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Veterans

Grip on Billions in VA Contracts Could Be Loosened in Appeal

Two historically ''overlooked'' workforce groups will enter a Washington, D.C. appeals courtroom Sept. 4 to battle over access to billions of dollars in federal contracts business with the Department of Veterans Affairs.

Specifically, a small veteran-owned business will argue that it and those similarly situated should always receive preferential treatment under a 2006 veterans benefits law when the VA considers contracting options, even if that hurts its opponents--nonprofit agencies that employ blind and disabled workers.

Those AbilityOne nonprofit agencies contend, however, that a 1938 law provides that an AbilityOne agency must always receive contract priority if such an agency is capable of providing what the government wants.

How the Federal Circuit views these two seemingly conflicting laws could have far-reaching implications for contracting revenue, and impact the livelihoods of the ''well-deserving'' people who would do the work.

The VA awarded $5.4 billion in contracts to small veteran-owned small businesses in fiscal 2017, and nearly $82 million to entities designated as AbilityOne nonprofit agencies, according to data Bloomberg Government compiled.

A Matter of Priorities The U.S. Court of Appeals for the Federal Circuit will decide in a matter of first impression:

- whether or not the VA must first consider small veteran-owned businesses like Brooklyn-based PDS Consultants Inc. to perform prescription eyewear contracts; or
- whether the VA correctly assigned that business to a North Carolina AbilityOne agency without looking at veteran-owned businesses.

PDS convinced a lower court that the VA must always first conduct a Rule of Two analysis when seeking to award a contract, which requires the department to assess whether two or more small veteran-owned businesses are able to perform before considering other entities.

The Rule of Two doesn't result in the automatic selection of a small veteran-owned business--it just requires the VA to examine the feasibility of such a selection.

The veteran business community should be watching this case very closely because a ruling overturning the lower court could ''dangerously undercut'' the Rule of Two provided in the Veterans Benefits, Health Care, and Information Technology Act of 2006, Steve Koprince of Koprince Law, Lawrence, Kan., told Bloomberg Government.

The 2006 veterans law helped veterans while also ensuring that AbilityOne kept its contracting priority before all non-VA federal agencies, a pro-veterans business court brief said.

Congress passed and President George W. Bush signed the veterans law both to help soldiers coming home from overseas access healthcare services and overcome a high veterans unemployment rate. This preferential treatment has expanded contracting opportunities for these businesses.

Threat to the Mission AbilityOne agencies counter that Congress never intended for the Rule of Two to trump the AbilityOne mandate provided in the Javits-Wagner-O'Day Act.

The law clearly says the government ''shall'' procure a product or service if it is on the AbilityOne procurement list, which includes, among other items, bedding and mattresses, office supplies, and prescription eyewear.

A loss for AbilityOne agencies in this appeal could mean lost VA contracts, which could damage the mission of creating sustainable employment for people who are blind or disabled—a workforce group with a 64 percent unemployment rate.

Employees who lose their jobs and are blind are twice as likely not to return to work as their sighted peers, said Seth Anderson, director of marketing and communications for IFB Solutions.

IFB is the new name for the appellant in this case, Winston-Salem Industries for the Blind Inc.

Preferred Status PDS wanted to compete for eyewear contracts in the VA's New York/New Jersey and southeast regions, and complained that the VA prematurely selected the AbilityOne agency in Winston-Salem to perform.

A proper interpretation of the 2006 veterans law required stopping Winston-Salem because the VA didn't perform a Rule of Two analysis, the U.S. Court of Federal Claims decided. A Rule of Two analysis is required because veteran preference is the VA's first priority under a June 2016 Supreme Court ruling, *Kingdomware Techs. Inc. v. United States*, Judge Nancy B. Firestone said.

Winston-Salem's appeal is supported by the government and several AbilityOne allies that stand to lose business if the veterans law takes priority over the Javits-Wagner-O'Day Act.

 ISSN 0014-9063

AbilityOne agencies are a ''mandatory'' contract source under the Federal Acquisition Regulation, and therefore the government must select an AbilityOne agency if it provides the services or products the government wants, said SourceAmerica in its amicus brief.

Goodwill Industries probably will lose most of its VA contracts when they expire if the Federal Circuit sides with veteran-owned businesses, it told the court.

That result will lead to the elimination of thousands of jobs for those ''who struggle to find work,'' including veterans with disabilities, and cause the loss of $12 million in funding for its employment assistance programs, Goodwill said.

Close Call This statute standoff presents an issue of first impression for the Federal Circuit, and Firestone's decision to stay action on the eyewear contracts pending this appeal suggests the case is ''somewhat of a close call,'' said Aron Beezley of Bradley Arant Boult Cummings LLP, Washington.

However, a fair reading of the statutory language will probably lead to PDS defeating this appeal, said Cherie Owen, of counsel with Jones Day, Washington.

The veterans law ''doesn't limit its reach to only competitive procurements, or only to contracts awarded to commercial vendors. Similarly, the *Kingdomware* ruling noted that the rule of two applies to 'all contracting determinations,' not just competitive procurements,'' she said.

Much at Stake ''We don't believe Congress intended to have more recent legislation expanding opportunities for veteran-owned small businesses to negate a nearly 80-year-old program that provides employment and economic independence for people who are blind,'' Anderson said.

The stakes are high, he said, because:

- 36 AbilityOne agencies hold contracts with the VA
- only 36 percent of working age individuals who are blind are in the workforce; and
- IFB (Winston-Salem) will lose nearly 16 percent of its total business, and at least 35 individuals who are blind and working in the optical department will lose their jobs, if the appeal fails.

On the other hand, the Rule of Two has clearly helped expand opportunities for veterans.

In the year following *Kingdomware*, the VA's veteran-owned business and service-disabled veteran-owned small business spending surged 47 percent from the previous 12-month period. Veteran-owned business set-asides almost doubled, Bloomberg Government reported in July 2017.

Veterans ages 18 to 24 had a nearly 19 percent unemployment rate in August 2005, according to the Bureau of Labor Statistics.

In August 2017, veterans that reported serving in Iraq, Afghanistan, or both had an unemployment rate of 4.4 percent, the bureau said.

Not Just AbilityOne PDS should win, but the government's aggressive aim at the Rule of Two should give veteran-owned businesses pause, Koprince said.

''If the government's reasoning is adopted here, it would open the door to circumventing *Kingdomware* not only for AbilityOne acquisitions, but for any acquisition where the government decided—without first conducting a rule of two analysis—to procure using non-competitive procedures,'' he said.

This would include other mandatory sources listed with AbilityOne in FAR Part 8, he said.

FAR Part 8 provides that contracting agencies must rely upon specific sources before using commercial vendors, such as Federal Prison Industries and AbilityOne agencies, or when seeking wholesale supply services, printing services, leased motor vehicles, and helium.

Congress enacted statutes dictating that agencies procure certain goods in certain circumstances, and those FAR Part 8 mandates take precedence over awarding contracts to commercial vendors, the government said in its January brief.

If Congress wanted the Rule of Two elevated over mandatory sources, it would have said so, the government said.

The case is *PDS Consultants Inc. v. United States*, Fed. Cir., *oral argument scheduled*, 9/4/18.

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