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VA Must Comply with Veterans' Preference in Contracting, Supreme Court Says

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8.0—Veterans' Preference
10.2—Other Supreme Court Cases

***Kingdomware Technologies, Inc. v. United States,* 579 U.S. 162 (2016).**

This is a unanimous (8-0) decision of the United States Supreme Court.[3] The decision was written by Justice Clarence Thomas, and all seven of his colleagues joined.

The Veterans Benefits, Health Care, and Information Technology Act of 2006 requires the Secretary of the Department of Veterans Affairs (VA) to set annual goals for VA contracting with service-disabled and other veteran-owned small businesses.[4] To help reach these goals,

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[1]I invite the reader's attention to https://www.roa.org/page/LawCenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

[2]BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

[3]Justice Antonin Scalia died in February and the vacancy has not yet been filled.

[4]38 U.S.C. 8127(a). The citation is to section 8127(a) of title 38 of the United States Code.

Congress established a separate set-aside program called the "Rule of Two." Under this rule, the federal contracting officer "*shall* award contracts" by restricting competition to veteran-owned small businesses if the contracting officer reasonably expects that at least two such businesses will submit offers and that "the award can be made at a fair and reasonable price that offers best value to the United States."[5]

Kingdomware Technologies, Inc. (KTI)is a small business owned by service-disabled veterans. In January 2012, the VA decided to procure an Emergency Notification Service for four VA medical centers. Using the Federal Supply Schedule (FSS) system, the VA sent a request for a price quotation to a company that was not veteran-owned and awarded the substantial contract to that company.

KTI filed a bid protest with the Government Accountability Office (GAO), asserting that the VA was violating section 8127 by procuring multiple contracts through the FSS without restricting competition using the Rule of Two. GAO agreed with KTI and recommended that the VA reopen the bid and comply with section 8127, but the VA ignored the GAO's non-binding recommendation. This lawsuit resulted.

KTI sued the VA in the United States Court of Federal Claims, and that court granted the VA's motion for summary judgment.[6] KTI appealed to the United States Court of Appeals for the Federal Circuit, and a divided panel affirmed the Court of Federal Claims.[7] The Supreme Court granted *certiorari* (discretionary review).

The VA made two arguments in support of its claim that section 8127 did not apply here. First, the VA argued the Rule of Two is only a mandatory requirement when the VA needs to use that methodology to meet its goal for percentage of utilization of service-disabled-veteran owned small businesses in a particular year. The VA argued that if it was above the percentage floor for the year it was free to ignore the Rule of Two. Second, the VA argued that an order through the FSS system was not a "contract" and section 8127 therefore did not apply.

In his scholarly opinion, Justice Thomas forcefully rejected both VA arguments. The use of the word "shall" clearly demonstrates that use of the Rule of Two is mandatory, not discretionary. The reference to percentage goals in section 8127(a) was a sort of preface, and that preface does not make the 8127(d) requirement any less mandatory, the Supreme Court held.

Justice Thomas' opinion cites *Black's Law Dictionary* and other authorities in holding that an FSS order is a contract and that the VA must not be permitted to use the FSS system to avoid its obligations under section 8127. The VA argued that the FSS was established for simple procurement and that undermining the FSS would impose significant costs on the VA and other government agencies. In rejecting that argument, Justice Thomas made a favorable reference

[5]38 U.S.C. 8127(d) (emphasis supplied).
[6]107 Fed. Cl. 226 (2012).
[7]754 F.3d 923 (Fed. Cir. 2014).

to the *amicus curiae* (friend of the court) brief filed by the Iraq and Afghanistan Veterans Association (IAVA):

> But this argument [by the VA] understates current practices under the FSS. The Department has expanded use of the FSS well beyond simple procurement. See Brief for Iraq and Afghanistan Veterans of America as Amicus Curiae 14-16.

Justice Thomas' favorable mention of the IAVA *amicus* brief demonstrates that such briefs can be a powerful tool in shaping the case law in ways that benefit the public interest. During the six years that the Service Members Law Center (SMLC) was operational (June 2009 to May 2015), we drafted and filed several *amicus* briefs in the United States Supreme Court and other courts. I hope that at some point it will be possible for ROA to reestablish the SMLC, or something like it, and resume this activity.

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ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

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