

In Awarding Contracts for the Procurement of Goods or Services, the United States Department of Veterans Affairs *Must* Award the Contracts to Small Businesses Owned and Operated by Service-Connected Disabled Veterans under some Circumstances.

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

8.0—Veterans' preference³

***Kingdomware Techs., Inc. v. United States*, 579 U.S. 162 (2016).**⁴

¹ I invite the reader's attention to <http://www.roa.org/lawcenter>. You will find more than 2300 "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. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

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 45 years, I have collaborated 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 (VRRRA—the 1940 version of the federal reemployment statute) for 38 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 VRRRA 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 VRRRA 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 In Law Review 21039 (July 2021), I discussed the rules about veterans' preference in hiring for Federal civilian jobs. In Law Review 19085 (September 2019), I discussed the requirement that Federal contractors give preference to certain veterans when hiring employees. In this article, I address the requirement that Federal agencies give preference to companies owned and operated by certain veterans when awarding contracts for goods and services. These three subcategories of veterans' preference should not be conflated. State laws govern veterans' preference in State and local government hiring and contracting.

⁴ This is a unanimous decision of the United States Supreme Court, released on 6/16/2016. The citation means that you can find the decision in Volume 579 of *United States Reports*, starting on page 162. At the time of this decision,

Section 8127 of title 38 of the United States Code (U.S.C.) provides as follows:

(a) Contracting goals.

(1) In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities, the Secretary [of the Department of Veterans Affairs] shall—

(A) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans who are not veterans with service-connected disabilities in accordance with paragraph (2); and

(B) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans with service-connected disabilities in accordance with paragraph (3).

(2) The goal for a fiscal year for participation under paragraph (1)(A) shall be determined by the Secretary.

(3) The goal for a fiscal year for participation under paragraph (1)(B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)).

(4) The Secretary shall establish a review mechanism to ensure that, in the case of a subcontract of a Department contract that is counted for purposes of meeting a goal established pursuant to this section, the subcontract was actually awarded to a business concern that may be counted for purposes of meeting that goal.

(b) Use of noncompetitive procedures for certain small contracts. Except as provided in subsection (d)(2), for purposes of meeting the goals under subsection (a), and in accordance with this section, in entering into a contract with a small business concern owned and controlled by veterans or a small business concern owned and controlled by veterans with service-connected disabilities for an amount less than the simplified acquisition threshold (as defined in section 134 of title 41 [41 USCS § 134]), a contracting officer of the Department may use procedures other than competitive procedures.

(c) Sole source contracts for contracts above simplified acquisition threshold. Except as provided in subsection (d)(2), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department may award a contract to a small business concern owned and controlled by veterans or a small business concern owned and controlled by veterans with service-connected disabilities 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 section 134 of title 41 [41 USCS § 134]) but will not exceed \$5,000,000; and

there were eight (not nine) Justices on the Supreme Court because Justice Antonin Scalia had passed away and his replacement had not yet been confirmed.

(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.

(d) Use of restricted competition.

(1) Except as provided in paragraph (2) and in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns or small business concerns owned and controlled by veterans with service-connected disabilities owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans or small business concerns owned and controlled by veterans with service-connected disabilities will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

(2)

(A) Notwithstanding paragraph (1) and except as provided by subparagraph (B) of this paragraph, with respect to the procurement of a covered product or service, a contracting officer of the Department shall procure such product or service from a source designated under chapter 85 of title 41 [41 USCS §§ 8501 et seq.], and in accordance with the regulations prescribed under such chapter.

(B)

(i) Subject to clause (ii), subparagraph (A) shall not apply in the case of a covered product or service for which a contract was—

(I) awarded under paragraph (1) after December 22, 2006; and

(II) in effect on the day before the date of the enactment of the Department of Veterans Affairs Contracting Preference Consistency Act of 2020 [enacted Aug. 8, 2020].

(ii) Clause (i) shall cease to apply to a covered product or service described in such clause upon a determination of the Secretary that when the current contract for the covered product or service is terminated or expires there is no reasonable expectation that— **(I)** two or more small business concerns owned and controlled by veterans will submit offers as described in paragraph (1); and

(II) the award can be made at a fair and reasonable price that offers best value to the United States.

(C) In this paragraph, the term “covered product or service” means—

(i) a product or service that—

(I) is included on the procurement list under section 8503(a) of title 41 [41 USCS § 8503(a)]; and

(II) was included on such procurement list on or before December 22, 2006; or

(ii) a product or service that—

(I) is a replacement for a product or service described under clause (i);

(II) is essentially the same and meeting the same requirement as the product or service being replaced; and

(III) a contracting officer determines meets the quality standards and delivery schedule of the Department.

(e) Eligibility of small business concerns. A small business concern may be awarded a contract under this section only if the small business concern and the veteran owner of the

small business concern are listed in the database of veteran-owned businesses maintained by the Secretary under subsection (f).

(f) Database of veteran-owned businesses.

(1) Subject to paragraphs (2) through (6), the Secretary shall maintain a database of small business concerns owned and controlled by veterans, small business concerns owned and controlled by veterans with service-connected disabilities, and the veteran owners of such business concerns.

(2)

(A) To be eligible for inclusion in the database, such a veteran shall submit to the Secretary such information as the Secretary may require with respect to the small business concern or the veteran. Application for inclusion in the database shall constitute permission under section 552a of title 5 [5 USCS § 552a] (commonly referred to as the Privacy Act) for the Secretary to access such personal information maintained by the Secretary as may be necessary to verify the information contained in the application.

(B) If the Secretary receives an application for inclusion in the database from an individual whose status as a veteran cannot be verified because the Secretary does not maintain information with respect to the veteran status of the individual, the Secretary may not include the small business concern owned and controlled by the individual in the database maintained by the Secretary until the Secretary receives such information as may be necessary to verify that the individual is a veteran.

(3) Information maintained in the database shall be submitted on a voluntary basis by such veterans.

(4) No small business concern may be listed in the database until the Secretary has verified that—

(A) the small business concern is owned and controlled by veterans; and

(B) in the case of a small business concern for which the person who owns and controls the concern indicates that the person is a veteran with a service-connected disability, that the person is a veteran with a service-connected disability.

(5) The Secretary shall make the database available to all Federal departments and agencies and shall notify each such department and agency of the availability of the database.

(6) If the Secretary determines that the public dissemination of certain types of information maintained in the database is inappropriate, the Secretary shall take such steps as are necessary to maintain such types of information in a secure and confidential manner.

(7) The Secretary may not issue regulations related to the status of a concern as a small business concern and the ownership and control of such small business concern.

(8)

(A) If a small business concern is not included in the database because the Secretary does not verify the status of the concern as a small business concern or the ownership or control of the concern, the concern may appeal the denial of verification to the Office of Hearings and Appeals of the Small Business Administration (as established under section 5(i) of the Small

Business Act [15 USCS § 634(i)]). The decision of the Office of Hearings and Appeals shall be considered a final agency action.

(B)

(i) If an interested party challenges the inclusion in the database of a small business concern owned and controlled by veterans or a small business concern owned and controlled by veterans with service-connected disabilities based on the status of the concern as a small business concern or the ownership or control of the concern, the challenge shall be heard by the Office of Hearings and Appeals of the Small Business Administration as described in subparagraph (A). The decision of the Office of Hearings and Appeals shall be considered final agency action.

(ii) In this subparagraph, the term “interested party” means—

(I) the Secretary; or

(II) in the case of a small business concern that is awarded a contract, the contracting officer of the Department or another small business concern that submitted an offer for the contract that was awarded to the small business concern that is the subject of a challenge made under clause (i).

(C) For each fiscal year, the Secretary shall reimburse the Administrator of the Small Business Administration in an amount necessary to cover any cost incurred by the Office of Hearings and Appeals of the Small Business Administration for actions taken by the Office under this paragraph. The Administrator is authorized to accept such reimbursement. The amount of any such reimbursement shall be determined jointly by the Secretary and the Administrator and shall be provided from fees collected by the Secretary under multiple-award schedule contracts. Any disagreement about the amount shall be resolved by the Director of the Office of Management and Budget.

(g) Enforcement penalties for misrepresentation.

(1) Any business concern that is determined by the Secretary to have willfully and intentionally misrepresented the status of that concern as a small business concern owned and controlled by veterans or as a small business concern owned and controlled by service-disabled veterans for purposes of this subsection shall be debarred from contracting with the Department for a period of not less than five years.

(2) In the case of a debarment under paragraph (1), the Secretary shall commence debarment action against the business concern by not later than 30 days after determining that the concern willfully and intentionally misrepresented the status of the concern as described in paragraph (1) and shall complete debarment actions against such concern by not later than 90 days after such determination.

(3) The debarment of a business concern under paragraph (1) includes the debarment of all principals in the business concern for a period of not less than five years.

(h) Priority for contracting preferences. Preferences for awarding contracts to small business concerns shall be applied in the following order of priority:

(1) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and controlled by veterans with service-connected disabilities.

(2) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and controlled by veterans that are not covered by paragraph (1).

(3) Contracts awarded pursuant to—

(A) section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(B) section 31 of such Act (15 U.S.C. 657a).

(4) Contracts awarded pursuant to any other small business contracting preference.

(i) Applicability of requirements to contracts.

(1) If after December 31, 2008, the Secretary enters into a contract, memorandum of understanding, agreement, or other arrangement with any governmental entity to acquire goods or services, the Secretary shall include in such contract, memorandum, agreement, or other arrangement a requirement that the entity will comply, to the maximum extent feasible, with the provisions of this section in acquiring such goods or services.

(2) Nothing in this subsection shall be construed to supersede or otherwise affect the authorities provided under the Small Business Act (15 U.S.C. 631 et seq.).

(j) Annual reports. Not later than December 31 each year, the Secretary shall submit to Congress a report on small business contracting during the fiscal year ending in such year. Each report shall include, for the fiscal year covered by such report, the following:

(1) The percentage of the total amount of all contracts awarded by the Department during that fiscal year that were awarded to small business concerns owned and controlled by veterans.

(2) The percentage of the total amount of all such contracts awarded to small business concerns owned and controlled by veterans with service-connected disabilities.

(3) The percentage of the total amount of all contracts awarded by each Administration of the Department during that fiscal year that were awarded to small business concerns owned and controlled by veterans.

(4) The percentage of the total amount of all contracts awarded by each such Administration during that fiscal year that were awarded to small business concerns owned and controlled by veterans with service-connected disabilities.

(k) Limitations on subcontracting.

(1)

(A) The requirements applicable to a covered small business concern under section 46 of the Small Business Act (15 U.S.C. 657s) shall apply with respect to a small business concern owned and controlled by veterans that is awarded a contract under this section.

(B) For purposes of applying the requirements of section 46 of the Small Business Act (15 U.S.C. 657s) pursuant to subparagraph (A), the term “similarly situated entity” used in such section 46 [15 USCS § 657s] includes a subcontractor for a small business concern owned and controlled by veterans described in such subparagraph (A).

(2) The Secretary may award a contract under this section only after the Secretary obtains from the offeror a certification that the offeror will comply with the requirements described in paragraph (1)(A) if awarded the contract. Such certification shall—

(A) specify the exact performance requirements applicable under such paragraph; and

(B) explicitly acknowledge that the certification is subject to section 1001 of title 18 [18 USCS § 1001].

(3)

(A) The Director of Small and Disadvantaged Business Utilization for the Department, established pursuant to section 15(k) of the Small Business Act (15 U.S.C. 644(k)), and the Chief Acquisition Officer of the Department, established pursuant to section 1702 of title 41 [41 USCS § 1702], shall jointly implement a process using the systems described in section

16(g)(2) of the Small Business Act (15 U.S.C. 645(g)(2)), or any other relevant systems available, to monitor compliance with this subsection.

(B) The Director of Small and Disadvantaged Business Utilization and the Chief Acquisition Officer shall jointly refer any violations or suspected violations of this subsection to the Inspector General of the Department.

(C) If the Secretary determines, in consultation with the Inspector General of the Department, that a small business concern that is awarded a contract under this section did not act in good faith with respect to the requirements described in paragraph (1)(A), the small business concern shall be subject to any or all of the following consequences—

(i) referral to the Debarment and Suspension Committee of the Department;

(ii) a fine under section 16(g)(1) of the Small Business Act (15 U.S.C. 645(g)(1)); and

(iii) prosecution for violating section 1001 of title 18 [18 USCS § 1001].

(D) Not later than November 30 for each of fiscal years 2021 through 2025, the Inspector General shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report for the fiscal year preceding the fiscal year during which the report is submitted that includes, for the fiscal year covered by the report—

(i) the number of referred violations and suspected violations received under subparagraph (B); and

(ii) the disposition of such referred violations, including the number of small business concerns suspended or debarred from Federal contracting or referred to the Attorney General for prosecution.

(I) Definitions. In this section:

(1) The term “small business concern” has the meaning given that term under section 3 of the Small Business Act (15 U.S.C. 632).

(2) The term “small business concern owned and controlled by veterans” has the meaning given that term under section 3(q)(3) of the Small Business Act (15 U.S.C. 632(q)(3)).

(3) The term “small business concern owned and controlled by veterans with service-connected disabilities” has the meaning given the term “small business concern owned and controlled by service-disabled veterans” under section 3(q)(2) of the Small Business Act (15 U.S.C. 632(q)(2)).⁵

Kingdomware Technologies is a small business owned by a Service-Connected Disabled Veteran (SCDV). The company contended that section 8127(d)(1) (italicized above) required the United States Department of Veterans Affairs (VA) to limit competition for the procurement at issue to companies owned and operated by SCDVs so long as the VA could reasonably conclude that at least two such companies would bid and that a fair and reasonable price would result. The VA contended that limiting competition in that way was discretionary, not mandatory.

The VA contended that section 8127(d)(1) was limited by section 8127(a), which requires the VA and other Federal agencies to establish goals for using SCDV owned and operated companies for procurement, and that so long as the VA had met its goal it was not required to apply section

⁵ 38 U.S.C. 8127 (emphasis supplied).

8127(d)(1). Kingdomware contended that section 8127(a) and section 8127(d)(1) are unrelated and that the application of section 8127(d)(1) was not limited by section 8127(a).

The VA contended that section 8127(d)(1) does not apply to expedited procurements under the Federal Supply Schedule (FSS). Kingdomware contended that FSS procurements are not exempted from the rule.

Kingdomware filed a bid protest with the United States Government Accountability Office (GAO), the investigative arm of Congress, and GAO agreed with the company that the VA was violating the legal requirements of section 8127(d)(1). GAO decisions on bid protests are advisory not mandatory, but Federal agencies seldom ignore GAO determinations in matters of this nature. In this case, the VA chose to ignore the GAO determination.

Kingdomware filed suit against the VA in the United States Court of Federal Claims, a specialized Article I court. The Court of Federal Claims granted the VA's motion for summary judgment, and Kingdomware appealed to the United States Court of Appeals for the Federal Circuit, a specialized Federal appellate court that has nationwide jurisdiction over certain kinds of claims, including the company's claim.

The Federal Circuit affirmed the unfavorable decision by the Court of Federal Claims, but Judge Jimmie V. Reyna filed a vigorous and eloquent dissent, which got the attention of several Justices of the Supreme Court. Accordingly, the Supreme Court granted certiorari (discretionary review).

In his scholarly decision for the unanimous Supreme Court, Justice Clarence Thomas held that section 8127(d)(1) is mandatory, not discretionary. Justice Thomas pointed out that several other subsections of section 8127 use the word "may" while subsection 8127(d)(1) uses the word "shall." Thus, it is clear that Congress intended that this subsection be a requirement, not just an authorization.

Justice Thomas firmly rejected the VA's argument that section 8127(d)(1) does not apply to FSS procurements. FSS orders clearly qualify as "contracts" under the common law definition of that term.

We will keep the readers informed of further developments on this important issue.

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Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, ROA educates service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

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If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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