

VETERAN-OWNED CONTRACTORS: SCOTUS REAFFIRMS THE “RULE OF TWO,” WHICH IS GOOD FOR YOU!

by Andrew G. Wailgum and Sara P. Bryant

The U.S. Supreme Court’s ruling last week in *Kingdomware Techs., Inc. v. U.S.*¹ should create more opportunities for veteran-owned and service-disabled veteran-owned small businesses (collectively, “VOSBs”) to win contracts with the Department of Veteran Affairs (the “Department”). In its decision, the Court made clear that the Department must use the “Rule of Two” for all of its contracts, even if it has already met its contracting goals.² The Rule of Two, part of a federal Act³ intended to encourage contracting with VOSBs, provides that the Department must limit competition for a contract to VOSBs where: (1) the contracting officer reasonably expects that at least two VOSBs will submit bids, and (2) the contract can be awarded “at a fair and reasonable price that offers best value to the United States.”

The Decision

In the case, Kingdomware, a VOSB, challenged the Department’s award of a contract for emergency notification services to a non-VOSB business and asserted that the Rule of Two required that competition for that contract be restricted to VOSBs only. The Department had awarded the contract pursuant to the Federal Supply Schedule (“FSS”), a streamlined procedure for government agencies to procure supplies and services in bulk. The Department had sent a price request to a non-VOSB company through the FSS system for the emergency notification services and eventually issued a purchase order to that non-VOSB company. Kingdomware challenged the award and Court of Federal Claims and the Federal Circuit both ruled against Kingdomware.

Kingdomware argued on appeal to the Supreme Court that the clear language of the Act required that the Department proceed under the Rule of Two before using competitive procedures like the FSS system for procuring services. The Act provides that, “. . . 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 requirements of the Rule of Two can be met. 38 U.S.C. § 8127(d) (emphasis added). Kingdomware argued that based on this unambiguous language, the contracting officer was required to limit competition for the emergency notification services contract to VOSBs.

The Department unsuccessfully claimed that it did not need to restrict competition to VOSBs because: (1) it already had met its annual VOSB goal under the Act, and (2) it placed the order through the FSS system.

If you have any questions about the issues addressed here, or any other matters involving Construction Law issues, please feel free to contact:

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With regard to the first argument, the Department relied on introductory language in the Act, which provides that the Rule of Two is to be used “for the purpose of meeting” the annual goals for contracting with VOSBs. The Court quickly dismissed this argument, holding that the Act’s introductory language did not affect the Act’s mandatory requirement to employ the Rule of Two.

In its second response to Kingdomware’s challenge, the Department asserted that the Rule of Two does not apply to orders under FSS contracts. The Court also rejected this argument, finding that the Act provides that the Rule of Two applies whenever the Department awards contracts and that the Department’s orders through the FSS process are indeed contracts. The Court also stated that the Department improperly expanded the use of the FSS system – which is intended for simple procurement – when it used it for procuring the multi-year contract for complex information technology services.

Takeaway

The takeaway here is that U.S. Supreme Court has made it crystal clear that the Department must use the Rule of Two for awarding contracts, even those procured using the FSS method. VOSBs should now have more opportunities to compete for Department contracts against only other VOSBs.

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¹ 579 U.S. ____ (2016).

² The “Rule of Two” (38 U.S.C. § 8127(d)) contains two exceptions, which both allow the Department to award contracts to VOSBs using non-competitive procedures under certain circumstances.

³ Veterans Benefits, Health Care, and Information Technology Act of 2006 (codified, as amended, at 38 U.S.C. §§ 8127, 8128).