

**STATEMENT OF THOMAS J. LENEY
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BEFORE THE
SENATE COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP
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Chairman Vitter, Ranking Member Shaheen, and Members of the Committee, thank you for inviting me to testify on the ramifications of the Supreme Court's June 16, 2016, decision in *Kingdomware Technologies, Inc. v. United States*, 579 U.S. ____ (2016), concerning the statutory mandate for use of Veteran-owned small business (VOSB) set-asides at the Department of Veterans Affairs (VA). The Court held that VA's set-aside law was mandatory and must be applied to all competitive contract awards, including orders on the Federal Supply Schedules. Awards must also be made to VOSBs verified as such by VA.

As a starting point, VA will comply immediately with the Court's decision. The Office of Small and Disadvantaged Business Utilization, and our counterparts in VA's Offices of Acquisition, Logistics and Construction and General Counsel, are identifying and addressing the policy and operational changes required. While VA's previous policy was found to be consistent with the law by two subordinate Federal courts, *Kingdomware* represents a correction of our understanding of the Veterans First mandate.

We have already engaged VA's acquisition workforce with new guidance, focusing most urgently on procurements currently in process, but not yet awarded. VA operates a health care system that must remain staffed and supplied 24 hours a day, seven days a week. Acquisitions to support these activities must proceed without undue delay, while also remaining within legal requirements. Accordingly, VA acquisition professionals will continue to work diligently on new acquisitions while policymakers fully determine *Kingdomware's* implications and issue new guidance.

In the interim, we have already taken action to address the Court's recent decision. For example, we have modified VA's Procurement Review Policy, issued by my office, to require the review of all procurements not set aside for VOSBs. We have also directed VA's contracting officers to review all active procurements to determine whether VOSBs were appropriately considered in the market research. In addition, because verification is mandatory for VOSB and service-disabled Veteran-owned small business (SDVOSB) set-asides, market research should rely on VA's database of verified firms as a starting point for the Rule of Two analysis, as described below.

The FAR provides a policy framework, under which VA can adopt Department-specific rules in its Veterans Affairs Acquisition Regulation, also known as the VAAR.

For long-term planning, these changes must be accomplished through formal rulemaking, but this also provides opportunities for the public to participate in this process through public comment. In addition, VA will seek input from Veteran advocates and the public, which we view as essential. We welcome advice from you and our other Congressional stakeholders.

While the policy guidance is critically important, it is equally important to improve our operational practices. Most notably, we must become more effective and more systematic at market research in support of our VOSB and SDVOSB goals, as well as our other small business contracting goals. The FAR already requires Federal agencies to conduct market research, to help contracting officers determine whether they have a reasonable expectation of receiving two or more offers, at fair and reasonable prices. This determination, commonly referred to as the Rule of Two, enables contracting officers to determine whether a set-aside for VOSBs or SDVOSBs is appropriate under the law, as amplified by the Court's ruling.

In addition, contracting officers and their program office customers need to have confidence that VOSBs can execute the contracts awarded to them. VA wants our contractors to be successful without unnecessary delays, higher costs, and added risks to VA's mission. This is one reason why some personnel may perceive large business contractors as a safer choice, because they believe large firms' internal quality assurance programs will mitigate these risks. In this view, small businesses may look like a riskier choice.

I believe we can overcome this perception with more extensive market research. This means market research must consist of more than merely finding firms in a particular industry code listed in the System for Award Management. Contracting offices can make better use of Requests for Information, or RFIs, for data-driven decision making. Additionally, program offices need to meet with procurement-ready VOSBs to understand their capabilities and what they are already accomplishing. Learning about innovative, new technologies will help program offices define their requirements in delivering services to Veterans. VA also will seek to improve our capacity to retain and share market research for recurring requirements, consistent with acquisition restrictions and protection of proprietary business information.

Accordingly, the Court's decision is an opportunity for VA to improve our best practices. We understand that work is needed in this area. In the days and weeks ahead, we will scrutinize and adapt our policies, while keeping vital procurements moving forward. VA can also make a quantum improvement to our engagement with small business, especially VOSBs and SDVOSBs, by strengthening our market research.

Doing so is consistent with Secretary McDonald's MyVA transformation plan that puts the needs, expectations and interests of Veterans first. In this case, embracing the Court's decision in *Kingdownware*, improves the Veteran experience, both as Veteran

small business owners and as Veteran customers receiving the health care and benefits they have earned and deserve.

Mr. Chairman, this concludes my testimony. I am pleased to answer any questions you or the other Members of the Committee may have.