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Challenging the Reign of Kingdomware – Federal Circuit May Decide Whether Veterans or AbilityOne Participants Receive Priority in VA Procurements.

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On Friday of last week, while most of the country was getting ready for the Labor Day Holiday, the U.S. Court of Federal Claims in *PDS Consultants, Inc. v. United States*, Case No. 16-1603C, Slip. Op. (September 1, 2017) stayed its own judgment that arguably would have protected and potentially expanded veteran-owned businesses' ability to win government contracts. The Court's order essentially defers to the U.S. Court of Appeals for the Federal Circuit on whether to limit the impact of a landmark U.S. Supreme Court ruling veteran-owned businesses celebrated just a year ago.

Last June, we reported on the U.S. Supreme Court decision, *Kingdomware Technologies, Inc. v. United States*, 136 S.Ct. 1969 (June 16, 2016). Overturning the U.S. Court of Federal Claims, the Supreme Court in *Kingdomware* held that the Veterans Benefits, Health Care, and Information Technology Act of 2006 ("VBA") required the VA to employ the "rule-of-two" analysis to determine whether it must set aside task orders for SDVOSBs before opening them up to unrestricted competition. *Kingdomware* was generally considered a victory by the SDVOSB community, who expected the decision would require the VA to set-aside more SDVOSB task orders. Unfortunately, the *PDS* case demonstrates that *Kingdomware*'s application is far from straightforward.

PDS ultimately asks the Court of Federal Claims – and now the Federal Circuit – to answer the question: how can the VA comply with *Kingdomware*'s directive to perform a rule-of-two analysis when another conflicting statute requires it to direct-award to an organization on the AbilityOne Procurement List created under the Javits-Wagner-O'Day Act ("JWOD"), 41 U.S.C. §8127. In *PDS*, the VA awarded to a JWOD AbilityOne contractor without first employing the rule-of-two and considering SDVOSBs as *Kingdomware* required. Initially, the VA and awardee intervenor, IFB Solutions, argued that the VA could not have violated the VBA because it had complied with JWOD (JWOD generally requires federal agencies to purchase products and services from designated nonprofits that employ blind and otherwise severely disabled people, listed on the AbilityOne Procurement List). Put differently, the VA and IFB argued that the VA could not be penalized for violating one law by virtue of having complied with another. Later in the protest, the VA changed its position to apply the rule-of-two in favor of SDVOSBs for items added to the AbilityOne Procurement List after the VBA's January 7, 2010 effective date, essentially taking the position that going forward, the VA would prioritize SDVOSBs over AbilityOne listees. Disagreeing, IFB maintained that JWOD required the VA to procure from AbilityOne list recipients

without regard to SDVOSB or the rule-of-two. It was up to the Court of Federal Claims to decide whether the VA's revised position to prioritize SDVOSBs appropriately reconciled the VBA with JWOD.

The Court ruled in favor of veterans citing the VBA's plain language and the reasoning in *Kingdomware* to rule that Congress required the VA to give priority to SDVOSBs and VOSBs when procuring goods and services. IFB appealed the Court's order.

Pending appeal, IFB moved for an injunction staying the Court's judgment until the Federal Circuit could weigh in on the issue. Last Friday, the Court granted the requested stay. Notably, in applying the traditional elements for injunctive relief, the Court's order expressed some disbelief in its own prior opinion, observing that "while the Court rejected IFB's arguments, it is not possible to determine the likelihood of success on appeal." Using language that we might describe as tentative, the Court remarked that "[t]his case involves two statutes designed to give preferences to different well-deserving groups" and that "[w]hether the VA has made the right call and properly reconciled its obligations under VBA and JWOD after *Kingdomware* will now be decided by the Federal Circuit."

The ruling granting IFB's request for a stay suggests that the Court of Federal Claims is not convinced that the VBA requires the VA to consider setting aside contracts for SDVOSBs in cases where there is a qualified AbilityOne awardee. SDVOSBs and other veterans groups will want to stay closely tuned to this case as it comes before the Federal Circuit and invites potential reconsideration of the scope and meaning of *Kingdomware* and the VBA's rule-of-two requirement.