Ramifications of the Supreme Court Kingdomware Decision

Intro: Chairman Vitter, Ranking Member Shaheen and distinguished members of the Committee, thank you for this opportunity to testify on the effects the Supreme Court Ruling on Kingdomware vs. VA will have on veterans' business ownership and on federal government operations this morning.

My name is Michael Phipps. I am the Chairman of the Advisory Committee on Veteran Business Affairs (ACVBA), an independent advisory board administered at the SBA and a service disabled veteran business owner with over 15 years of government and commercial contracting experience.

I'm here today to discuss the ramifications of the Supreme Court Kingdomware Decision, and what it means for the VA and the government contracting community at large.

Minor impact to VA operation

In light of the current ruling, the Supreme Court is clear that VA shall adhere to the contracting procedures under Section 8127(d) of the 2006 Veterans Benefits, Health Care, and Information Technology Act. This does not pose a threat to the way the VA preferentially purchases commercial products and services. Coming out of this decision we predict that VA can still preferentially purchase off the Federal Supply Schedule (FSS), they will just have the additional task of identifying veteran owned businesses on the Schedule. The VA will have the benefit of two prior evaluations of these VOSBs: the evaluation to become a Federal Supply Schedule contractor, and the evaluation by the VA for a VOSB certification.

Veteran owned small businesses on the FSS are vetted and underwent an intense and sometimes costly process. These businesses are committed, have skin in the game and have the requisite time and experience to do business with the government.

Effects on Veteran Small Business Community

First, the Kingdomware decision clearly reaffirms that service-disabled veteran-owned small business contracting goals are neither a public relation ploy nor an end in themselves. The goals do not exist for government departments to pat themselves on the back, issue press releases, and then ignore veterans once the goals are achieved. Rather, the Supreme Court confirmed that those goals exist to provide "small business opportunities" for service-disabled veterans. Government buyers should be reminded that this reasoning applies to the Small Business Act goals as well as goals under agency-specific laws like the VA law at issue in the case. The case also validated the Congressional practice of enhanced agency-specific Service Disabled Veteran Owned Small Business (SDVOSB) set-aside goal measures to supplement the Small Business Act. This shows other agencies the importance of implementing internal policies where buyers cannot stop looking for SDVOSB's even after they meet their SDVOSB goals. The Committee should direct all agencies to implement such policies.

Second, the Kingdomware decision provides the Supreme Court's stamp of approval for a legally sound model of "Veterans First" or "Service-Disabled Veterans-First" set-asides and preferences. Congress can now extend this model government-wide in the Small Business Act or in agency-specific legislation. Such set-aside rules or preference would be entirely appropriate. Especially, for the two agencies that actually generate veterans and service-disabled veterans: the Departments of Defense and Homeland Security.

Mandated in 2006 by public law 109-461 and, before that, by President Bush's 2004 Executive Order 13360, the Department of Veteran Affairs was entrusted with a fiduciary responsibility to grow the veteran owned small business industrial base. It is our belief that the federal agencies that produce veterans and service-disabled veterans should also share VA's fiduciary responsibility. Agencies such as the Department of Defense and Homeland Security should have not only a moral imperative but a statutory mandate to enforce veteran's preference in their purchases. The Veterans First contracting program within VA should be legislatively extended to the aforementioned agencies requiring the same percentage goaling and the same set-aside authorities.

This also has implications for SDVOSB's working with other agencies. Extending the VA set-aside criteria to the FAR brings the issues with the government wide SDVOSB language to light. The current set-aside language in the FAR is ineffective, confusing and rarely used. Due to the language ambiguity, contracting officers rarely use the SDVOSB set-aside in the FAR. Contracting officers want clear direction that there will be no back lash or questioning of their decisions. This issue becomes evident when finding extremely low numbers of SDVOBS's set asides when searching the Federal Procurement Data System https://www.fpds.gov/. The decision on how much business development is needed for a particular veteran-owned business is difficult for contracting officers to determine by themselves.

Third, the Kingdomware decision clearly rejected the speculations that veterans and service-disabled veteran set-asides are an obstacle to purchasing efficiency or that veteran businesses would surely bankrupt taxpayers with overpriced food slicers and griddles. For that reason, Kingdomware validates the Congressional direction that such set-asides must be extended to Federal Supply Schedule (FSS) order contracts placed by the VA. This is a model worth replicating government-wide. The Small Business Jobs Act of 2010 gave contracting officers discretionary authority over SDVOSB's and other small business set-asides in multiple-award contracts (MAC) and MAC task order level. That language was adopted at the time as a kind of compromise because some agencies did not follow the GAO's 2008 Delex case decision which required mandatory small business set-asides on MAC orders. The veteran's population is growing, and with that, so are veterans' and spouse self-employment needs and their needs for access to government contracts. There is likewise no longer any reason, on procurement efficiency grounds, why the mandatory set-asides approved in Kingdomware should not apply to FSS and other MAC orders government-wide.

Fourth, the Kingdowmware decision leaves in place some barriers to business development for new and emerging veteran-owned businesses. For example, the Supreme Court confirmed the buyers' discretion to use veteran set-asides at contracts below the Simplified Acquisition Threshold. However, the Court did not provide any guidance on how to make such buying

decisions or even on how to conduct market research. This leaves VOSBs and SDVOSB's wondering how to persuade the buyers that their businesses really need that low-dollar set-aside to grow in order to obtain larger contracts later. In many industrial categories, only large-dollar contracts are awarded with the pathway to those contracts missing. There is no guidance for buyers on how to make that choice. There is an opportunity to assist with this ambiguity with a Service Disabled Veteran Owned Small Business Development Program discussed further in my testimony.

Additionally, the dollars being awarded to SDVOSB's are going to a small group of companies leaving the majority of SDVOSB out of equation. This is due to the transactional incentives being driven by the 3% SDVOSB total spending and not necessarily by participation. Regretfully, the SDVOSB Program as it now stands is not a business development program that would allow for direct award regulations while promoting metrics to start, grow and maintain a multitude of Service Disabled Veteran Owned Small Businesses.

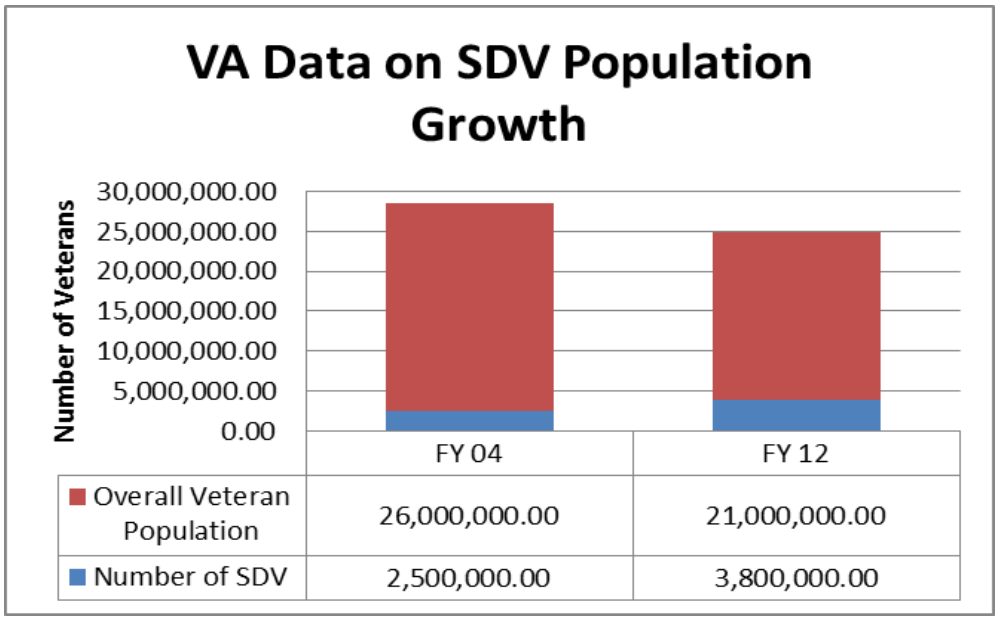
The Supreme Court decided the case unanimously, doing the right thing for Veteran business owners at the VA. In contrast the rest of the Federal Government has still yet to act on a program focused on veteran Business development. A Veteran business development program was recommended as early as 18 years ago by the Congressional Commission on Service members' and Veterans' Transition (the Principi Commission). Since that time there have been numerous missed opportunities to establish such a program. Starting in 1974 with **Public Law 93-237 with what was known as the "Anti-Discriminatory Amendment" to Section 4 of the Small Business Act, codified as 15 USC §633(4).** Other missed opportunities occurred in December of 1997, with enactment of the **Small Business Reauthorization Act of 1997, Public Law 105-135** and with **Public Law 106-50, the Veterans Entrepreneurship and Small Business Development Act of 1999** and in **December of 2003, with Sections 101 and 102 of the Veterans Benefits Act of 2003 (became Public Law 108-183**). Unfortunately, the SBA and the FAR Council's 2005 SDVOSB rules declined the opportunity to create a business development program.

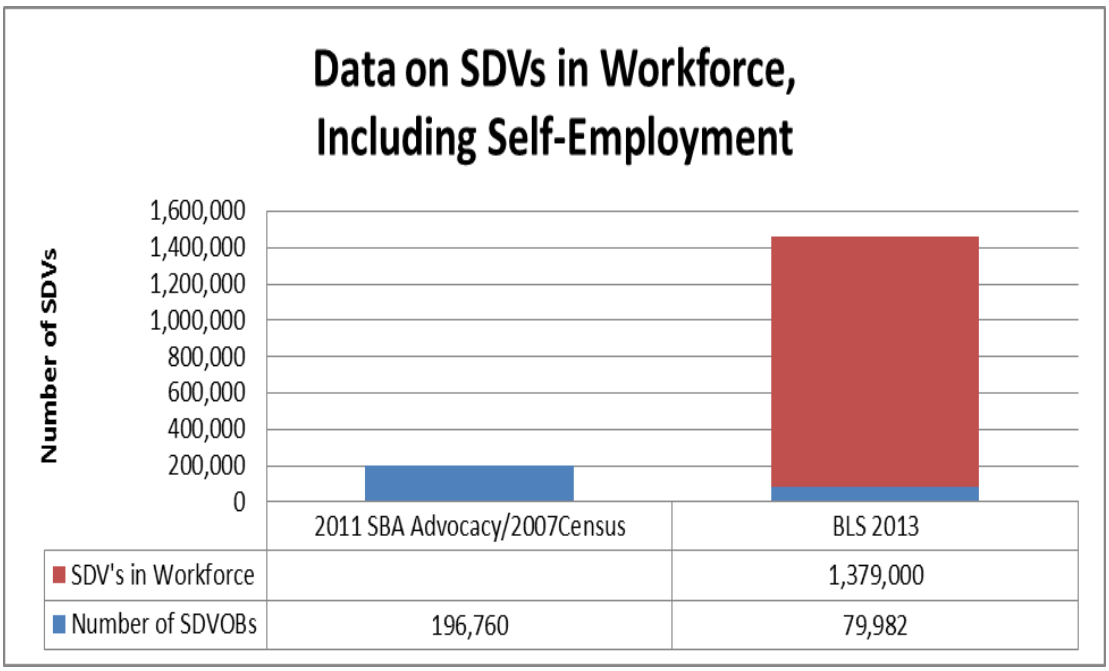
Congress should act as the Supreme Court has acted, and unconditionally set the record straight that our Veterans deserve and have earned the right for a Veteran Business Development program throughout the entire government contracting space.

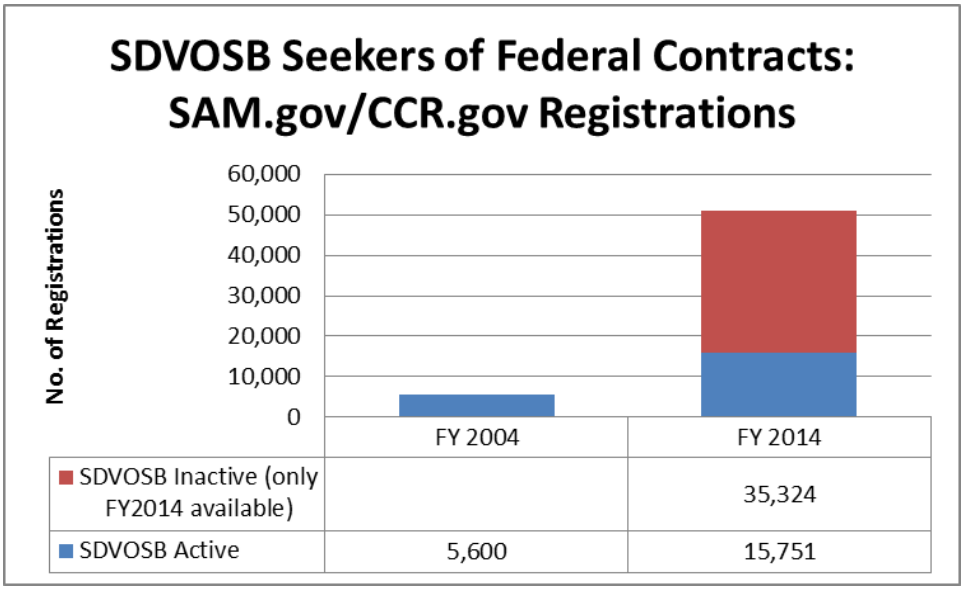
Fifth, the Kingdomware decision illustrates the need for a Service-Disabled Veteran-Owned Small Business (SDVOSB) Business Development Program. Though the Kingdomware decision speaks of "opportunities" that "encourage small businesses," it does not define exactly how contracting officers should look for such businesses and decide which ones are to be encouraged in what way. In the 1999 and the 2003 legislation, Congress gave the SBA and other Federal agencies broad business development authority to help veterans. The SBA and the FAR Council, however, announced in 2005 rulemaking that the government-wide SDVOSB Program is only for "established" businesses and is not meant to help veterans business development. Congress should encourage the SBA and the FAR Council to carry out its business development authority.

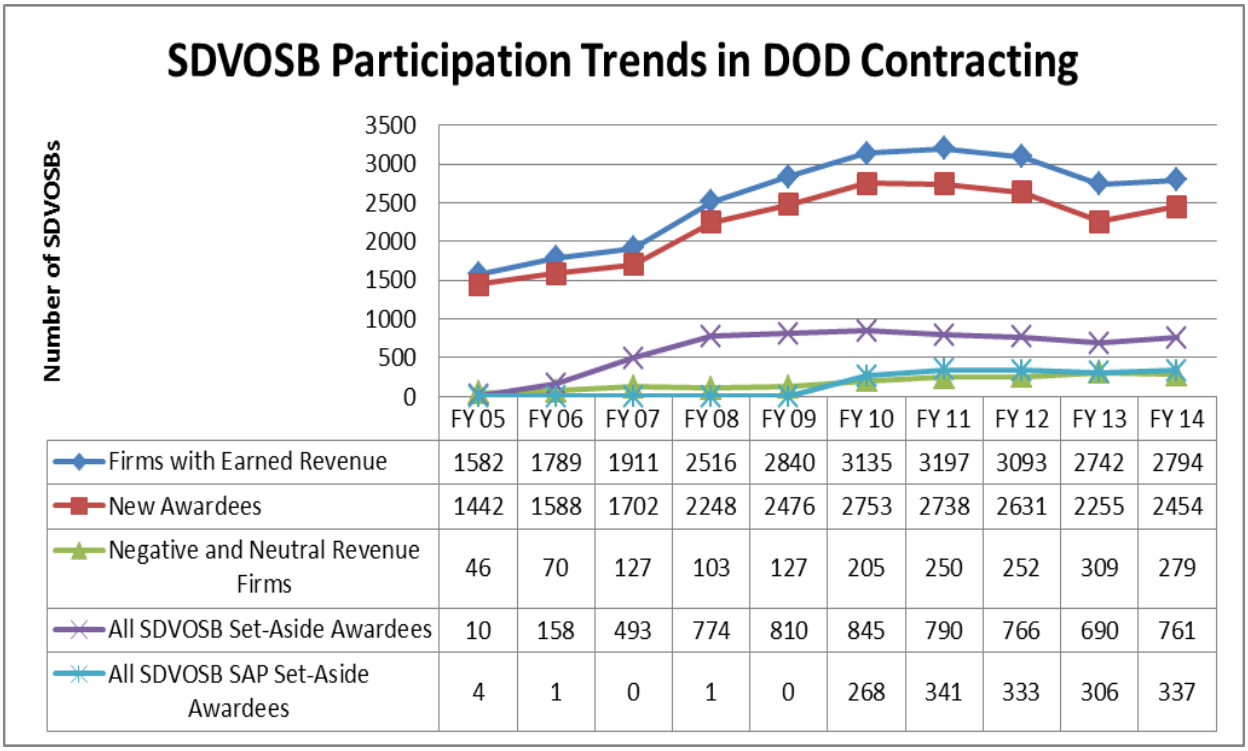
In this regard, the Senate Small Business Committee should consider the research conducted by Professor Max Kidalov and his co-author Jennifer Lee (who both testified in front of the ACVBA

at the SBA) at the Naval Postgraduate School, "An Open Door and a Leg Up: Increasing Service-Disabled Veteran-Owned Small Business (SDVOSB) Participation in Defense, Navy, and Marine Corps Contracting," available here: http://calhoun.nps.edu/handle/10945/47473. The research conclusively demonstrates that the current SDVOSB Program supports a dwindling number of established firms. This is because the SDVOSB Program as currently designed is not effectively aligned to increase broad-based participation of SDVOSB firms as contractors. Provided below are five figures from Prof. Kidalov's and Ms. Lee's research illustrating this point:

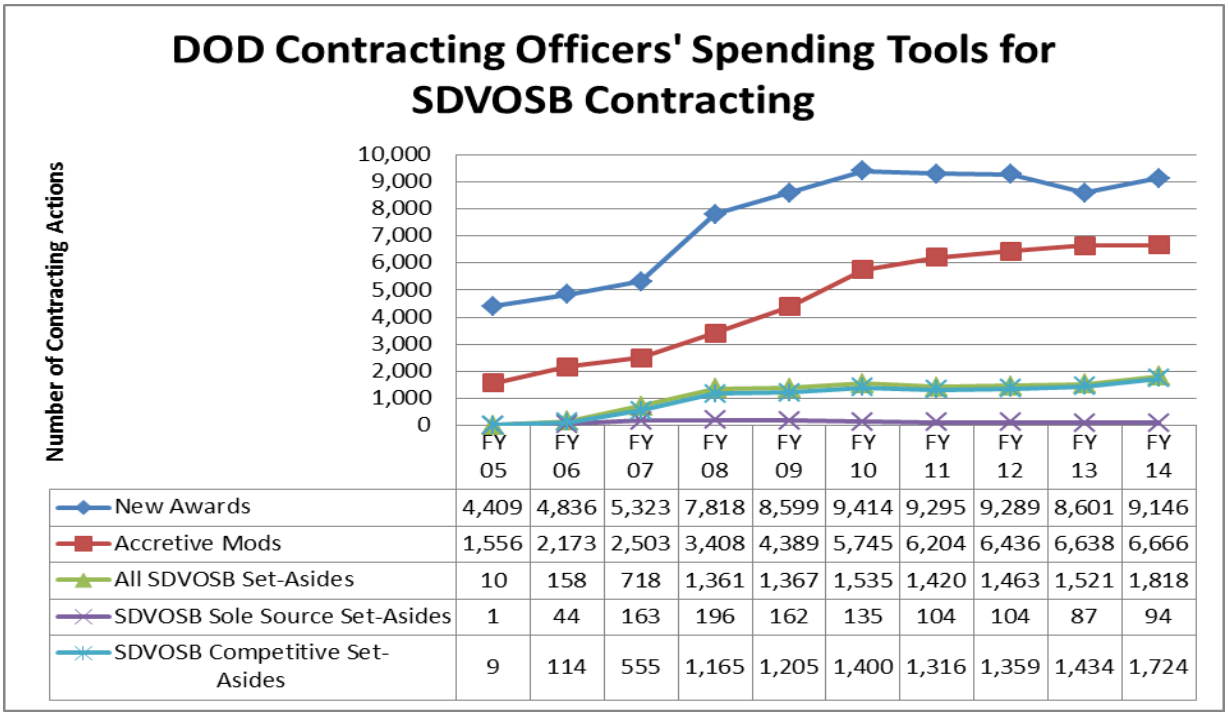








	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14
Firms with Earned Revenue	1582	1789	1911	2516	2840	3135	3197	3093	2742	2794
New Awardees	1442	1588	1702	2248	2476	2753	2738	2631	2255	2454
Negative and Neutral Revenue Firms	46	70	127	103	127	205	250	252	309	279
All SDVOSB Set-Aside Awardees	10	158	493	774	810	845	790	766	690	761
All SDVOSB SAP Set-Aside Awardees	4	1	0	1	0	268	341	333	306	337



	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14
New Awards	4,409	4,836	5,323	7,818	8,599	9,414	9,295	9,289	8,601	9,146
Accretive Mods	1,556	2,173	2,503	3,408	4,389	5,745	6,204	6,436	6,638	6,666
All SDVOSB Set-Asides	10	158	718	1,361	1,367	1,535	1,420	1,463	1,521	1,818
SDVOSB Sole Source Set-Asides	1	44	163	196	162	135	104	104	87	94
SDVOSB Competitive Set-Asides	9	114	555	1,165	1,205	1,400	1,316	1,359	1,434	1,724

The research highlights the need to create a growth pathway from low-dollar simplified acquisitions to more complex buys. The research also demonstrates that contracting officers have trouble deciding on when to use discretionary SDVOSB set-asides. For this reason, the research recommends a Business Development Program for SDVOSB's, agency-specific or government-wide.

Sixth, the Kingdomware decision demonstrates the need for continued research and education of the acquisition workforce in service-disabled veteran-owned small business contracting. Contracting officers will need to be taught and trained in applying this decision and its reasoning. The implementation of this case and related initiatives deserves continued analysis.

In this regard, the Advisory Committee (ACVBA) received a written disclosure from Prof. Kidalov that the Naval Postgraduate School (NPS) will no longer be conducting research, instruction, or advisory service in support of veterans contracting and small business contracting. Instead, senior NPS leaders are now committing an estimated $800,000 in Department of the Navy (DON) Operating Funds over the next three years to subsidize a program of anti-small business and anti-service-disabled veteran-business advocacy, service, and education at the NPS Graduate School of Business and Public Policy (GSBPP). NPS GSBPP educates contracting officers and program managers from across the Armed Forces and civilian agencies like the VA. This is a very significant adverse development for the veteran business community. It also appears to be a significant deviation from Federal laws and Navy policies requiring support of small and veteran businesses, and may well constitute unlawful censorship of pro-small business research and analysis. This new advocacy program will be run by one of the leading opponents of small business and SDVOSB contracting who was specifically recruited by NPS in recognition of his vocal testimony before Congress against the 2003 SDVOSB law and even against SDVOSB's getting Recovery Act contracts. The same academic is famous for arguing that veteran small

business contracting is inherently inefficient and costly – both arguments unanimously rejected by the Supreme Court in Kingdomware. His writings suggest that Navy and VA buyers will now be taught that ignoring "selfish" SDVOSB's is the true "public service." According to the documents provided to the Advisory Committee, among other things the new NPS program will advocate for less measuring of small business participation in defense contracts. The new NPS program will also seek to reaffirm that service-disabled veterans "do not matter" in defense contracting. Advocacy initiatives like this should be reviewed by the Senate Small Business Committee to ensure that Congressional veterans priorities are not undermined.

NPS is a known leader in the research and analysis of procurement legislation. Their work is useful not just for the procurement workforce within DOD but for the VA as well. To lose an ally of the veteran small business community the SBA, and Federal small business program offices would be detrimental to the implementation of the Supreme Court Decision and related programs.

Closing Remarks

The Kingdomware case has established that the VA must adhere to the rule of 2 for all procurements including the Federal Supply Schedule. With minimum impact to government resources, this procurement doctrine change should not impose a severe burden on the VA. This decision is a significant win for the Veteran small business community but it's not a perfect solution and barriers still exist. With the support of congress and this Committee, the SBA could achieve a Service Disable Veteran Owned Business Development Program within their current authority.

With the Supreme Court ruling unanimously to uphold Veteran Business preferences at the VA, this Committee has the opportunity to leave a bipartisan legacy with an equally resounding statement as the Supreme Court's, to break the cycle and organize veteran business resources into one program.

Chairman Vitter, Ranking Member Shaheen and the distinguished members of the Committee, thank you for this opportunity to testify this morning and I look forward to your questions.