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CLIENT ALERT

U.S. Court of Federal Claims Sides with the VA on the Question of "FSS vs. Vets First"

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On November 27, 2012, the U.S. Court of Federal Claims ruled that the Department of Veterans Affairs ("VA") has discretion to procure goods and services from the Federal Supply Schedule ("FSS") without first having to determine whether it can conduct the acquisition using restricted competition for service-disabled veteran-owned small businesses ("SDVOSBs") or veteran-owned small businesses ("VOSBs"). The court's decision, captioned as *Kingdomware Technologies, Inc. v. United States*, vindicates the VA's position that the statutory priority for SDVOSBs and VOSBs in VA acquisitions does not apply to FSS procurements.

The *Kingdomware* ruling is a departure from several U.S. Government Accountability Office ("GAO") decisions over the past year. Beginning with *Aldevra*, B-405271; B-405524 (Oct. 11, 2011), the GAO has consistently ruled that the VA must comply with the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-28 (the "2006 Act") before conducting a procurement via the FSS. The 2006 Act created the Veterans First Contracting Program and gave priority to SDVOSBs and VOSBs in VA acquisitions. The *Aldevra* line of GAO protests arose because the VA was using the FSS without first determining if a SDVOSB or VOSB set-aside was warranted. Although the GAO repeatedly recommended that the VA should cancel and re-solicit the protested procurements using an SDVOSB set-aside rather than the FSS, the VA steadfastly maintained that the GAO's interpretation of the 2006 Act was wrong and should not be followed. The VA instructed its acquisition officials to continue using the FSS without regard for the Veterans First Contracting Program, while waiting for the issue to be sorted out by the courts.

The *Kingdomware* case represents the first time a court has ruled on the question of "FSS vs. Veterans First." Judge Nancy B. Firestone's decision respectfully disagreed with the GAO's *Aldevra* line of cases and found that the VA did not act arbitrarily when it used the FSS without first stepping through the requirements of the Veterans First Contracting Program. Contrary to the GAO's interpretation, Judge Firestone found that the 2006 Act "is at best ambiguous as to whether it mandates a preference for SDVOSBs and VOSBs for all VA procurements." As the decision explains:

> The [VA] Secretary's discretion to set contracting goals for SDVOSBs and VOSBs under the [2006 Act] contradicts plaintiff's interpretation of the statute as creating a mandatory SDVOSB and VOSB set-aside procedure for each and every procurement . . . the goal-setting nature of the statute clouds the clarity plaintiff

> would attribute to the phrase "shall award" . . . and renders the [2006 Act] ambiguous as to its application to other procurement vehicles, such as the FSS.

Furthermore, the court concluded that the 2006 Act "is silent as to the relationship between its set-aside provision and the FSS and thus the specific issue in this case is not answered by the words of the statute." Finding that the VAAR is also "silent as to the role of the FSS in relation to the set-aside program established by the 2006 Act," the court looked to the preamble of the regulation to determine the reasonableness of the VA's interpretation. The court ultimately concluded that the gaps in the legislation and regulations were reasonably filled by the VA's interpretation, which was entitled to deference by the court.

Specifically, the court focused on the VA's statement that the VAAR "do[] not apply to FSS task or delivery orders." The VA made this statement in the preamble to the VAAR implementing the 2006 Act. Judge Firestone recognized that the text in the preamble "lacks the formality of the regulations themselves" and is therefore not entitled to greater deference. However, the court reasoned that, because the VA's statements in the preamble constitute interpretations of the 2006 Act, the VA's interpretations are "still entitled to deference in so far as it has 'the power to persuade' . . . ." The court determined that the VA's interpretation was reasonable and entitled to deference because the VA's position has been consistent over time and reflects a uniform approach. The court also noted that the VA's interpretation in the preamble is not inconsistent with the 2006 Act or the VAAR, both of which the court found were silent about the role of the FSS in meeting the VA's set-aside goals. The court found that the legislative history for the 2006 Act supported its ruling as well, because the history reflects a desire to give the VA flexibility in meeting its set-aside goals and other obligations. And, Judge Firestone noted that the VA's interpretation of the 2006 Act is consistent with the fact that the FSS is generally exempted from the small business set-aside requirements under the FAR.

As a result of the court's findings, Judge Firestone ruled that the VA did not act arbitrarily and capriciously when it used the FSS without first determining the appropriateness of a set-aside for SDVOSBs or VOSBs. Unless overturned on appeal, the *Kingdomware* decision clearly bolsters the VA's continued use of the FSS without first considering the Veterans First Contracting Program. It is unclear whether the GAO will reconsider its position in light of the *Kingdomware* decision the next time an *Aldevra*-like protest is filed with the GAO, or if Congress will address the "FSS vs. Veterans First" question. Even if the GAO continues to issue decisions similar to *Aldevra*, the VA has refused to follow the GAO's prior recommendations and the *Kingdomware* decision gives the VA no reason to change its stance. Therefore, SDVOSBs and VOSBs should assume that, for the foreseeable future, protests against the VA's use of FSS instead of a Veterans First set-aside will result in a Pyrrhic victory, at best.

If you have any questions about the *Kingdomware* ruling and what it may mean for you, please contact Jon Williams at 202-857-1000 or jwilliams@pilieromazza.com.