

**Final Written Testimony of Jonathan T. Williams  
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**Hearing entitled:  
“Beyond the Bench: Ramifications of the Supreme Court Kingdomware Decision”**

**Before the U.S. Senate Committee on Small Business & Entrepreneurship**

**June 23, 2016**

Chairman Vitter and distinguished Members of the Committee, I would like to express my sincere thanks for the invitation to submit testimony for this hearing of the U.S. Senate Committee on Small Business & Entrepreneurship. I am honored to present my interpretation of the U.S. Supreme Court’s recent decision in Kingdomware Technologies, Inc. v. United States (“Kingdomware”) and my perspective on the ramifications of this ruling for service-disabled veteran-owned small businesses and veteran-owned small businesses (collectively, “VOSBs”), other types of small businesses, the Department of Veterans Affairs (“VA”), and other federal agencies.

My name is Jonathan Williams. I am a partner with PilieroMazza PLLC, a woman-owned law firm based in Washington, DC. Many of our clients are small and mid-sized government contractors that participate in the two federal procurement programs for VOSB, one operated by the VA and the other by the Small Business Administration (“SBA”). We also serve as General Counsel for the National Veteran Small Business Coalition (“NVSBC”). I personally have practiced law for 15 years and nearly all of this time I have spent working with government contractors, including small businesses that utilize the VOSB programs.

I am testifying on behalf of myself as well as on behalf of my colleagues at PilieroMazza. My testimony is based on our reading of the Kingdomware decision and understanding of that case’s history, as well as the underlying laws and regulations, and our experiences and knowledge of the VA and SBA VOSB programs.

The Supreme Court’s decision in Kingdomware is an important victory for the VOSB community, and one that feels long overdue. Since at least 2010, the VA has consistently taken the position that the “Vets First” mandate under the Veterans Benefits, Health Care, and Information Technology Act of 2006 does not apply to task orders issued under VA Federal Supply Schedule (“FSS”) contracts. The VA has taken this position despite clear statutory language indicating the Vets First mandate applies to all VA contracts.

The Supreme Court’s ruling is a fairly simple and straight-forward rebuke of the VA’s prior interpretations and the agency’s attempts to avoid application of the Vets First priority to FSS contracts. The Supreme Court found that the Vets First mandate applies to all VA contracts, with no exception for FSS task orders. The Supreme Court rejected the VA’s argument that a FSS task order is not a contract. And the Court overturned the U.S. Court of Appeals for the Federal Circuit’s reasoning that the Vets First mandate does not apply when the VA has satisfied its VOSB contracting goals.

Each of the Supreme Court's conclusions is well-reasoned and consistent with the plain language of the law and Congress' intent. We find nothing to quibble with in the ruling. What is left open to debate now is whether and how the VA will adhere to the ruling.

First, the ramifications that are clear. Based on the Supreme Court's interpretation that the Vets First mandate applies to all VA contracts, including FSS task orders, the VA must immediately begin applying the Vets First mandate to FSS task orders. This means the VA must perform the Rule of Two analysis before issuing FSS task orders to determine if there is a reasonable expectation that two or more VOSBs will submit offers and that the award can be made at a fair and reasonable price that offers best value to the government. When the Rule of Two is satisfied, and assuming the limited statutory exceptions do not apply, the VA should set-aside the requirement for competition amongst VOSBs.

Less clear is whether and how the VA will comply with the Supreme Court's definitive interpretation. As noted, the VA has been fighting this interpretation for years. When the VA previously lost protests before the Government Accountability Office ("GAO") on this issue, the VA issued internal acquisition policy guidance advising its personnel to ignore the GAO's recommendations and continue the agency's procurement practices business as usual. But while the GAO can only issue recommendations, the Supreme Court's ruling is now the law of the land and must be followed, unless Congress changes the law. Nevertheless, the veteran community (not without good reason) is concerned that the VA will continue to look for ways to avoid following the law. Congress should monitor and push the VA to demonstrate the steps it is taking to ensure the Supreme Court's binding interpretation of the Vets First mandate is now shared by and followed at the VA.

The veteran business owners we talk to and represent understand that the Vets First mandate will not be satisfied for all VA contracts. There will not be at least two VOSBs that will reasonably be expected to submit offers for some acquisitions, and for some acquisitions VOSBs will not represent the best value. But what the veterans want – and deserve – is a fair opportunity to be afforded priority in all VA acquisitions when the legal requirements for that priority are met. They want to know the VA is no longer ignoring or trying to avoid its obligations under the law, but is instead embracing those obligations. Congress passed the Vets First law because it wanted the VA to set the example for federal agencies in contracting with VOSBs. A multi-year legal battle to avoid the Vets First mandate was not the example Congress intended the VA to set. Hopefully, the Supreme Court's ruling in Kingdomware will be the VA's wakeup call.

With that said, it should be noted that the VA in recent years has exceeded its VOSB contracting goals. I do not believe this means the VA should let off the gas pedal in its efforts to maximize VOSB participation in VA procurements. Though, we should recognize that the Vets First legislation – which was designed to accelerate the VA's achievement of its VOSB goals – has worked. With the Supreme Court's ruling in Kingdomware, the law is poised to be even more successful because the VA should now reserve many more procurements for VOSBs.

An important aspect of the VA's decision to reserve an FSS task order for VOSBs is market research. That is, the determination of whether at least two VOSBs will submit an offer.

The Supreme Court explicitly declined to address how extensive the VA's market research must be to satisfy its obligations under the Vets First mandate. Does the VA need to look only at FSS contract holders to determine if the Rule of Two is satisfied? Or, does the VA need to look outside FSS contract holders? The Supreme Court did not say, so Congress should step in with legislation to answer this question

The Kingdomware ruling is also another opportunity to ponder the wisdom of having two federal government procurement programs for VOSBs. The two programs, one run by the VA and the other by the SBA, are very similar but are not identical. Inconsistencies between the two programs have led to confusion and inefficiencies for the veteran contracting community and federal agencies. As an example, we represented one VOSB that was proposed for debarment by SBA because of the company's ownership structure, which did not comply with the SBA's VOSB rules but did satisfy the VA's VOSB rules. Additionally, VOSBs have been forced to file bid protests with the GAO because of procuring officials who have applied the VA's verification requirements to non-VA procurements. Contracting officers have sent SDVOSB protests on a non-VA contract to the VA, instead of the SBA. VA contracting officers have failed to forward size protests to the SBA, even though the SBA is the agency exclusively authorized to decide size status. And VOSBs that participate in SBA's VOSB program may seek review of eligibility determinations before an administrative law judge at SBA's Office of Hearings and Appeals, but VOSBs participating in the VA's program cannot. There are other differences between the programs, all of which unnecessarily add to the veteran's compliance burden and complicate the mission of increasing federal spending on VOSBs.

The particular distinction between the two programs raised in the Kingdomware decision is in how the two programs apply to FSS task orders. Kingdomware clearly holds that, for VA FSS task orders, the VA must apply the Vets First mandate. However, for FSS task orders outside the VA, under FAR 8.4, all set-aside decisions are discretionary, as Congress made clear when it passed the Small Business Jobs Act of 2010. The dichotomy here is consistent with the intent for the VA to lead the way in maximizing participation of VOSBs in VA acquisitions. At the same time, it calls more attention to the fact that the federal government has two different procurement programs for VOSBs, with different requirements. On balance, I believe we would be better off if Congress acted to create one consistent VOSB program applicable across all federal agencies.

Staying on the theme of applicability across all federal agencies, the Kingdomware ruling rejected a troubling aspect of the Federal Circuit's reasoning that could have harmed other small business programs. The Federal Circuit found that the VA did not have to use the Vets First mandate when it had satisfied its VOSB goals. The Federal Circuit essentially viewed the VOSB goals as a ceiling, rather than a floor, which could have been a dangerous precedent for all small business programs. Indeed, the small business contracting goals are the bare minimum Congress expects from federal agencies. The goals are not a final destination after which agencies can simply stop following the Rule of Two and reserving contracts for small businesses. Furthermore, the Federal Circuit's ruling ignored the practical impossibility of asking contracting officers to make set aside decisions based on whether the agency's small business goals have been met. Fortunately, the Supreme Court tossed out this reasoning and found that, although the

Vets First mandate is applied in service of meeting the VA's VOSB contracting goals, the mandate continues to apply even if the VA is meeting its goals.

In closing, the Kingdomware decision is an important victory for VOSBs and will hopefully be the necessary wakeup call the VA needs to more firmly commit to implementing the Vets First mandate in all of its acquisitions. There will be some challenges in implementing the ruling, which Congress may need to address. The veterans we work with simply want to be given a fair shot, as Congress intended when it passed the Vets First law, and we are hopeful that this ruling will be a critical step in that direction.

Thank you again for the opportunity to submit this testimony.