No. 14-916

IN THE
Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government argued for years—and convinced the Federal Circuit to hold—that the "for purposes of meeting the goals" clause in 38 U.S.C. § 8127(d) limits the mandatory "shall award" language of the statute. Faced with the irrefutable error of that position, the government has now abandoned it and conceded that § 8127(d) "imposes a mandate" (U.S. Br. 24) that does not depend on the agency's progress in meeting the Secretary's annual goals (*id.* 25, 48).

The government's concession cannot save its new position. Nor is the concession the government's first tactical retreat. The VA originally tried to give itself discretion, despite § 8127(d)'s mandatory language, by pointing to provisions in the Federal Acquisition Regulation that exempt Federal Supply Schedule procurements from the small business set-asides *in FAR part 19*. Pet. Br. 17-18. After the Government Accountability Office rejected that view—explaining that FAR part 19 implements the Small Business Act and does not control the application of the separate, VA-specific Rule of Two in § 8127(d)—the VA turned to the "for purposes of" clause as a fallback. *Id.* 19-20.

Now that its fallback has failed as well, the government presents yet another new argument, contending for the first time in this nearly decade-long dispute that the VA need not consider the Rule of Two before placing orders from the FSS program because such orders are not "contracts" within the meaning of § 8127(d). U.S. Br. 25-30. It is no accident that the government never thought of this theory before. The notion that an FSS order requiring a supplier to provide goods or services and obligating the government to pay for them is not a "contract" defies the plain

meaning of the term, a point that even the government concedes. *Id.* 27. Even focusing solely on the context of government acquisitions, the government's new position conflicts with the definition of "contract" in the FAR and the usage of the term in other statutes, including the Small Business Act.

The failure of the government's textual argument leaves only an unsupported assertion that Congress intended the 2006 Veterans Act to operate in the same way as the Small Business Act. But the 2006 Veterans Act was a pointed departure from the Small Business Act, adopted because two prior amendments to that Act had failed to accomplish Congress's purposes. By creating a mandatory contracting preference specific to the VA, Congress sought to ensure that veteran-owned small businesses are "routinely … granted the primary opportunity to enter into VA procurement contracts." H.R. Rep. No. 109-592, at 14-15 (2006). Congress did not contemplate an enormous FSS loophole that would exempt as much as 60% of VA procurements.

The VA's own regulations also undercut the government's newly conceived litigating position. The regulations require consideration of the Rule of Two for all "acquisitions," a term that includes placing orders from the FSS program. Although the preamble to the final rule contradicted that command by asserting that the Rule of Two does not apply to FSS orders, the preamble made no mention of any putative distinction between "contracts" and "orders." Instead, it relied on a flawed reading of FAR part 19 that the government has long since abandoned. No deference is owed to the government's *post hoc* rationalization for the VA's action.

Finally, the government's brief is replete with unfounded assertions that mandatory consideration of the Rule of Two will be onerous or will cause VA procurement to grind to a halt. The VA already has a database of eligible veteran-owned small businesses to consult; § 8127(d) applies only if "the award can be made at a fair and reasonable price that offers best value"; the VA retains the option to further streamline the process by awarding sole-source contracts under § 8127(b)-(c); and in the many instances in which the Rule of Two is not met, the VA can use other procedures, including the FSS. Congress made a considered judgment regarding the best way to serve veterans, and this Court should reject the government's invitation to rewrite that mandate.

Even the government concedes that the Federal Circuit's decision was wrong with respect to open-market purchases, and the government's attempt to carve out an exemption for FSS orders is meritless. The judgment should be reversed.

I. SECTION 8127(d) REQUIRES THE VA TO CONSIDER THE RULE OF TWO BEFORE USING THE FSS PROGRAM

A. The Government's Textual Distinction Between "Contracts" And "Orders" Fails

1. Section 8127(d) applies when the VA "award[s] contracts." The government acknowledges (at 27) that, by placing an FSS order, a contracting officer "creates further contractual obligations" and that issuing such an order "could reasonably be described" as awarding a contract under the plain meaning of "contract." *See, e.g.*, *Black's Law Dictionary* 341 (8th ed. 2004). Its entire case therefore rests on establishing that "contract" as used in § 8127(d) has a specialized meaning, excluding FSS orders. That textual argument fails.

First, the government never confronts the *definition of "contract"* in the FAR. Since the FAR was first promulgated, it has defined a "contract" as any "mutually binding legal relationship obligating the seller to furnish the supplies or services … and the buyer to pay for them," including "all types of commitments that obligate the Government to an expenditure of appropriated funds." 48 C.F.R. § 2.101; *see Establishing the Federal Acquisition Regulation*, 48 Fed. Reg. 42,102, 42,107 (Sept. 19, 1983).[1] If Congress intended to adopt any specialized meaning of "contract" in § 8127(d), it would be the FAR definition.

Applying that definition, an order under a preexisting FSS contract is itself a "contract." Placing the order creates a "mutually binding legal relationship" and "obligate[s] the Government to an expenditure of appropriated funds." Even though the FSS contract may be with the GSA, the order creates an enforceable obligation between the supplier and *the ordering agency*. *E.g.*, 48 C.F.R. § 8.406-3(a) (remedies for the "ordering" agency if "a contractor delivers a supply or service" that "does not conform to the order"). The order also specifies the performance to be rendered. *Id.* § 8.406-1(d) ("Orders shall include," among other things, key terms such as "Quantity," "Delivery time," and "price").

Accordingly, the GAO has found that the "issuance of a purchase/delivery order pursuant to an FSS con-

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[1] The FAR also provides a non-exhaustive list of examples of "contracts"—including "awards" and various "orders." 48 C.F.R. § 2.101. The most comprehensive dictionary of procurement terms further confirms that "contract" is used broadly in this context. Nash et al., *The Government Contracts Reference Book* 121 (2d ed. 1998).

tract generally gives rise to a legal and binding contract incorporating both the FSS contract provisions and the specific terms of the purchase/delivery order." *Matter of Lanier Bus. Prods.*, 1977 WL 12991, at *2 (Comp. Gen. May 11, 1977); *see also, e.g.*, *AmerescoSolutions, Inc.*, ASBCA Nos. 56824 & 56867, 11-1 BCA ¶ 34,705, at 170,905 (2011) (FAR definition of "contract" is "sufficiently comprehensive to include 'delivery' orders").

Second, the government's attempt to categorically exclude FSS orders from the term "award[ing] contracts" ignores the procedures for placing orders. For services, a contracting officer often must generate a "statement of work"—*i.e.*, a "description of work to be performed" that fills in important details not specified in the schedule itself. 48 C.F.R. § 8.405-2(b). The officer must then issue a request for quotation and evaluate the responses from solicited FSS contractors that are interested. *Id.* § 8.405-2(c)-(d). Only then does the officer place an "order" that requires the contractor to perform and the government to pay for the *particular* task described in the statement of work.

Similarly, for orders above the simplified acquisition threshold (generally $150,000), the contracting officer cannot simply shop from a marketplace. Instead, the officer generally must issue a request for quotation and solicit competitive offers from multiple schedule contractors. 48 C.F.R. § 8.405-1(d)(2)-(4); *see* 41 U.S.C. § 3302(c) (requiring competition); Iraq & Afg. Veterans Br. 14-18 (FSS "orders" are used for multi-million dollar procurements requiring complex acquisition procedures).

These procedures rebut the government's attempt to categorically distinguish between placing orders and "award[ing] contracts." Rather, for "multi-award con-

tracts, such as … FSS contracts," "the underlying contract is simply an invitation to participate in future competitions for *contracts*." *LB&B Assocs. Inc.* v. *United States*, 68 Fed. Cl. 765, 772 (2005) (emphasis added).

Third, the government's crabbed reading of "contract" would imperil the FSS program's legal foundation, a central premise of which is that no binding commitment of government funds exists *until* an order is placed. Under federal appropriations law, no employee may "involve [the] government in a contract or obligation for the payment of money before an appropriation is made." 31 U.S.C. § 1341(a)(1)(B) (Antideficiency Act); *see also* 41 U.S.C. § 6301(a) (Adequacy of Appropriations Act). When GSA began negotiating supply schedules lasting more than one fiscal year, it feared involving "the Government in a contract for a period of time" beyond current appropriations. *Matter of GSA—Multiple Award Schedule Multiyear Contracting*, 63 Comp. Gen. 129, 131 (1983). The GAO concluded, however, that multiyear schedules are permissible precisely because they do "not actually bind the Government to make a payment unless and until it … issues a purchase order." *Id.* The government's novel theory that in FSS procurements the award of the schedule itself is the only "contract"—*i.e.*, the only "commitment[] that obligate[s] the Government to an expenditure of appropriated funds," 48 C.F.R. § 2.101—would imply that multiyear schedules are unlawful.

Fourth, the VA's own regulations include a chart that refers to "task/delivery *orders* … includ[ing] orders under Federal Supply Schedule contracts" with an "[a]nticipated *contract* award value" of $500,000 or more. 48 C.F.R. § 801.602-71 (emphases added). The government has also repeatedly referred to the task

order at issue in this case as a "contract." *E.g.*, U.S. Br. 18; Opp. 10; JA13, 31.

Fifth, the government's textual argument is inconsistent with numerous statutes that apply by their terms to "contracts" and yet have been understood to apply to FSS orders. Adopting the government's theory would threaten the settled understanding of a host of other laws.

To start, the Small Business Act—the statute to which the government repeatedly seeks to compare the 2006 Veterans Act—requires the federal government to set annual "goals for procurement contracts awarded to small business concerns." 15 U.S.C. § 644(g)(1)(A). FSS orders are counted as "contracts awarded to small business concerns" for purposes of those annual goals. 48 C.F.R. § 8.405-5(b) ("Orders placed against schedule contracts may be credited toward the ordering activity's small business goals."); *accord* 48 C.F.R. § 8.405-5(a) (2006).

The GAO bid protest statute is similar. With an exception not relevant here, all the procurement activities that may give rise to a "protest" must involve "a contract for the procurement of property or services." 31 U.S.C. § 3551(1)(A). The GAO has interpreted that language to "include[] solicitations and awards of *orders under the FSS*." *Matter of Savantage Fin. Servs., Inc.*, 2013 WL 21663045, at *4 (Comp. Gen. June 11, 2003) (emphasis added).

The Contract Disputes Act likewise applies to procurement "contract[s]." 41 U.S.C. § 7102(a). The government's theory that this term would not apply to disputes about orders is contrary to established practice. *E.g.*, *U.S.I.A. Underwater Equip. Sales Corp.* v. *DHS*,

CBCA No. 2579, 14-1 BCA ¶ 35,503, at 174,026-174,027 (2014) (Disputes Act appeal from FSS order).

Similarly, various statutes disqualify contractors from eligibility for the award of a "contract" as a form of sanction. *E.g.*, 41 U.S.C. § 6504(b) (Davis-Bacon Act). The FAR implements these debarment statutes in part by prohibiting further "orders" under pre-existing FSS "contracts." 48 C.F.R. § 9.405-1(b).

2. Against all this textual evidence, the government's counterexamples of putative distinctions between "contracts" and "orders" are unpersuasive. The government points (at 27-28) to the terminology used in FAR part 8 to distinguish schedule "contracts" from "orders." But that terminology is unremarkable. Distinguishing GSA-negotiated master schedules from agency-specific orders is useful in describing the precise mechanics of the program, but doing so does not imply that FSS "orders" are not also "contracts," as they clearly are under both the plain meaning of the term and the FAR definition. *Supra* pp. 3-5.[2]

The government also relies (at 28-29, 36) on 15 U.S.C. § 644(r), which was enacted in 2010 and which directs the Small Business Administration and GSA to promulgate regulations to permit agencies to "set aside orders placed against multiple award contracts for small business concerns." Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1331, 124 Stat. 2504, 2541. However, § 644(r) contradicts the government's textual theory. Congress enacted that law not to create new "order" set-asides, but rather to clarify that the set-

[2] None of the statutes cited by the government (at 28) suggests that Congress uses the term "contracts" to *exclude* "orders" or that orders are not a type of contract.

asides *already* enacted elsewhere in the Small Business Act (using the term "contracts") may be applied to FSS orders. S. Rep. No. 111-343, at 7 (2010) (purpose was "to correct the very mixed record" of set-asides for multiple-award contracts and to "provide[] clear direction" permitting set-asides).

The regulations implementing § 644(r) reflect that understanding. Rather than create entirely new procedures, the regulations incorporate existing set-aside programs. *Set-Asides for Small Businesses*, 76 Fed. Reg. 68,032, 68,033 (Nov. 2, 2011). There would have been no lawful basis for doing so under the government's theory, as the existing Small Business Act set-asides do not (under its view) apply to orders. Moreover, the Small Business Administration implemented § 644(r) by promulgating new definitions that are emphatically at odds with the government's argument. The regulations define the term "contract" as "includ[ing] orders against Multiple Award Contracts," such as "GSA Schedule Contract[s]." *Acquisition Process*, 78 Fed. Reg. 61,114, 61,134 (Oct. 2, 2013) (codified at 13 C.F.R. § 125.1(d), (k)).

3. The government's textual theory also finds no support in the language of the 2006 Veterans Act or surrounding provisions. The government suggests (at 33) that reading "contracts" in § 8127(d) to include FSS orders would render § 8127(i) superfluous, but that is mistaken. Section 8127(d)'s mandate is triggered only when there is a "reasonable expectation that two or more" veteran-owned small businesses will submit offers. When the Rule of Two is not satisfied, such as when there is only *one* eligible business, § 8127(i) requires the VA to prioritize the discretionary set-asides in § 8127(b) and (c) over any other applicable Small Business Act set-asides. And § 8128 in turn requires

the VA to prioritize veterans even *within* those other set-asides. In each case, Congress made clear its intention to consider veterans first, before turning to other potential sources of supply.

The government's reliance (at 30-31) on references to the FSS in 38 U.S.C. §§ 8125-8126 is also misplaced. Both sections were enacted well before the 2006 Veterans Act, and neither addresses the government's putative "contract/order" distinction. Reading § 8127(d) to require the VA to consider veteran-owned small businesses before turning to the FSS program is perfectly congruent with other statutes indicating that the FSS program is an available source of supply. And to the extent those other statutes may make it less likely that the Rule of Two would be satisfied in any particular procurement for the items they cover, it serves only to alleviate the VA's exaggerated policy concerns regarding medical care (*infra* pp. 19-22), not to justify a blanket FSS exemption even when the Rule of Two is met.

Finally, despite abandoning its "goals"-based interpretation, the government reprises its argument (at 32) that the Secretary's "discretion to set goals" under § 8127(a) would be rendered "insignificant." However, the government simply ignores the important role of the goals in fostering transparency and accountability, guiding the discretionary use of § 8127(b) and (c), and shaping training and outreach efforts. Pet. Br. 37-38.[3]

[3] It is far from clear that the VA has met its goals in practice. The government complains (at 52-53) that "[t]he record in this case does not include any evidence" of the inaccuracies that led the VA's chief procurement officer to become a whistleblower (*see* Pet. Br. 24 n.2, 57-58). But that uncertainty is precisely why a remand would be necessary if, notwithstanding the government's conces-

B. The Government's Analogy To The Small Business Act Also Fails

Unable to rely on the statutory text, the government seeks to ground its argument in the "statutory and regulatory backdrop" against which § 8127(d) was enacted, specifically the exemption of FSS orders from Small Business Act set-asides. U.S. Br. 27. That enterprise is flawed from start to finish.

1. Much of the government's brief proceeds from the false premise that "Congress intended for Section 8127 to operate in the same fundamental way as the prior small-business contracting preferences upon which it was modeled." U.S. Br. 30. Congress enacted the 2006 Veterans Act after two prior amendments to the Small Business Act failed. Members of Cong. Br. 9. Rather than enact another discretionary government-wide set-aside in the Small Business Act, Congress changed course and created a mandatory set-aside specific to the VA—changing the statutory language from "may" to "shall" and placing the new provision outside the Small Business Act. *Compare* 15 U.S.C. § 657f(b), *with* 38 U.S.C. § 8127(d); *see also* Pet. Br. 11-13, 30, 41-42. Congress thus intended that veteran-owned small businesses would "routinely be granted the primary opportunity to enter into VA procurement contracts," H.R. Rep. No. 109-592, at 14-15 (2006), not relegated to an FSS afterthought. Tellingly, the government nowhere addresses that history.

The government's reading of § 8127(d) would rob Congress's imperative—"shall award"—of much of its force. The government now concedes (at 25) that

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sion and all the arguments to the contrary, the Court were to read the "for purposes of" clause as limiting.

§ 8127(d) is mandatory for open-market acquisitions, but it still maintains (at 51) that the VA "always has discretion" to avoid the mandate by using the FSS program. A "mandate" of such limited scope would hardly have been the centerpiece of the 2006 Veterans Act.

In fact, when Congress enacted § 8127(d), the government-wide Rule of Two for small businesses was *already* mandatory for, at a minimum, all open-market acquisitions above $3,000 (now $3,500). 48 C.F.R. § 19.502-2 (2006); Pet. App. 29a & n.10 (Reyna, J., dissenting). Had Congress merely intended to require the VA to favor veterans when applying the Rule of Two to open-market acquisitions, it would have enacted only § 8128, which requires that veterans be preferred when the VA uses other set-asides. The separate, mandatory Rule of Two in § 8127(d) accomplished almost nothing on the government's reading.

2. Even indulging the government's premise, its analogy to the Small Business Act cannot do the work the government requires. The government reasons (at 26-27) that because prior Small Business Act set-asides applied to "contracts" and had been interpreted not to apply to FSS orders, Congress intended § 8127(d) not to apply to FSS orders because it too uses the term "contracts." That argument fails as a textual matter because the term "contracts" includes "orders." *Supra* pp. 3-8. It also fails as a historical matter.

The FSS program originated in agency practice. U.S. Br. 6-7. When it was placed on express statutory footing in the Competition in Contracting Act of 1984, Congress defined it as a permissible form of "'competitive procedure[]'" only if "participation in the program has been open to all responsible sources." Pub. L. No. 98-369, § 2711, 98 Stat. 1175, 1180 (now codified at 41

U.S.C. § 152(3)). The agencies responsible for the FAR thought that statutory language precluded setting aside orders because the award arguably would no longer be "open to all responsible sources." *E.g.*, *Federal Acquisition Regulation*, 69 Fed. Reg. 34,231, 34,232 (June 18, 2004) (asserting that set-asides are inconsistent with "the basic statutory authority for the program," which "provides that contracts and orders be open to all sources"); *Report of the Acquisition Advisory Panel* 297-299 (2007) (summarizing this view).[4]

The exemption of FSS orders from Small Business Act set-asides thus does nothing to further the government's argument because the exemption has never rested on any supposed distinction between "contracts" and "orders." Indeed, accepting the government's theory would render the very exemptions on which it relies superfluous. *E.g.*, 48 C.F.R. §§ 8.405-5(a), 19.502-1(b). If the term "contract" in the Small Business Act did not include orders, there would have been no reason to exempt FSS orders from Small Business Act set-asides.

3. The regulatory exemption of FSS orders from Small Business Act set-asides reflects the fact that the language of most Small Business Act set-asides is *discretionary*, not mandatory. Pet. Br. 10 (collecting citations). The government tries to sidestep this fact by pointing (at 34-39) to two set-asides in the Small Business Act that used the term "shall." It argues that those provisions were understood in 2006 not to limit agency discretion to use the FSS program, and therefore that the "shall" language in the 2006 Veterans Act

[4] As noted (*supra* pp. 8-9), 2010 legislation clarified that FSS orders may in fact be set aside under the Small Business Act.

should be understood the same way. However, the language of both provisions is materially different from § 8127(d), their meaning was far from clear in 2006, and neither will be affected by the decision in this case.

The HUBZone provision in 15 U.S.C. § 657a(b)(2)(B)—which was amended in 2010 to say "may"—previously provided that "a contract opportunity shall be awarded pursuant to this section" on the basis of competition restricted to small businesses in historically underutilized business zones if the Rule of Two is satisfied. HUBZone Act of 1997, Pub. L. No. 105-135, § 602(b)(1)(B), 111 Stat. 2627, 2630. Far from having a settled meaning before 2010, the effect of this language was decidedly unclear. No court had considered whether it required consideration of the Rule of Two before placing FSS orders. It was implemented in FAR part 19, which did not apply at the time to FSS orders. *Historically Underutilized Business Zone (HUBZone) Empowerment Contracting Program*, 63 Fed. Reg. 70,265, 70,273 (Dec. 18, 1998). But several courts and the GAO held that § 657a was mandatory and had to be applied before discretionary set-asides. *Contract Mgmt., Inc.* v. *Rumsfeld*, 434 F.3d 1145, 1149 (9th Cir. 2006); *DGR Assocs., Inc.* v. *United States*, 94 Fed. Cl. 189, 207-208 (2010); *Matter of Mission Critical Solutions*, 2009 WL 1231855, at *4 (Comp. Gen. May 4, 2009).[5] When Congress later wished to make the set-aside discretionary, it substituted "may" for "shall," confirming the key textual distinction that the govern-

[5] Even in the government's view, the scope of the statute was limited not by its reference to "award[ing]" a "contract," but rather by other language specific to § 657a. *See* OLC, *Permissibility of Small Business Administration Regulations*, 2009 WL 2870163, at *5 (Aug. 21, 2009).

ment ignores in this case. Small Business Jobs Act § 1346(c), 124 Stat. at 2547.

The government fares no better with 15 U.S.C. § 644(j)(1), which requires that "[e]ach contract" within a certain dollar range (generally $3,500-$150,000) "be reserved exclusively for small business concerns" if the Rule of Two is met. The meaning of that statute is *currently* in dispute even within the government, and thus it could hardly provide the sort of well-established usage critical to the government's textual argument.

As the government acknowledges (at 37 n.8), the Small Business Administration has read § 644(j) to require set-asides of FSS orders. The GSA and GAO have disagreed, but their theory has nothing to do with the term "contract." It relies instead on § 644(r), the statute enacted in 2010 to clarify that Small Business Act set-asides may (but need not) be applied to FSS orders. Letter from Michael D. Tully, GSA, to Paula A. Williams, GAO, 3-4 (Sept. 16, 2015); *see also* Op. 5-7, *Matter of Aldevra*, B-411752 (Comp. Gen. Oct. 16, 2015) (adopting GSA's reasoning); *supra* pp. 8-9 (discussing § 644(r)).

Moreover, the context and history of § 644(j) cloud its meaning compared to the 2006 Veterans Act. When enacted, § 644(j) was limited to contracts "subject to small purchase procedures," a specific form of simplified procedures generally not used in the FSS program. Act of Oct. 24, 1978, Pub. L. No. 95-507, § 221, 92 Stat. 1757, 1771; *see* 41 C.F.R. subpt. 1-3.6 (1978) (procedures for "Small Purchases"); *Small Purchase Set-Asides for Small Business Concerns*, 45 Fed. Reg. 55,721, 55,722 (Aug. 21, 1980) (use of FSS "unaffected" by § 644(j)). In 1994, Congress removed that clause in the course of other revisions, but stated that it did not intend to "al-

ter the current priority among sources of supplies and services," thus creating doubt about whether it intended to mandate consideration of this set-aside before the FSS program. H.R. Rep. No. 103-712, at 213 (1994) (Conf. Rep.); *see* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 4004, 108 Stat. 3243, 3338. The history of the 2006 Veterans Act contains no comparable indication that Congress may have intended to exempt FSS orders from the scope of § 8127(d)'s mandate.

4. Finally, the government cites (at 31 n.6) bills introduced to eliminate loopholes that the VA has tried to create, as though Congress's inaction on those proposals might be a sign of acquiescence. If anything, the post-enactment legislative record reveals that Members of the House Veterans' Affairs Committee, which spearheaded passage of the 2006 Veterans Act, have been sharply critical of the VA's interpretation. *See Follow-up on the [VA] Service-Disabled Veteran-Owned Small Business Certification Process: Hearing before the Subcomm. on Oversight & Investigation of the H. Comm. on Veterans' Affairs*, 112th Congress 1-4, 7-9 (2011); Members of Cong. Br. 3-5.

C. The Veterans Canon Resolves Any Alleged Ambiguity

Section 8127(d)'s mandatory language is unambiguous, but even were there any ambiguity, the veterans canon would require resolving it in favor of the veteran-owned small businesses that Congress sought to assist in enacting the law. Pet. Br. 43-44; American Legion Br. 7-14. The government seeks to dismiss the canon because, in its view, other veterans might be harmed if the VA must consider the Rule of Two before placing FSS orders. That is incorrect (*infra* pp. 19-22),

as underscored by the support of the veterans' community for Kingdomware's position. *E.g.*, American Legion Br. 7-24; National Veterans Small Bus. Coal. Br. 10-23; Paralyzed Veterans of Am. Br. 7-28. In any event, the veterans canon requires construing a benefits statute "in the *beneficiaries'* favor." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (emphasis added). It thus disfavors the government's attempt to divert contracts from veteran-owned small businesses by engrafting an FSS exemption onto the statute.

II. THE GOVERNMENT'S POSITION IS CONTRADICTED BY VA REGULATIONS AND IS NOT OWED DEFERENCE

The government contends (at 47-50) that the VA's interpretation of § 8127(d) as preserving its discretion to order from the FSS program is entitled to *Chevron* deference. However, as with the government's prior goals-based interpretation, the VA's implementing regulations undercut its current view and confirm that no deference is warranted. Pet. Br. 46-52.

The implementing regulations require contracting officers to "set-aside an *acquisition* for competition" restricted to service-disabled veteran-owned small businesses whenever the Rule of Two is satisfied. 48 C.F.R. § 819.7005(a) (emphasis added); *accord id.* § 819.7006(a) (same, for veteran-owned small businesses). The FAR defines "acquisition" as the entire process of "acquiring by contract with appropriated funds … supplies or services," from "the point when agency needs are established" through "performance." *Id.* § 2.101. The breadth of the term is underscored by the FAR's definition of "procurement," which simply states

"see 'acquisition.'" *Id.*[6] Issuing an order to procure goods or services from the FSS program is clearly part of conducting an "acquisition." *See, e.g.*, *id.* § 8.404(c) ("[a]cquisition planning" for FSS procurements). Thus, even if the plain text of § 8127(d) did not already mandate consideration of the Rule of Two before placing FSS orders, the implementing regulations would do so.

The government argues (at 49) that these regulations nonetheless do not apply to FSS orders because the VA numbered them to correspond to government-wide regulations in FAR part 19, "plugging" them into the FAR "framework." But nothing in the FAR addresses the VA-specific Rule of Two in § 8127(d), as the GAO held in rejecting essentially this same argument. Pet. Br. 19-20. The VA's regulations do not purport to create any exceptions, nor does the statute permit any.

Unable to rely on the actual regulations, the government asks (at 49-50) for deference to the preamble to its rulemaking, which states that the Rule of Two in § 8127(d) "does not apply to FSS task or delivery orders." *VA Acquisition Regulation*, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009). As an initial matter, the government does not dispute that the preamble lacks the force of law and was not subject to notice-and-comment procedures. Pet. Br. 50. In any event, the preamble merely underscores the *post hoc* nature of the government's current view. The construction of "contract" now at the heart of the government's case was not addressed in the preamble, which instead mistakenly relied on provisions of the FAR that do not control the separate, VA-specific mandate in § 8127(d). *Id.*

[6] The government acknowledges (at 18, 21, 25, 30) that issuing an order using the FSS program is a "procurement."

The VA has never before perceived or purported to resolve any ambiguity in the term "contract."

To be sure, the VA has consistently claimed that the 2006 Veterans Act does not limit its discretion to use the FSS program. But it has cycled through evolving and inconsistent legal rationales for doing so, including the new one offered in this Court. And its latest interpretation is premised on a supposedly established usage of the term "contract" in the Small Business Act and the FAR, neither of which is within the VA's expertise. Deference to the agency's "appellate counsel," who also have no particular expertise in this subject and no "'responsibility for elaborating and enforcing statutory commands,'" would likewise be "entirely inappropriate." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 213 (1988).

III. The Government's Policy Disagreement With Congress Does Not Justify An FSS Loophole

Congress had good reason to enact a mandatory, VA-specific contracting preference for small businesses owned by veterans, especially those who have incurred service-related disabilities. Pet. Br. 53-56; Members of Cong. Br. 3 (citing "the tremendous debt of gratitude we owe our men and women in uniform and their families"); *id.* 10 (noting "the failure of prior discretionary policies"). The agency's disagreement with that policy judgment, as applied to the FSS, provides no basis for ignoring Congress's command. The government nonetheless invites this Court to play policymaker by implying that applying the law as written, without an FSS loophole, will harm veterans, depriving some of life-saving medical care. *E.g.*, U.S. Br. 21 ("drugs, medical or surgical supplies, laboratory services"); *id.* 39 ("stents, laparoscopes, critical-care beds," "mortuary

freezer[s]," "cardiologists or nurses"). Those scare tactics are unfounded. Compliance with Congress's mandate would not be onerous for the VA, which exaggerates both the burdens of the Rule of Two and the benefits of the FSS.

First, the government concedes (at 40) that a Rule of Two determination can be "relatively swift." Congress mandated that the VA maintain a database of veteran-owned small businesses and restricted application of the Rule of Two to businesses listed in the database precisely so that contracting officers would have a ready list of eligible veteran suppliers. 38 U.S.C. § 8127(e)-(f); Pet. Br. 55-56.

Second, the Rule of Two requires that contracts be set aside only if there is a "reasonable expectation" that "two or more" veteran-owned small businesses will submit offers "at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). When these criteria are not met, as will often be the case, the contracting officer can quickly revert to other procurement procedures.

Third, § 8127(d)'s internal safeguards regarding a "fair and reasonable price" and "best value" (which means that a contract "provides the greatest overall benefit," 48 C.F.R. § 2.101) ensure that routine application of the Rule of Two will not result in waste. Pet. Br. 37. The government implies (at 43) these safeguards are insufficient to achieve "the cost advantage associated with high-volume buying." But its example of $8 million of savings from increased FSS usage, out of $2.9 billion of spending, hardly outweighs Congress's decision to prioritize the important benefits of supporting veteran-owned small businesses. *See* Paralyzed Veterans of Am. Br. 15-21. As the VA itself has ex-

plained, "[b]uying from [service-disabled veteran-owned small businesses] and [veteran-owned small businesses] directly supports VA's mission. Supporting service-disabled veterans who own businesses contributes significantly in restoring their quality of life while enhancing transition from active duty to civilian life." *VA Acquisition Regulation*, 73 Fed. Reg. 49,141, 49,141 (Aug. 20, 2008).

Fourth, the government decries (at 43) the "red tape" and "delay" of the default procurement procedures for open-market acquisitions. But existing law already allows the use of streamlined procurement procedures when there is an "unusual and compelling urgency" and "the Federal Government would be seriously injured" by following normal procedures. 41 U.S.C. § 3304(a)(1); *see also* 48 C.F.R. § 6.302-2 (authorizing sole-source contracts); *id.* § 5.202(a) (relaxing notice requirements); *id.* § 5.203(b) (considering "urgency" in setting response times).

Congress also already provided a ready alternative. The 2006 Veterans Act authorizes the VA to award sole-source contracts up to the simplified acquisition threshold, or, if the award can be made "at a fair and reasonable price that offers best value" to a "responsible source," up to $5 million. 38 U.S.C. § 8127(b)-(c); Pet. Br. 56. The government's argument (at 43-44) that increased use of these tools would be wasteful once again ignores the statutory "best value" requirement. 38 U.S.C. § 8127(c).

Fifth, the government exaggerates the relative benefits of the FSS program. All government acquisitions are already supposed to begin with planning and market research, the extent of which varies with the amount and complexity of the procurement. 48 C.F.R.

§§ 7.102(a), 8.404(c)(1); *see* GSA, *Multiple Award Schedules Desk Reference* 27-28 (6th ed. 2013); Pet. App. 30a-31a (Reyna, J., dissenting). Indeed, VA contracting officers are already required to consult the VA's database *whenever* they perform market research. 48 C.F.R. § 810.001.

Moreover, the simplified FSS procedures for low-value items mirror similarly simplified procedures for small open-market purchases. 48 C.F.R. §§ 5.101(a)(1), 13.203(a)(2)-(3). From the supplier's perspective, "there is little reason" to obtain an FSS contract if the supplier's "typical order is less than $25,000" because contracting officers "will probably make the purchase using the simplified acquisition procedures in FAR Part 13." McVay, *Getting Started in Federal Contracting* 227 (5th ed. 2009).

Sixth, the categorical FSS exemption that the government seeks is vastly disproportionate to its stated concerns. Consider the contract at issue here, which was valued at $33,824.10 with extension options that could have increased its total value to $101,472.30 over three years. JA31. A contract of that size can provide an invaluable lifeline to a small business owned by a service-disabled veteran and is exactly the type of contract Congress had in mind when it enacted § 8127(d). But without even checking its own database to identify any of the service-disabled veteran-owned small businesses eligible to do the work, the VA went straight to the FSS and conducted a limited-source acquisition in which it requested a quote from, and made the award to, a single, non-veteran-owned business. *Id.* That same scene will play out over and over again unless the law is enforced as written.

There is no evidence in the text of the law, its purpose and structure, or its legislative history to suppose that Congress exempted a substantial portion of the VA's contracting from the mandate in § 8127(d). It did not, and the VA's effort to create an FSS loophole should be rejected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTES AND REGULATIONS

31 U.S.C. § 1341. Limitations on expending and obligations amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

(C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or

(D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.

* * *

31 U.S.C. § 3551. Definitions

In this subchapter:

(1) The term "protest" means a written objection by an interested party to any of the following:

(A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.

(B) The cancellation of such a solicitation or other request.

(C) An award or proposed award of such a contract.

(D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

(E) Conversion of a function that is being performed by Federal employees to private sector performance.

* * *

41 U.S.C. § 6301. Authorization requirement

(a) IN GENERAL.—A contract or purchase on behalf of the Federal Government shall not be made unless the contract or purchase is authorized by law or is under an appropriation adequate to its fulfillment.

* * *

41 U.S.C. § 7102. Applicability of chapter

(a) EXECUTIVE AGENCY CONTRACTS.—Unless otherwise specifically provided in this chapter, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28) made by an executive agency for—

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair, or maintenance of real property; or

(4) the disposal of personal property.

* * *

13 C.F.R. § 125.1. What definitions are important to SBA's Government Contracting Programs?

* * *

(d) *Contract*, unless otherwise noted, has the same definition as set forth in FAR 2.101 (48 U.S.C. 2.101) and includes orders issued against Multiple Award Contracts and orders competed under agreements where the execution of the order is the contract (*e.g.*, a Blanket Purchase Agreement (BPA), a Basic Agreement (BA), or a Basic Ordering Agreement (BOA)).

* * *

(k) *Multiple Award Contract* means a contract that is:

(1) A Multiple Award Schedule contract issued by GSA (*e.g.*, GSA Schedule Contract) or agencies granted Multiple Award Schedule contract authority by GSA (*e.g.*, Department of Veterans Affairs) as described in FAR part 38 and subpart 8.4;

(2) A multiple award task-order or delivery-order contract issued in accordance with FAR subpart 16.5, including Governmentwide acquisition contracts; or

(3) Any other indefinite-delivery, indefinite-quantity contract entered into with two or more sources pursuant to the same solicitation.

* * *

48 C.F.R. § 2.101. Definitions.

(a) A word or a term, defined in this section, has the same meaning throughout this regulation (48 CFR chapter 1), unless—

(1) The context in which the word or term is used clearly requires a different meaning; or

(2) Another FAR part, subpart, or section provides a different definition for the particular part or portion of the part.

(b) If a word or term that is defined in this section is defined differently in another part, subpart, or section of this regulation (48 CFR chapter 1, the definition in—

(1) This section includes a cross-reference to the other definitions; and

(2) That part, subpart, or section applies to the word or term when used in that part, subpart, or section.

Acquisition means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those tech-

nical and management functions directly related to the process of fulfilling agency needs by contract.

* * *

Best value means the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement.

* * *

Contract means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.* For discussion of various types of contracts, see part 16.

* * *

Procurement (see "acquisition").

* * *

48 C.F.R. § 8.404. Use of Federal Supply Schedules.

* * *

(c) *Acquisition planning.* Orders placed under a Federal Supply Schedule contract—

(1) Are not exempt from the development of acquisition plans (see subpart 7.1), and an information technology acquisition strategy (see Part 39);

(2) Must comply with all FAR requirements for a bundled contract when the order meets the definition of "bundled contract" (see 2.101(b)); and

(3) Must, whether placed by the requiring agency, or on behalf of the requiring agency, be consistent with the requiring agency's statutory and regulatory requirements applicable to the acquisition of the supply or service.

* * *

48 C.F.R. § 8.405-5. Small business.

(a) Although the preference programs of part 19 are not mandatory in this subpart, in accordance with section 1331 of Public Law 111-240 (15 U.S.C. 644(r))—

(1) Ordering activity contracting officers may, at their discretion—

(i) Set aside orders for any of the small business concerns identified in 19.000(a)(3); and

(ii) Set aside BPAs for any of the small business concerns identified in 19.000(a)(3).

(2) When setting aside orders and BPAs—

(i) Follow the ordering procedures for Federal Supply Schedules at 8.405-1, 8.405-2, and 8.405-3; and

(ii) The specific small business program eligibility requirements identified in part 19 apply.

(b) Orders placed against schedule contracts may be credited toward the ordering activity's small business goals. For purposes of reporting an order placed

with a small business schedule contractor, an ordering agency may only take credit if the awardee meets a size standard that corresponds to the work performed. Ordering activities should rely on the small business representations made by schedule contractors at the contract level.

(c) Ordering activities may consider socio-economic status when identifying contractor(s) for consideration or competition for award of an order or BPA. At a minimum, ordering activities should consider, if available, at least one small business, veteran-owned small business, service disabled veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business schedule contractor(s). GSA Advantage! and Schedules e-Library at *http://www.gsa.gov/fas* contain information on the small business representations of Schedule contractors.

(d) For orders exceeding the micro-purchase threshold, ordering activities should give preference to the items of small business concerns when two or more items at the same delivered price will satisfy the requirement.