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

BRIEF FOR IRAQ AND AFGHANISTAN VETERANS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Established in June 2004, Iraq and Afghanistan Veterans of America (IAVA), a non-profit and non-partisan organization, is dedicated to improving the lives of Iraq and Afghanistan veterans and their families. IAVA is the nation's first and largest group dedicated to those military personnel who have served, and continue to serve, in the wars in Iraq and Afghanistan. To date, more than 2.8 million American troops have served in Iraq or Afghanistan, and hundreds of thousands of them have deployed multiple times during the more than decade-long period of conflict. IAVA focuses on critical issues facing veterans and their families, with a particular emphasis on issues facing new veterans. Its membership comprises active veterans and civilian supporters, totaling more than 175,000 members in all 50 states.

Programs encouraging participation by small businesses in government procurement fosters entrepreneurship, which IAVA believes is an important opportunity for veterans reentering civilian society after their military service. In a 2014 survey, 20 percent of IAVA member respondents reported plans to start a business. IRAQ & AFG. VETERANS OF AM., 2014 POLICY AGENDA § 5.3 (2014) (hereinafter 2014 POLICY AGENDA). Post-9/11 veterans starting or growing nascent businesses,

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[1] The parties have consented to the filing of this brief in blanket letters of consent on file with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the *amicus curiae* or its counsel provided any monetary contribution to its preparation or submission.

however, report multiple challenges, including difficulty in obtaining startup capital, covering operating costs, and navigating complex state and federal regulations. *Id.* One of the six policy recommendations formulated by IAVA to assist with overcoming these challenges is to ensure that existing contracting preferences for veteran-owned small businesses are applied to the considerable volume of procurements awarded. *Id.* Thus, IAVA's interests are strongly aligned with Petitioner's.

SUMMARY OF ARGUMENT

After fighting far from home in the physically and psychologically punishing environment of Iraq and Afghanistan, reintegrating into civilian society is not easy. Often struggling with mental and physical health issues, post-9/11 veterans face more than their fair share of problems succeeding in a post-recession economic environment, as reflected by their stubbornly high unemployment rate. VANESSA WILLIAMSON & ERIN MULHALL, IRAQ & AFG. VETERANS OF AM., ISSUE REPORT: CAREERS AFTER COMBAT 4 (2009) (hereinafter IAVA, ISSUE REPORT) (noting an unemployment rate for former active duty personnel of 8.1 percent). Many post-9/11 veterans believe starting and managing a small business offers them, and the fellow veterans they employ, a way to reestablish roots in their communities and achieve financial and emotional stability.

The mission of the Department of Veterans Affairs (VA) is to serve these veterans, and the VA is an obvious choice among federal agencies to foster greater reliance on veteran-owned businesses for the vast array of products and services purchased by the

Federal government. Unfortunately, for years, the VA, as well as other federal agencies, has not always done its part to aid these businesses. To aid veteran entrepreneurship, Congress enacted Section 502 of the Veterans Benefits, Health Care, and Information Technology Act of 2006. Pub. L. No. 109-461, § 502, 120 Stat. 3403, 3431 (2006) (codified at 38 U.S.C. § 8127 (2012)) (hereinafter 2006 Veterans Act). This statute requires that the VA "shall" set aside contracts for veteran-owned small businesses whenever there is a reasonable expectation that two or more of these businesses can provide the needed good or services at a fair and reasonable price. *Id.* This mandatory directive is often referred to as the "Rule of Two." *See* Pet. Br. 37.

Notwithstanding the statute's unambiguous language directing the VA to reserve procurement opportunities for veteran-owned small businesses, a divided Federal Circuit panel validated the VA's position that it need not apply the 2006 Veterans Act's mandatory set-aside provision "as long as" the VA's contracting goals for those businesses are met. Pet. App. 20a. As a result, the Federal Circuit allowed the VA to continue ignoring the mandatory set-aside provision when making purchases under the auspices of the Federal Supply Schedule (FSS), Pet. App. 21a, a program designed for the streamlined federal procurement of commercial items and services, *see* 48 C.F.R. § 8.402(a) (2014). The VA now defends its position and the Federal Circuit's decision by arguing that the VA should be able to ignore the set-aside requirement if applying it to orders for basic off-the-shelf items, such as "griddles" and "slicers," would lead to administrative

inefficiency. Opp. 20, 23. Rather than require the VA to implement a clear rule enacted to prod the VA to do *more* than it historically had been willing to do, the court ruled the VA need only comply with the law if, in the VA's discretion, it was necessary to meet the VA's own fluid and self-determined "goals." Pet. App. 21a. The panel's ruling effectively allowed the VA to revert to the state of complacency it inhabited before passage of the 2006 Veterans Act.

The Federal Circuit erred. The VA's position is contrary to controlling precedent and inimical to the purposes of the 2006 Veterans Act. It also ignores the reality of today's FSS program. Although the FSS program may be used to buy the occasional "griddle," such one-off purchases account for only a tiny portion of the total VA FSS spend. The VA indisputably also uses the FSS program to conduct multimillion-dollar competitions for complex technology and services, as well as the vast majority of the government's pharmaceutical and medical device purchases. These FSS purchases total approximately 60 percent of the VA's annual procurement budget. VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009). These acquisitions are not routine administrative "orders"; they are full-blown procurements no different than any other significant procurement conducted by the VA. If left to stand, the VA's current policy would allow it to continue diverting 60 percent of its procurement budget away from the very veterans whom the 2006 Veterans Act was intended to benefit.

The VA's decision to interpret the mandatory provisions of the 2006 Veterans Act as discretionary thus is unreasonable, arbitrary and capricious, and an abuse of discretion. Amicus agrees with Petitioner that § 8127(d) requires the VA to set aside procurements for veteran-owned small businesses whenever the Rule of Two is satisfied, and that the statute does not exempt FSS purchases. But, even if the statute allowed VA to create an exception for small or routine purchases under the FSS in the interest of administrative efficiency, the VA's broad carve-out of FSS contracts is still improper because it effects a radical and fundamental change in the statute.

The Federal Acquisition Regulation (FAR), 48 C.F.R. pts. 1–53, which governs all aspects of government procurement, provides a sliding scale of increasing process, oversight, and competition requirements as the dollar value of an FSS order increases. This existing framework provides thresholds from below $3,000, where little competition and paperwork is required, to $150,000 and more, where multiple steps must be taken to publicize the procurement and ensure that competition is maximized. Amicus's members, like the government itself, have a vested interest in ensuring that the VA's procurement function operates efficiently. But the VA appears not even to have considered whether the FAR's dollar-value thresholds might be leveraged to achieve a balance between the need for administrative efficiency, on one hand, and Congress's intent that procurements "shall" be set aside for veteran-owned small businesses, on the other.

Notwithstanding the existing spectrum of incremental alternatives, the VA ignored them all and instead implemented a policy that transformed the provisions of § 8127(d) from mandatory to discretionary. But agency discretion to implement a statute is not unfettered; it must be reasonable. And it is patently unreasonable to interpret a statutory directive in such a way as to effectively gut it.

ARGUMENT

I. THE 2006 VETERANS ACT SERVES A VITAL ROLE IN AIDING THE REINTEGRATION OF POST-9/11 VETERANS INTO SOCIETY.

In the next six years, over one million service members are expected to make the transition back to civilian life. U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-676, VETERANS AFFAIRS: BETTER UNDERSTANDING NEEDED TO ENHANCE SERVICES TO VETERANS READJUSTING TO CIVILIAN LIFE 1 (2014). The struggle to welcome home our veterans and reintegrate them into civilian society follows on the heels of every conflict. And the veterans of the Iraq and Afghanistan conflicts face unique challenges returning home. The effects of post-traumatic stress disorder and traumatic brain injury from recent conflicts are well documented. *Id.* at 11–14. Less well known, but often more widespread, are the economic challenges post-9/11 veterans face upon leaving the military. In the "largest nongovernmental survey of confirmed Iraq and Afghanistan combat veterans," members of Amicus list employment as their number one challenge in the transition into civilian life. IRAQ & AFG. VETERANS OF AM., 2014 IAVA MEMBER SURVEY 3, 21

(2014) (hereinafter 2014 IAVA MEMBER SURVEY). Such economic concerns far outweigh veterans' concerns about loss of military identity or even their own mental health. *Id.* at 21. Indeed, 64 percent of survey respondents reported difficulty paying their bills each month. *Id.* And 77 percent of respondents experienced a period of unemployment since leaving the military; 27 percent of those veterans were unemployed for over a year. *Id.* at 19.

In 2007, before the "Great Recession," the U.S. Department of Labor reported that veterans leaving active duty service experienced an 8.1 percent unemployment rate—at the time, nearly double the unemployment rate of those who had never served in the military. IAVA, ISSUE REPORT 4. Amicus member survey respondents recently reported an unemployment rate as high as 10%. 2014 IAVA MEMBER SURVEY 19. Post-9/11 veterans also experience a loss of earning power after military service. For those with college degrees, returning veterans earn on average $10,000 less annually than their non-military peers. *Id.* This has been attributed to a variety of causes, including social stigma and stereotyping, the difficulty of enforcing laws banning employment discrimination, and most often the difficulty veterans face explaining to employers how military experience translates to the civilian workforce. *Id.* at 2–5. This difficulty exists despite the fact that military service provides skills most employers should want: leadership, adaptability, and teamwork, among others.

The same qualities that make veterans valuable employees also make them natural entrepreneurs.

The U.S. Small Business Administration recognizes that "veteran business owners have gained important skills and leadership abilities from their active duty and Reserve Component service that are often directly relevant to business ownership." U.S. SMALL BUS. ADMIN., VETERAN-OWNED BUSINESSES AND THEIR OWNERS—DATA FROM THE CENSUS BUREAU'S SURVEY OF BUSINESS OWNERS 5 (2012). According to SBA statistics, veteran business owners are responsible for nearly one out of ten small businesses in America, and they employ nearly six million workers while generating over $1.2 trillion in receipts per year. *Id.* at 1. More importantly, veterans are 45 percent more likely than their non-veteran counterparts to be self-employed. *Id.* at 6.

And yet veteran entrepreneurs face significant challenges. Members of Amicus report difficulty raising startup capital, rising operating costs, and a confusing maze of state and federal regulations as barriers to entry for veteran entrepreneurs. 2014 POLICY AGENDA, *supra*, § 5.3. Those current and aspiring veteran business owners with service-connected disabilities face an even bleaker situation. Although nearly 7 percent of all veterans and non-veterans are self-employed, only 4 percent of service-disabled veterans are entrepreneurs. AMY G. COX & NANCY Y. MOORE, RAND CORP., IMPROVING FEDERAL AND DEPARTMENT OF DEFENSE USE OF SERVICE-DISABLED VETERAN-OWNED BUSINESSES 1 (2013).

Part of the problem veteran entrepreneurs have faced is the reluctance of federal agencies like the VA to meet their own goals for awarding federal contracts to veteran-owned small businesses. As the

Federal Circuit panel found, two earlier statutes designed to aid veteran-owned small businesses were ineffective because awards to such businesses were discretionary, and not mandatory. *See* Pet. App. 4a - 5a.

The 2006 Veterans Act, and the legislation that preceded it, was enacted to help veterans overcome these barriers, and hold the VA to greater accountability, by setting aside VA procurements for veteran-owned small businesses. Congress's stated intent in passing § 8127 was to "increase contracting opportunities for small business concerns owned and controlled by veterans and * * * by veterans with service-connected disabilities." 38 U.S.C. § 8127(a). Unfortunately, the VA has not maintained fidelity to Congress's intent.

II. AN AGENCY MAY NOT INTERPRET A STATUTE TO FRUSTRATE CONGRESSIONAL INTENT.

Petitioner explains that § 8127(d) unambiguously requires that the Rule of Two be applied to all VA procurements, including those conducted under the auspices of the FSS. Pet. Br. 44–45. Amicus agrees. However, even assuming there is room for interpretation somewhere in the 2006 Veterans Act's mandate, the VA still must interpret the Act in a reasonable manner consistent with Congress's intent. It has failed to do so. The VA's malleable interpretation of the word "shall" apparently means "whenever a VA contracting officer concludes that a particular procurement will help achieve the VA's small business goals." In practice, however, the VA's "whenever we feel like it" position exempts *all* FSS

procurements—representing roughly 60 percent of the VA's total procurement expenditures—from the requirements of the 2006 Veterans Act. That goes too far.

An agency is entitled to some deference when interpreting an ambiguous statute that it must implement and administer. *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). An agency likewise is entitled to a certain amount of deference when interpreting its own regulations. *Gonzales v. Or.*, 546 U.S. 243, 255 (2006). In either case, however, the agency's interpretation must be reasonable. For example, an agency cannot interpret a statute to significantly expand its regulatory authority if doing so contravenes Congressional intent and the purpose of the statute. *See MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 234 (1994).

MCI, for example, addressed Section 203(a) of the Communications Act of 1934, 47 U.S.C. ch. 5, which provided that "*every* common carrier * * * shall * * * file" tariffs with the Federal Communications Commission (FCC). (Emphasis added.) 47 U.S.C. § 203(b) expressly authorized the FCC to "modify" the requirements of § 203(a). The FCC subsequently opted to "modify" § 203(a) by completely exempting non-dominant long distance carriers from the tariff filing requirement. *MCI Telecomm. Corp.,* 512 U.S. at 221–223. The FCC defended its position on the ground that it would promote more efficient telephone service. *Id.* at 233. This Court nevertheless rejected the FCC's interpretation,

concluding that it effected a "radical [and] fundamental change" to the law. *Id.* at 229, 234.

The same logic applies here, and then some. The 2006 Veterans Act does not even afford the VA the express authority to modify the mandatory set-aside requirement as was the case in *MCI*. Even if it did, a modification that makes a mandatory requirement a discretionary one—and thereby exempts the majority of FSS procurements from the Rule of Two—effects a "radical and fundamental change" in the statute.

In contrast to the VA's approach here, other agencies have implemented analogous mandatory requirements in such a way as to maintain efficiency while avoiding frustrating Congress's intent. For example, when implementing a law prohibiting the Defense Department from procuring certain "specialty metals" not melted or produced in the United States, then Secretary of Defense Melvin Laird issued a memorandum stating that it would be impracticable for the Defense Department to review *all* metals procured at the subcontract level and, therefore, the Department would not apply the law to purchases of specialty metals unless the acquisition was made for one of six specific types of defense products: aircraft, missile and space systems, ships, tanks, weapons, and ammunition. Memorandum from Melvin Laird, Sec'y of Defense, to Sec'ys of the Military Dep'ts & Dirs. of the Def. Agencies (Nov. 20, 1972), *available at* http://www.aia-aerospace.org/assets/berry-lairdmemo.pdf; *see* VALERIE BAILEY GRASSO, CONG. RESEARCH SERV., RL33751, THE SPECIALTY METAL PROVISION AND THE BERRY AMENDMENT: ISSUES FOR CONGRESS 3–5

(2008). As the Secretary explained, the vast majority of specialty metals acquired by the Defense Department were incorporated into these six types of items; enforcing the domestic-sourcing requirement with respect to other, smaller procurements would be impractical and provide no significant benefit to domestic industry. *Id.*; Memorandum from Melvin Laird, *supra.*

The Defense Department's rule on specialty metals thus avoided impracticability by creating a narrow exception designed to have little or no impact on the intended beneficiaries. The VA here has done just the opposite. It has created a highly *impractical* "system" under which VA contracting officers must make a case-by-case determination whether to apply the Rule of Two based on the VA's progress against its set-aside goals, without even having access to the information they would need to track such progress.[2] Petitioner explains why this system is unworkable in practice. Pet. Br. 56–58. It is also at odds with this Court's jurisprudence, which favors agency interpretations that provide clear guidelines to agency personnel and public stakeholders over amorphous, case-by-case determinations that can prove unworkable in practice. *See Household Credit Servs., Inc. v. Pfennig,* 541 U.S. 232, 242–244 (2004) (observing that the Federal Reserve Board's bright-

[2] The VA's recent track record suggests it would benefit from a clear rule. *See Fire Risk Mgmt., Inc.*, B-411552, 2015 WL 4979628 (Aug. 21, 2015) (finding the VA failed to exercise "informed business judgment" when concluding that two service-disabled veteran-owned small businesses were not available to compete for an architect/engineer contract).

line rule of what constitutes a "finance charge" avoids an approach that "would prove unworkable to creditors and, more importantly, lead to significant confusion for consumers"); *Chevron,* 467 U.S. at 857, 866 (affirming the EPA's "bright-line" definition of a "stationary source"). And as we next explain, the VA similarly could have fashioned a bright-line, fair, and practical policy to implement the 2006 Veterans Act through notice and comment rulemaking. It just failed to do so.

III. THE FEDERAL ACQUISITION REGULATION SYSTEM PROVIDES A FRAMEWORK TO IMPLEMENT THE MANDATORY PROVISIONS OF THE 2006 VETERANS ACT.

The Federal Circuit accepted the government's contention that even though the statute states that the VA "shall" restrict competition to veteran-owned small businesses whenever the Rule of Two is met, following the statute's plain meaning would force the VA to subject routine purchases for "griddles" and "slicers" to an overly complex procurement process. Pet. App. 18a; *see* Opp. 20. The panel thus set up a choice: either completely exempt the VA from the statute's requirements for FSS purchases or grind the VA's procurement process to a halt. That is a false choice; there were and are multiple incremental options available to the VA that would not burden it at all when purchasing "griddles and slicers." And those incremental options already are embedded in the regulations governing the FSS program.

A. The Federal Supply Schedule Supports Not Only Routine Orders, But Also Multi-Million-Dollar Procurements.

The FSS program was established to allow government agencies to easily obtain commercial products and services at pre-negotiated, favorable prices with minimum administrative burden. *See, e.g.*, 48 C.F.R. § 8.402(a) (2014).[3] This program has proven popular with federal agencies. In 2014, the government spent approximately $33.1 billion on purchases off the FSS schedules. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-590, FEDERAL SUPPLY SCHEDULES: MORE ATTENTION NEEDED TO COMPETITION AND PRICES 1 (2015) (hereinafter GAO REPORT, GAO-15-590). The VA is a significant user of the FSS program, acknowledging allocations of upwards of 60 percent of its acquisition funds toward FSS purchases in the past. VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009).

Although originally established to simplify rudimentary purchases, *see* Opp. 12, the FSS program has become something much more. Now, a vast majority of expenditures made against FSS contracts do *not* involve basic products. A mere *one-half of one percent* of FSS obligations in 2014 was

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[3] GSA and VA FSS contracts require the schedule-holder to track commercial pricing and discounting practices (and adjust schedule prices accordingly) to ensure government customers always receive the best possible deal. *See* 48 C.F.R. §§ 538.270(a), 552.238-75. This is known as "most favored customer" pricing. *Id.* § 538.270(a).

spent on items such as office supplies, whereas three service categories accounted for 70 percent (or $18 billion) of the overall expenditures. GAO REPORT, GAO-15-590, at 8.[4] Indeed, some of the government's most significant acquisitions take place through the FSS program.

In a July 2015 report, for example, GAO noted that although the FSS Program can be used to "procure relatively simple items * * * our sample also included large and complex procurements—for example, a $123M order for web-based human resources information system, a $91M order for in-person consumer support services, and a $66M order for enterprise-level technology support." *Id.* GAO did not dismiss these examples as outliers. *See id.* To the contrary, it suggested that use of the FSS program to award large contracts has become common practice. Between 2010 and 2014, the following acquisitions (among others not cited) were awarded using the FSS process:

- $20 million order for communications support and infrastructure in Kuwait and Afghanistan;

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[4] GAO found that 38 percent ($9.8 billion) was spent on professional, management and administrative support services; 20 percent ($5.1 billion) on information technology and telecommunication services; and 12 percent ($3.1 billion) on information technology products, such as equipment, software, and supplies. GAO REPORT, GAO-15-590, at 8. The procurement in this case involves information technology services, the second-highest category of expenditures. Pet. App. 50a.

- $20 million order for technical and professional information technology services;
- $123 million order for web-based human resources solution by the VA;
- $90 million order associated with the Affordable Care Act;
- $91 million order for in-person consumer support services; and
- $66 million order for enterprise-level technology support.

Id. at 8, 13, 16–17. These "orders" are actually complicated procurements that involve considerable acquisition planning, detailed solicitations and statements of work, and a competitive process comparable to any other government procurement.

Not surprisingly, when buying complex services and high-volume or high-value products, agencies routinely apply procedures well beyond those used when buying a small number of low-cost products. Indeed, as shown later, they are *required* to do so as the dollar value of an FSS order increases. These purchases are not simple orders; they are full-fledged procurements that trigger regulatory guidance specifically promulgated to govern such acquisitions.[5] For example, agencies prepare detailed Requests for Quotations (RFQs) that include exhaustive technical

[5] The FAR grants contracting officers the discretion to augment any simple acquisition with requirements from the other FAR sections governing more involved acquisitions. *See* 48 C.F.R. §§ 8.405-1(f), 13.106-2(b)(1) (2014).

specifications and pricing guidance. These RFQs include rigorous technical evaluation and price/technical tradeoff criteria designed to assure that minimum technical requirements are met and that the ordering agencies receive the best value possible. And they afford offerors who take the time to prepare lengthy and complicated proposals with procedural protections, including the ability to challenge the agencies' award decisions.[6]

Moreover, when the government purchases tailored services, such as many information technology services, or high value or a high volume of products (even if the product is itself "basic"), it is required to apply processes and procedures that add time and complexity, regardless of whether the purchase is made through the FSS program or the open market.[7] 48 C.F.R. §§ 8.405-1, 8.405-2. Put another way, if the VA were purchasing a few supplies for a single VA office it might well just pick up the phone and place an order with an FSS contract holder. In contrast, if it were buying thousands of supplies to use in every VA office in the country, it could not use

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[6] *See, e.g.*, *Glotech, Inc.*, B-406761; B-406761.2, Aug. 21, 2012, 2012 CPD ¶ 248. This $900 million VA procurement under the FSS contained requirements for thirty-eight categories of infrastructure, information technology systems, and "cross-cutting activities" that would be evaluated on a "best value basis, considering price and six non-price factors." *Id.* at 2. Such a process, even on an FSS "order," resembles that found in most complex open-market federal procurements.

[7] An "open market" purchase is any federal procurement, or portion of a procurement, awarded outside of the FSS program. *See, e.g.*, *LS3 Techs., Inc.*, B-407459, B-407459.2, Jan. 7, 2013, 2013 CPD ¶ 21 at 9.

that same approach; it would have to follow more rigorous procedures. The VA's argument that it must treat all FSS purchases equally, and therefore must make § 8127(d) equally inapplicable to the entire FSS program, thus ignores existing rules that distinguish between routine orders and larger, more complex procurements.

In practice, then, the difference between open-market and FSS acquisitions has become progressively blurred.[8] The United States' arguments are premised on an antiquated characterization of the FSS program. And the VA was not justified in fashioning its policy to exempt the *entirety* of its purchase under FSS program. It could easily have avoided that unreasonable "all-or-nothing" approach by leveraging the FAR's existing tiered administrative structure, which thoughtfully calibrates the competing priorities of administrative convenience and compliance with procurement statutes and regulations.

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[8] *See Holloway & Co. v. United States*, 87 Fed. Cl. 381, 393–394 (2009) ("The distinction between when 'the more formal and rigorous procedures for negotiated procurements' * * * are required, and when they are not, has to do with the nature of the procurement."); *Labat–Anderson, Inc. v. United States*, 50 Fed. Cl. 99, 103–104 (2001) (holding that when making an FSS purchase, if the agency also incorporates procedures akin to negotiated open market procurements, the agency's procurement decision will be reviewed according to the more rigorous standards that govern such procurements).

B. The Federal Acquisition Regulation Provides a Tiered System of Increasing Process, Oversight, and Competition That the VA Can Use to Implement the 2006 Veterans Act.

The FAR does not proscribe a "one-size fits-all" process for agency procurements. There are many procurement types, and as many rules to meet varying needs associated with each. *See* 48 C.F.R. § 1.101 (2014). FAR Subpart 8.4, which is relevant here, outlines the procedures that agencies (and other eligible entities) must follow when making purchases using the FSS program. *See* 48 C.F.R. § 8.405 (2014).

As reflected in the following examples, there is a "ratcheting-up" of mandatory procurement process requirements (some dictated by statute) as the procurement becomes more complex and the dollar value of the purchase increases:

- The "micro-purchase threshold" ($3,000).[9] Agencies seeking to purchase below this threshold are not required to compete micro-purchases nor are they required to publicize them. Agencies may place these orders with any FSS contractor that can meet the agency's needs; no formal evaluation of technical specifications is required. 48 C.F.R. §§ 8.405-1(b), 8.405-2(c)(1) (2014).

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[9] The micro-purchase threshold is $3,000 for most purchases; in limited circumstances, other values may apply. 48 C.F.R. § 2.101 (2014).

- Purchases between $3,000 and $150,000[10] (the micro-purchase and "simplified acquisition" thresholds, respectively). 48 C.F.R. § 2.101. In this range, agencies are required to solicit quotes from at least three available sources, gradually increasing the level of competition and oversight in the process. 48 C.F.R. 8.405-1(c), 8.405-2(c)(2) (2014). Acquisitions valued above $25,000 must be summarized, or "synopsized," on a public-facing government-wide website. 48 C.F.R. § 16.505(a)(4)(iii) (2014).

- Acquisitions expected to exceed $150,000 (the "simplified acquisition threshold"). At this threshold, procedural requirements become more intense. Agencies must develop an RFQ or a Request for Proposals that describes the nature of the government's needs. 48 C.F.R. § 8.405-2(c)(3). An agency must provide the solicitation to as many schedule contractors as practicable. 48 C.F.R. §§ 8.405-1(d)(3)(ii), 8.405-2(c)(3)(iii)(b) (2014). The agency must evaluate responses for "best value," 48 C.F.R. § 8.405-2(d) (2014), and document more details of the evaluation process, 48 C.F.R. § 8.405-2(f) (2014).

Agencies placing larger orders under FSS contracts thus already are required to use procedures not unlike those used in any other type of government

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[10] The simplified acquisition threshold is $150,000 for most procurements; in limited circumstances, other values may apply. 48 C.F.R. § 2.101 (2014).

procurement. And because the ordering process for these larger orders is practically indistinguishable from those used on non-FSS procurements, the VA's position about applying the Rule of Two to FSS purchases unravels. The VA has stubbornly maintained that the mandatory provisions of the 2006 Veterans Act do not apply whenever it decides to use the FSS to purchase goods and services. But given the FAR framework, the VA had no supportable reason for adopting its "all or none" approach.

* * *

The VA's "all or none" approach significantly diminished the effect of a statute intended to benefit our veterans. And even assuming the VA had the authority under the 2006 Veterans Act to change a "shall" into a "may," the VA had alternatives readily available to it that would have preserved the Act's intended benefits while permitting the VA to design regulations allowing it to efficiently make truly routine purchases. The VA's interpretation should be set aside.

CONCLUSION

For all of the foregoing reasons, and those in Petitioner's brief, this Court should reverse the Federal Circuit's judgment.

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