



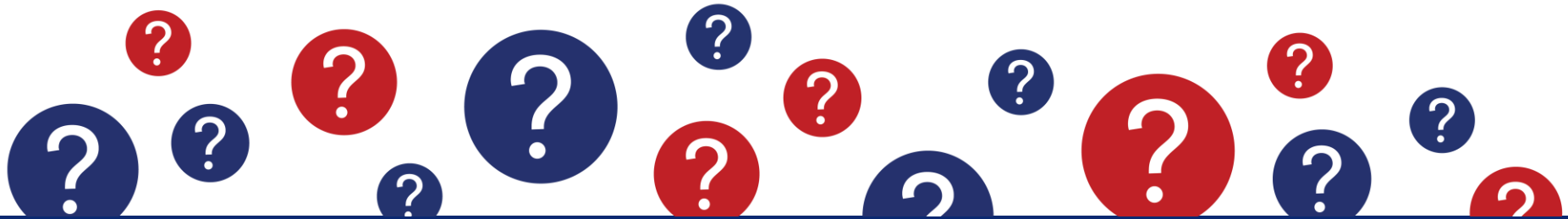
**ADVOCACY. NETWORKING.
MATCHMAKING. EDUCATION.**

Welcome! We start at top of the hour.

Holding the VA to *Kingdomware*: What Can We Do?

AN NVSBC NATIONAL BOOTCAMP WEBINAR

HOSTED BY JUDY BRADT, VP EDUCATION & TRAINING, DC CHAPTER





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How To Participate

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Webinar Format

- ✓ Introduction
- ✓ Featured Presentation: Holding the VA to *Kingdomware*:
What Can We Do?
- ✓ Q&A
- ✓ What's Next



FEATURED PRESENTER: **SARAH SCHAUERTE REIDA**

ATTORNEY SPECIALIZING IN VETERAN SMALL BUSINESSES IN THE FEDERAL SPACE

LEADING AUTHORITIES ON VA VETBIZ VERIFICATION REQUIREMENTS

STATUS PROTESTS, CLAIMS, COMPLIANCE ISSUES, AND IN GOVERNMENT CONTRACTS
LITIGATION BEFORE THE APPEALS BOARDS AND GAO

REPRESENTED VETERANS4YOU, INC. IN ITS SUSTAINED GAO PROTEST PROTECTING
VETERAN RIGHTS UNDER THE *KINGDOMWARE* PRECEDENT.

Holding the VA to *Kingdomware*: What Can We Do?

We will cover:

- ✓ The meaning of *Kingdomware* and the legal landscape after three major decisions further defining the Rule of Two
- ✓ The implications of the *Veterans4You* case, which involves a *Kingdomware* issue sustained at the GAO and pending before the U.S. Court of Federal Claims
- ✓ Understanding your rights under *Kingdomware*
- ✓ How to address (or prevent) a *Kingdomware* violation

Kingdomware and the Legal Landscape

- ✓ *Kingdomware* involved a four-year battle with the VA over the contracting preferences set forth in the Veteran Benefits Act (VBA)
- ✓ VA had conducted a procurement under the GSA FSS procedures set forth at FAR Part 8.4 without regard to the veteran contracting preferences of the VBA
- ✓ Case began at GAO, where *Kingdomware* represented itself
- ✓ U.S. Supreme Court unanimously decided in favor of *Kingdomware* in June 2016

***Kingdomware* and the Legal Landscape**

Supreme Court Holding: The set-aside requirement for veterans is “mandatory, not discretionary. . . [with the statutory] text requir[ing] the Department to apply the Rule of Two to all contracting determinations and to award contracts to veteran-owned small businesses.” *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016).

Kingdomware and the Legal Landscape

“Rule of Two:” The statutory requirement under the VBA to set aside a contracting action “if the contracting officer has a reasonable expectation that **two or more small business concerns owned and controlled by veterans will submit offers** and that the **award can be made at a fair and reasonable price** that offers the **best value to the government.**” 38 U.S.C. § 8127(d)

***Kingdomware* and the Legal Landscape**

Kingdomware also addressed the government's argument that a task order issued under an existing Federal Supply Schedule contract is not a "contract" subject to the Rule of Two requirement in section 8127(d): "[W]hen the Department [of Veterans Affairs] places an FSS order, that order creates contractual obligations for each party and is a 'contract' within the ordinary meaning of that term."

Kingdomware and the Legal Landscape

Aftermath/Implementation of *Kingdomware*:

- ✓ VA's summary of decision, webinars, and its policy memoranda can be found here:

[https://www.va.gov/osdbu/verification/veterans first contracting program adjustments to reflect the supreme court kingdomware decision.asp](https://www.va.gov/osdbu/verification/veterans%20first%20contracting%20program%20adjustments%20to%20reflect%20the%20supreme%20court%20kingdomware%20decision.asp)

- ✓ Tiered evaluation used to minimize issues with re-solicitation:

<https://www.va.gov/oal/docs/business/pps/ppm201804.pdf>

Kingdomware and the Legal Landscape

PDS Consultants, Inc. v. U.S. 907 F.3d 134 (2019)(on VA appeal from CoFC)

Fast Facts: Involved a conflict between the **Javits-Wagner O'Day Act of 1938**, which requires all government agencies – including the VA — to procure products and services from an approved nonprofit agency for the blind or significantly disabled before awarding a contract to another entity if the product or service is on the list managed by the Committee for Purchase from People Who Are Blind or Severely Disabled, known as the AbilityOne list, or provided by Federal Prison Industries, Inc.; and the **Veterans Benefits Act**, which requires the VA specifically to apply a preference to veteran-owned small businesses.

Kingdomware and the Legal Landscape

PDS Consultants, Inc. v. U.S. 907 F.3d 1345 (2018)(on VA appeal from CoFC)

Outcome: **Vets Win**

Takeaways:

- ✓ When two statutes conflict, the more specific statute prevails (basic canon of statutory construction)
- ✓ Held that the Rule of Two applies to all contracts, not just competitive contracts: “[W]hen the Rule of Two is triggered, the VA must apply competitive mechanisms to determine to whom the contract should be awarded.”

Kingdomware and the Legal Landscape

Veterans Contracting Group, Inc. v. U.S., CoFC No. 18-92C (April 4, 2018)

Fast Facts: The VA had initially issued a solicitation for a roof replacement for a medical center in NY as an SDVOSB set-aside. It received four offers, but two were deemed “non-responsive.” Pricing proposed was 30% higher than the IGCE. The VA then cancelled the solicitation and issued it as a small business set-aside. VCG had submitted one of the offers that was “non-responsive,” the reason being that it had been removed from the VIP database. After its readmission, it protested the terms of the solicitation as violating the Rule of Two because it contended the VA should expect that it would again receive at least two SDVOSB proposals.

Kingdomware and the Legal Landscape

Veterans Contracting Group, Inc. v. U.S., CoFC No. 18-92C (April 4, 2018)

Outcome: **Vets lose** (based on inability to show Rule of Two would be met)

Takeaways:

- ✓ Have to be able to show a reasonable expectation that the contracting officer would receive two or more offers from SDVOSBs at a fair and reasonable price; here, two of the three offers previously received were well above the IGCE
- ✓ When raising a Kingdomware issue, need facts to show that every element in the Rule of Two is satisfied

Kingdomware and the Legal Landscape

Electra-Med Corporation, et. al., v. U.S. and American Medical Depot, et. al., CoFC No. 18-927C (2018).

Fast Facts: Case involved the VA's Medical-Surgical Prime Vendor-Next Generation program. Under the MSPV program, the VA awards several contracts to so-called Prime Vendors. Each contract covers a specified geographical area. The VA can then place orders with Prime Vendors to obtain certain medical supplies, available on the VA's MSPV "Master List." The Master List contained only ,7800 out of the 80,000 items that the VA anticipated as necessary to support its healthcare network, so the VA sought to outsource to the Prime Vendors the selection of the items to be contained on the Master List, issuing a Class Justification and Approval to allow the Prime Vendors to modify the process of creating the Master List and allow the Prime Vendors to select the items on the Master List. Among other issues, the plaintiffs argued that the VA could not allow the Prime Vendors to select non-SDVOSBs to provide products for the Master List without first applying the rule of two and considering SDVOSB and VOSB sources for those products.

Kingdomware and the Legal Landscape

Electra-Med Corporation, et. al., v. U.S. and American Medical Depot, et. al.,
CoFC No. 18-927C (2018).

Outcome: **Vets Lose** (Public Interest Issue)

Takeaway:

- ✓ Difficulty in VA applying Rule of Two for every procurement
- ✓ Even if win on *Kingdomware* issue, won't get preliminary injunction/results desired if public interest in VA needs being fulfilled outweighs interest in maintaining integrity in procurement process (here, healthcare for veterans at risk).

Kingdomware and the Legal Landscape

Electra-Med Corporation, et. al., v. U.S. and American Medical Depot, et. al., CoFC No. 18-927C (2018)

“In this case, the VA is hamstrung by the myriad requirements and preferences layered onto the process of federal purchasing, and especially the preferences unique to the VA. The complaint here is exhibit A. Plaintiffs are correct that Congress has granted to them and bidders generally a variety of rights when it comes to selling things to the VA. It is for Congress and the voters to weigh the merits of the benefits and burdens imposed by such a labyrinth of legal and regulatory hoops and hurdles. This case presents a circumstance in which the VA could not timely clear the hurdles. The result is danger to veterans’ healthcare and increased cost to the government. The agency found a detour around the obstacles and tried to legally justify it. It could not do so, but the court is in no position to restore the status quo ante by enjoining a process aimed at protecting and improving the management of the VA’s supply chain for medical and surgical supplies. The equities do not favor the plaintiffs: the harm to the plaintiffs is somewhat speculative, while the harm to the agency is real and potentially grave. The public interest favors avoiding those harms. The protest must therefore be denied.” – Judge Bruggink

***Kingdomware* and the Legal Landscape**

Electra-Med Corporation, et. al., v. U.S. and American Medical Depot, et. al., CoFC No. 18-927C (2018)

“The bevy of protests filed in this court and at GAO since the Supreme Court’s decision in *Kingdomware* are evidence enough that these requirements are strict and difficult to follow in the mean and no doubt doubly so when the law requires that they be applied without fail or exception. And yet the law remains. Only Congress has the kill switch.” – Judge Bruggink

The *Veterans4You* Case

Veterans4You, Inc., B-417340 (June 3, 2019)

Fast Facts: VA wanted to buy suicide prevention gun locks for distribution through its Veterans Crisis Line. These consisted of a cable and keyed padlock. In addition to the device itself, the VA also required a logo, wallet card, and information about identifying suicide risk. Because of these minor printing elements, the VA invoked the “printing mandate” of 44 U.S.C. § 501, which requires agencies to have their printing needs met through the GPO. Because the procurement was conducted outside the VA, the VBA wasn’t followed.

The *Veterans4You* Case

Veterans4You, Inc., B-417340 (June 3, 2019)

Outcome: **Vets win**

Takeaways:

- ✔ GAO explicitly stated: “[A]ny time the VA is acquiring goods or services – without limitation – it is required to determine whether there are at least two SDVOSBs or VOSBs capable of meeting the agency’s requirements at a fair and reasonable price.” Applies to non-VA solicitations such as through the GPO.
- ✔ GAO found that the terms of 38 U.S.C. § 8127(i) apply to the current arrangement between VA and GPO, we also find that VA was required to – but did not – alert GPO to its unique requirements, and to have any acquisition performed by GPO on VA’s behalf implement, to the maximum extent feasible, the requirements of the VBA.”

The *Veterans4You* Case

Aftermath:

- ✓ Ten days after decision, VA (through GPO) issues an almost identical solicitation without setting the work aside for veteran businesses
- ✓ Only differences in solicitation are response date and deleting line acknowledging that printing is not the “predominate feature” of the work
- ✓ No indication of market research or other satisfaction of Rule of Two
- ✓ Veterans4You files suit in CoFC for declaratory and injunctive relief

The *Veterans4You* Case

Implications:

- ✓ Asking CoFC to determine that VA impermissibly invoked “printing mandate” to run acquisition through GPO (if applies here, applies elsewhere)
- ✓ Asking CoFC to determine that the VBA trumps printing mandate, and therefore confirming that VBA will always take precedence over other statutes that might interfere with the Rule of Two
- ✓ Asking CoFC to confirm that VA bound to Rule of Two even when acquiring through other agencies such as GPO

Understanding Your Rights Under *Kingdomware*

- ✓ Know the basic requirements binding the VA to set aside requisitions for SDVOSBs or VOSBs (the components of the “Rule of Two”):
 - Reasonable expectation
 - Two or more offers
 - Responsible
 - Fair and reasonable price
 - Best value to the Government

Understanding Your Rights Under *Kingdomware*

- ✓ Understand the procedures the VA must follow in conducting procurements if it does NOT set it aside:
 - Review VIP database for vendors listed under applicable NAICS code
 - Conduct appropriate market research to determine whether it is likely that it will receive two or more offers from responsible SDVOSBs/VOSBs (looking at capabilities, prior contracts, interested parties list, sources sought notices)
 - Document results on VA Form 2268 and submit it for approval in the instance the acquisition is not conducted as a set-aside.

September 27, 2018 (2016-05)(Implementation of the Veterans First Contracting Program as a Result of the U.S. Supreme Court Decision)

Understanding Your Rights Under *Kingdomware*

- ✔ The VA does not HAVE to set contracts aside unless the Rule of Two is met
- ✔ Before the VA determines that it doesn't have to set a contract aside, it MUST do the work required by the VBA and the implementing policy memoranda
- ✔ If you are contemplating a protest, the key considerations are: (1) Did the Rule of Two apply? and 2) Did the VA do what it was required to do?

How to Address (or Prevent) a *Kingdomware* Violation

During the Pre-Solicitation Phase:

- ✓ Respond to Sources Sought and market research conducted by the VA (otherwise they can say they were unable to identify responsible prospective offerors)
- ✓ Don't be shy about communicating capabilities and interest
- ✓ Tell the CO about *Kingdomware* (respect and professionalism goes a long way)
- ✓ Urge other companies to do the same (Rule of Two)
- ✓ Evidence of all of this can be included with your protest if it comes to that

How to Address (or Prevent) a *Kingdomware* Violation

When the VA fails to set aside for vets:

- ✓ Short window to protest (violations of federal regulations have to be protested **before** bids are due)
- ✓ GAO seems to get better results than agency level (likelihood of corrective action)
- ✓ Allege sufficient facts showing either that the Rule of Two was met and ignored or that the VA failed to take proper steps in determining whether it was required to set aside (Veterans Contracting Group as lesson learned).

How to Address (or Prevent) a *Kingdomware* Violation

- ✓ Remember that it is up to the veteran business community! Only VOSBs or SDVOSBs have standing to allege a *Kingdomware* violation and hold the VA to its mandate.
- ✓ Understand the Rule of Two
- ✓ Understand the obligations of VA contracting officers
- ✓ Don't be shy in reaching out to VA procurement officials
- ✓ Remember the tight deadline! Before offers are due!

Reference Handout

Kingdomware Nuts and Bolts

<http://bit.ly/kingdomware>

Link in the chat box, and pending in follow up email

KINGDOMWARE NUTS AND BOLTS

Kingdomware History – After four years of mixed results at the GAO, U.S. Court of Federal Claims, and Federal District Court, veteran business owners scored a major victory when the U.S. Supreme Court held that the provisions of the Veterans Benefits Act (VBA) require the VA to set aside contract opportunities for veteran-owned small businesses (“VOSB”) when certain requirements are met. (No. 14-916, 2016: https://www.supremecourt.gov/opinions/15pdf/14-916_6j37.pdf).

The “Rule of Two” – A VA contracting officer (CO) must restrict competition to VOSBs or SDVOSBs when he has the reasonable expectation that two or more responsible VOSBs or SDVOSBs will submit offers and that award can be made at a fair and reasonable price that offers best value to the United States (SDVOSBs as first priority)(38 U.S.C. § 8127(d): <https://www.law.cornell.edu/uscode/text/38/8127>).

Impact of “Rule of Two” – In the event a VA contracting officer fails to conduct necessary steps to determine if the Rule of Two is met, fails to set aside a contract for VOSBs/SDVOSBs when required, or otherwise violates the VBA, this provides grounds for a pre-bid protest.

Tiered Evaluation – To minimize delays in the re-solicitation process, the VA is authorized to conduct procurements using tiered (cascading) evaluation. While multiple socioeconomic categories may submit offers, the CO will examine them by tier (SDVOSB, VOSB, small business, large business). The objective is to make the award to an SDVOSB while providing flexibility to the VA in the event this is not possible. Access the guidance and procedures provided to VA COs here: <https://www.va.gov/oal/docs/business/pps/ppm201804.pdf>.

Most Helpful Resources:

- VA Webpage containing all policy memoranda and class deviations issued since the *Kingdomware* decision: <https://www.va.gov/oal/business/pps/vfcreadingroom.asp>.
- VA Procurement Policy Memorandum – Issued in September 2018, this is the most current policy memorandum applicable to VA contracting officers and provides important information relating to their obligations to implement the *Kingdomware* decision: <https://www.va.gov/oal/business/pps/flash18-33.asp>.
- September 2018 GAO Report – Addresses issues with implementation of *Kingdomware* decision, including major challenges (for instance, determining “best value”) and recommendations for improvement: <https://www.gao.gov/assets/700/694884.pdf>.

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Questions and Answers

RAISE A HAND OR USE CHAT BOX





THANK YOU!

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