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Memorandum

This memorandum provides our legal opinion regarding whether a contracting officer for the U.S. Department of Veterans Affairs ("VA") must set aside a solicitation for Service Disabled Veteran Owned Small Businesses ("SDVOSBs") or other small business concerns despite the existence of so-called "mandatory" Federal Supply Schedule ("FSS" or "GSA Schedule") requirements or other procurement vehicle requirements, such as a requirement that an acquisition be obtained under the VA medical/surgical prime vendor ("MSPV") program.

As discussed further in this memorandum, it is our legal opinion that a VA contracting officer must set aside a contract for SDVOSBs when the contracting officer has a reasonable expectation that two or more SDVOSBs will compete for the contract. This Rule of Two analysis should be conducted prior to satisfying any other procurement regulations, such as those pertaining to the FSS, as well as the MSPV program. Failing to conduct a Rule of Two analysis would be contrary to the U.S. Supreme Court's recent unanimous decision in Kingdomware Technologies, Inc., v. United States, No. 14-916 (2016).

I. Background

Red One Medical Devices, LLC, is a VA-verified SDVOSB. Red One is a reseller and provides medical devices, primarily implants to be used in spinal surgeries. It seeks to do business with various VA hospitals. However, one VA contracting officer recently declined to do business with Red One. The Contracting Officer explained that the VA's regulations require buying certain medical products off of the GSA Schedule, without first determining whether two or more SDVOSBs are likely to submit offers.

As explained below, it is our legal opinion that the VA contracting officer is incorrect. As the Supreme Court recently held, federal law (and the VA's own implementing regulations) require the VA to prioritize SDVOSB and VOSB procurements. There are no exceptions for GSA Schedule buys.

II. Discussion

The contracting officer's representation that she cannot purchase these items from Red One appears legally

flawed: it is inconsistent with the VA's "Rule of Two," and is also inconsistent with the VA's own regulations. And beyond the black-and-white law, the contention that the officer must buy off only the GSA Schedule is contrary to the VA's mission to promote and assist veteran-owned businesses.

The "Rule of Two" is a Congressional mandate set forth in 38 U.S.C. § 8127(d) and the VA's FAR supplement (the "VAAR") implementing that statutory mandate. It was enacted in 2006 with the specific purpose of ensuring that the VA prioritizes veteran-owned businesses. Under 38 U.S.C. § 8127(d), the VA is required to "award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d).

The contracting officer is correct that the VA's regulations ordinarily prioritize the GSA schedule for supply sources. See VAAR 808.002(a)(3). However, the priorities under VAAR 808.002 apply only to the extent the law does not provide for a different requirement. See VAAR 808.002(a)(3) (citing FAR 8.002 (a) (VAAR regulatory priorities apply "[e]xcept . . . as otherwise provided by law[.]")) The Rule of Two under 38 U.S.C. § 8127(d) is the very sort of exception specifically contemplated by the VAAR and FAR. Therefore, the Contracting Officer should only apply the otherwise-mandatory provisions of VAAR 808.002 after she has conducted a Rule of Two analysis, as required by 38 U.S.C. § 8127(d). If the Contracting Officer finds that she is reasonably expected to receive two or more offers from qualifying SDVOSBs at fair market prices, the acquisition should be set-aside for SDVOSBs.

In our view, the interaction of VAAR 808.002 and 38 U.S.C. § 8127(d) is clear and unambiguous, and the Rule of Two must be given priority. But even if the statue and the VAAR were in conflict, the statute would control. As a statute duly passed by Congress, 38 U.S.C. § 8127(d) carries much more weight and is a higher authority than any regulation adopted by the VA.

To prioritize non-SDVOSB GSA schedule holders over willing and able SDVOSB vendors simply because of this regulation is contrary to the Supreme Court's unanimous Kingdomware decision. In its decision, the Court writes that "[Section] 8127 unambiguously requires the Department to use the Rule of Two" before applying other procedures. The Court points out that the statute includes the word "shall," and writes "[u]nlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."

Accordingly, "the [VA] shall (or must) prefer veteran-owned small businesses when the Rule of Two is satisfied."

The contracting officer may believe, as the VA argued in Kingdomware, that orders under the GSA Schedule are exempt from 38 U.S.C. § 8127(d) because the statute refers to "contracts" and not orders, and that orders are not contracts. But the Supreme Court disagreed. In Kingdomware, the Court explained that "[w]hen the Department places an FSS order, that order creates contractual obligations for each party and is a 'contract' within the ordinary meaning of that term." The Court also explained that an order is a contract "as defined by federal regulations," particularly FAR 2.101." Moreover, the VA's own regulation implementing Section 8127 does not use the term "contract" to describe the VA's Rule of Two set-aside obligations. Instead, VAAR 819.7005 and VAAR 819.7006 both state that the VA "shall set aside an acquisition" for SDVOSBs or VOSBs when the Rule of Two conditions are met.

Thus, in our opinion, orders of medical/surgical products are "contracts" like any other, and subject to the plain mandate of Section 8127. It follows, then, that the VA cannot simply require that VA Medical Centers purchase all covered medical and surgical products from the FSS, MSPV, or another vehicle regardless of whether the vendors are SDVOSBs. Instead, just as with any other acquisition, the VA must first perform a "Rule of Two" analysis, and may only buy from a non-veteran source when the conditions of the "Rule of Two" are not satisfied. To do anything else would violate the Supreme Court's clear mandate in Kingdomware.

While this Memorandum has focused on legal matters, we would be remiss not to briefly address the deep policy concerns created by the contracting officer's stance. Freezing out veteran owned small businesses from participation in doing business with the VA contravenes the VA's core value of "[being] truly veteran-centric by identifying, fully considering, and appropriately advancing the interests of veterans . . . ." 38 C.F.R. § 0.601(c). The contracting officer's decision to buy off only GSA Schedule vendors does not fulfill the VA's commitment to being veteran-centric because it effectively excludes veteran-owned medical supplier participation in the sale of covered medical and surgical items.

This is especially true considering the length of time required to obtain a GSA Schedule contract. In many cases, it takes at least a year and sometimes as long as two years to obtain such a contract. Many small businesses begin and fail within that timeframe. Buying only from GSA Schedule vendors puts SDVOSBs

and VOSBs at the complete mercy of their approval of that contract. One can call such a system many things, but one certainly cannot call it "Veterans First."

Finally, leaving aside the Rule of Two, the contracting officer's representation that she must buy these items off the GSA Schedule is still incorrect. VAR 808.002(a)(3) does prioritize GSA Schedule items, but there are a number of exceptions, first of which being that the VAAR only requires purchasing off the GSA Schedule items that are specifically identified. The regulation mandates prioritizing contracts awarded in Federal Supply Classification (FSC) groups 65 and 66. Group 65 includes (65IIA) Medical Equipment and Supplies. Category 65IIA includes the product code 6515, Medical and Surgical Instruments, Equipment, and Supplies.

There is, however, no Special Item Number ("SIN") under 65IIA for spinal implants. Of all the SINs, the most likely to encompass spinal implants is A-20C, Other Implants, Surgical. According to the VA, when an item falls within FSC 65/66 but is not covered by an existing SIN, the contracting officer may order the item using open market procedures. See Office of Acquisitions and Logistics, Open Market Waiver Request Process ("If your research indicates that the required product falls within FSC 65/66 but it is not covered by an existing SIN category you are not required to submit a waiver request and you may order the item using open market ordering procedures."). Therefore, because spinal implants are not covered by a FSC 65/66 SIN, the contracting officer need not apply the priority requirements of VAAR 808.002.

Second, VAAR 808.002(b) allows the contracting officer to skip steps in priority when the need for supplies or services is of an unusual or compelling urgency. In order to select a lower priority source, the contracting officer need only include a justification for the deviation in the procurement file. In this case, such a justification could easily be the need for speed associated with spinal procedures.

Third, the contracting officer can submit an open market waiver request with the Office of Acquisitions and Logistics ("OAL"). See Office of Acquisitions and Logistics, Open Market Waiver Request Process. To get a waiver, the officer has to conclude either 1) a like or similar item is on Schedule, but there is a compelling clinical need to use a non-contract item; or 2) the schedule program does not offer a like or similar item. Id.

Here, we are assuming that a similar item is available on the GSA Schedule. However, if the surgeon in question believes that her patients are more likely to have a better outcome when using the product

offered by Red One, we believe that this would justify a waiver. Although a physician's personal preference is not indicative of compelling clinical need, here, this is not merely a personal preference, this is a genuine belief that patients are better off when this product is used. In other words, we are not talking about a preference for certain types of sutures or scalpels, we are talking about the difference between people having demonstrably better lives following the procedure. That, indeed, is a compelling clinical need. Due to this need, the contracting officer should be able to request a waiver and buy from Red One.

III. Conclusion

It is our considered legal opinion that the contracting officer's belief that she must buy from the GSA Schedule is mistaken. Instead, as clearly stated by the Supreme Court in Kingdomware, the contracting officer must prioritize SDVOSBs by applying the Rule of Two under 38 U.S.C. § 8127(d). And even assuming that the Rule of Two did not apply, the items in question fall under VAAR exceptions, which would allow VA contracting officers to purchase them from Red One.

We look forward to discussing these matters with you.

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