or receiving favorable comments from a jury about how impressed they are with our justice system and how they now appreciate the role of an independent judiciary. It might include a compliment and request for the recipe of the apple cake I bake for the jury deliberations. While we bemoan the decline of trials, really the most important thing we do as judges is what we try to do every day: help litigants resolve their disputes. So call it what you will—whether it's civil case management or umpiring the game—each of us is the face of justice for the parties and lawyers that comes before us. We have given them their day in court—whether it be a settlement conference, hearing, or trial—whatever that particular case needed. In short, we work to meet the promise of Rule 1. That, my friends, is some of what we do as district judges. ☉

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### **In-House Insight** *continued from page 9*

Here, the contracting officer for the Department of Veterans Affairs (VA) utilized the Federal Supply Schedule (FSS), which provides for government agencies to purchase certain goods and services through a streamlined process at pre-negotiated prices.<sup>8</sup> After discovering that this had been done on a regular basis without adhering to the Rule of Two, Kingdomware filed a bid protest with the Government Accountability Office (GAO), which found that the VA's actions were unlawful. When the VA defied the GAO's nonbinding judgment, Kingdomware filed suit for declaratory and injunctive relief.

Overall, the Supreme Court had jurisdiction to accept the case. Moreover, the most striking provision of the Court's opinion was, "On the merits, we hold that § 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 FSS."<sup>9</sup> This mandatory requirement gives the VA far less latitude and discretion; therefore, giving greater protections to veterans.

### **Conclusion**

The Court's opinion is crucial for veteran business owners to read, as well as for counsel who advise them. *Kingdomware* is a very complex case involving a variety of federal procurement statutes. In order for veterans to seize the opportunities provided to them

with "set aside" contracts, two or more entities need to ensure that "the award can be made at a fair and reasonable price that offers best value to the United States."<sup>10</sup> Overall, this is a significant win for veteran-owned businesses. ☉

### **Endnotes**

<sup>1</sup>U.S. Census Bureau, *Veteran-owned Businesses and their Owners—Data from the Census Bureau's Survey of Business Owners* (Mar. 2012), available at [www.sba.gov/sites/default/files/393tot.pdf](http://www.sba.gov/sites/default/files/393tot.pdf).

<sup>2</sup>Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. 106-50 (Aug. 17, 1999).

<sup>3</sup>See Facts about veteran owned businesses, VETERAN OWNED BUSINESS, [www.veteranownedbusiness.com/veteran-owned-businesses-facts.php](http://www.veteranownedbusiness.com/veteran-owned-businesses-facts.php).

<sup>4</sup>*Kingdomware Techs. Inc. v. United States*, 136 S.Ct. 1969, available at [www.supremecourt.gov/opinions/15pdf/14-916\\_6j37.pdf](http://www.supremecourt.gov/opinions/15pdf/14-916_6j37.pdf).

<sup>5</sup>Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. 109-461 (Dec. 22, 2006).

<sup>6</sup>*Supra* n.4 (citation omitted).

<sup>7</sup>579 U.S. at 1.

<sup>8</sup>*Id.*

<sup>9</sup>136 S.Ct. at 1972.

<sup>10</sup>38 U.S.C. § 8127(d).