

**U.S. Small Business Administration
Washington D.C. 20416**

Thursday, June 23, 2016

Written Testimony of

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Before The

**United States Senate
Committee on Small Business and Entrepreneurship**

Hearing Entitled

Beyond the Bench: Ramifications of the Supreme Court Kingdomware Decision

To Chairman Vitter, Ranking Member Shaheen, and members of the committee thank you for the opportunity to testify.

Small businesses are agile, innovative, and affordable partners for the federal government. Through small business contracting, the federal government acts as a catalyst for small business growth and innovation, while supporting the economic security of the nation. Over the past seven (7) years, the Administration, Congress, SBA, and federal agencies have been focused on increasing small business contracting opportunities across the federal government. This increased focus has resulted in over \$640 billion in federal contracting dollars being awarded to small businesses from Fiscal Years (FY) 2009-2015. Of that, \$90.7 billion was awarded in FY 2015, which represents an incredible impact to the American economy that drives innovation, growth, job creation, and support of over 537,000 jobs across the Nation.

In fact, FY 2015 is the 3rd consecutive year the federal government exceeded the 23 percent small business prime contracting procurement goal, awarding 25.75 percent of eligible contracts to small businesses. This is the highest percentage recorded in history. Additionally, the federal government achieved the Women-Owned Small Business (WOSB) goal of 5 percent

for the first time in history, doubled the Small Disadvantaged Business (SDB) goal, and achieved the highest percentage of contract awards to Service-Disabled Veteran Owned Small Business (SDVOSB) at 3.93 percent. To accomplish these achievements, federal agencies serve as our partners supporting small business participation and growth. During FY 2015, the federal government as a whole received an A on its Small Business Scorecard, with 3 of the 24 agencies receiving an A+, and 18 agencies receiving an A. These achievements are the result of the dedicated and focused efforts by the SBA and federal agencies to support small businesses, as they play a critical role in building and sustaining the nation's industrial base and strengthening the economy.

We are proud to serve as chair of the Small Business Procurement Advisory Council (SBPAC), which brings together the Office of Small Disadvantaged Business Utilization agency advocates and small business directors to share best practices for maximizing small business participation and breaking down barriers that may stand in the way of reaching new and established small businesses. We are equally proud to chair the Interagency Task Force on Veterans Business Development, which coordinates efforts to improve opportunities and access for small businesses owned by veterans and service-disabled veterans in federal contracting, capital, counseling, and other business development tools and services. The strong agency support and collaboration that occurs through both of these bodies has enabled positive impactful change in the way the federal government does business with the small business community and our taxpayers are the ultimate benefactor.

One of the tools agencies utilizes to support accomplishing their small businesses goals is the small business set-aside, which utilizes the "rule of two" as a core principle. The rule of two is a well-known principle, which says if a contracting officer has a reasonable expectation of receiving offers from two or more small business concerns that can perform at fair market prices, the acquisition shall be set-aside for exclusive competition among small business concerns. In the case of *Kingdomware Technologies v. United States*, the U.S. Supreme Court, in a unanimous decision on June 16, 2016, determined that the rule of two applied to all

Department of Veterans Affairs (VA) procurements, including purchases under the General Services Administration's (GSA) Federal Supply Schedule (Schedule) program.

The Kingdomware case centered on the Veterans Benefits, Healthcare, and Information Technology Act of 2006, which stated the VA shall set-aside an acquisition for Service-Disabled Veteran Owned Concerns or Veteran Owned Concerns if the rule of two applied. In this case, the VA argued the mandatory set-aside provisions do not apply to orders under pre-existing schedule contracts. The Supreme Court (Court) rejected these arguments and essentially determined orders under the Schedule are, in fact, contracts and the rule of two does apply. The Court noted the VA's statute did not provide an exception for orders under Schedule contracts. The Court did not address the use of order set asides by other agencies.

We are carefully reviewing the potential impact of the Kingdomware case, both in terms of small business goaling and the operation of the Small Business Act. The limitation on the VA's discretion to consider use of other small business programs when the rule of two can be met by service disabled veteran owned small businesses will likely affect the level of awards made by the VA to support WOSBs, 8(a) and SDBs, and HUBZone small businesses, all of which have experienced important positive upward trends in recent years. As you know, through its parity regulations, which this Committee has been helpful in preserving over the years, SBA vests contracting officers with discretion to decide which small business program can best satisfy an agency's acquisition requirement. This flexibility helps both SBA and agencies in fulfilling their goaling responsibilities.

The Kingdomware decision may have government-wide procurement implications because previously the Government Accountability Office (GAO) and lower courts have held the statutory rule of two does not apply to orders placed under Schedule contracts. These previous decisions were based on the interpretation of statute for the Schedule program and the Federal Acquisition Regulation, which provided that the small business preference programs are not mandatory when ordering off of a Schedule contract.

Since the Kingdomware decision is silent on the construction of the Small Business Act, it is unclear what impact the ruling has beyond VA and its use of the VA statute. SBA will be conferring with the Department of Justice, the SBPAC, GSA (as managers of the Federal Supply Schedules), the Federal Acquisition Regulatory Council, and others to discuss if any changes to regulations are needed.

Our mission at the SBA is to always ensure that responsible small businesses, capable of performing requirements, have the maximum practicable opportunity to compete for government contracting opportunities in any arena. We are diligently working to fulfill that mission. I would like to recognize the commitment to small businesses from the Congress, and acknowledge the Administration and federal agencies for recognizing the value of small businesses, and remaining committed to providing meaningful contracting opportunities. Led by Administrator Contreras-Sweet, we will continue to fight for small businesses to improve participation for firms to compete and successfully win federal contracting opportunities.

Thank you for the opportunity to testify here today. I look forward to your questions.