No. 14-916

In the Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

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

SUPPLEMENTAL REPLY BRIEF FOR THE UNITED STATES

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The United States respectfully submits this supplemental reply brief in response to this Court's order of November 4, 2015. Petitioner and the United States agree that this case is not moot. U.S. Supp. Br. 1; Pet. Supp. Br. 1. In particular, performance of the three procurements at issue here was completed by May 2013, but the case is not moot because it falls within the narrow exception for cases that are capable of repetition, yet evading review. *Ibid.* "[T]he same scenario is likely—indeed, virtually certain—to repeat itself again and again in the future for contracts of comparably short duration." Pet. Supp. Br. 1. Petitioner's supplemental brief, however, makes certain assertions that warrant response.

1. Petitioner states that small businesses owned and controlled by veterans "are being deprived of the contracting opportunities Congress intended to set aside for them." Supp. Br. 13; see *ibid.* ("Each lost

opportunity is a contract that cannot help to get a new veteran-owned business off the ground."). But the question whether 38 U.S.C. 8127 applies when the Department of Veterans Affairs (VA) places Federal Supply Schedule (FSS) orders is the disputed issue in this case. For the reasons stated in the United States' merits brief, the VA's current contracting practices are faithful to Congress's intent.

Veteran-owned small businesses are not "being deprived of" the opportunity to compete for FSS orders, moreover, because they can obtain FSS contracts, and the VA encourages them to do so. J.A. 9. Indeed, the VA applies a substantive preference for veteran-owned small businesses in many FSS orders. See 48 C.F.R. 808.405-2, 815.304, 815.304-70 (2014). The VA also has discretion to limit competition for FSS orders to small businesses owned and controlled by service-disabled veterans, see 15 U.S.C. 644(r); 48 C.F.R. 8.405-5(a) (2014), thereby giving those businesses a further competitive advantage.

Veteran-owned small businesses frequently and successfully compete for FSS orders. "[I]n 2011, the VA used FSS contracts for 20% of its total [procurement] spending, and 13% of these FSS expenditures went" to veteran-owned small businesses. Pet. App. 4a. That 13% figure surpassed the Secretary's 12% goal for contracting with veteran-owned small businesses, *id.* at 9a, and far surpassed the government-wide goal for contracting with service-disabled veteran-owned small businesses, which was 3%. See Small Bus. Admin., *Government-Wide Performance:*

FY2011 Small Business Procurement Scorecard 1 (June 29, 2012).[*]

2. Petitioner asserts that it "continues to be affected by the VA's refusal to apply the Rule of Two *to* the FSS." Supp. Br. 9 (emphasis added). The meaning of that statement is unclear. Thus far, petitioner has argued that the VA must "apply § 8127(d)'s Rule of Two *before* ordering from FSS suppliers." Pet. Br. 22 (emphasis added); see *id.* at 28-29 ("VA contracting officers [must] consider veteran-owned small businesses first, before turning to other potential suppliers or the FSS system."). Applying Section 8127 at the outset of every procurement would prevent the VA from using the FSS whenever the Rule of Two is satisfied, even if the FSS order would have been placed with a veteran-owned small business. Instead, the VA would need to award a wholly new contract. See 48 C.F.R 19.502-5(a) (2014) (set-asides are performed using the procedures for awarding wholly new contracts on the open market). As set forth in the United States' merits brief, that position cannot be squared with decades of procurement laws and regulations—including other contracting preferences that have used the word "shall"—and would severely impair VA operations.

The statement quoted above could be read to argue that the VA can use the FSS but must apply the Rule of Two when choosing among FSS vendors. Any such contention would clearly be wrong. As the VA's regulations confirm, Section 8127(d) applies only when the VA solicits and awards new contracts, and thus is inapplicable when the agency chooses among FSS

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[*] https://www.sba.gov/sites/default/files/files/FY11%20Final%20Scorecard%20Government-Wide_2012-06-29.pdf.

vendors. See U.S. Br. 20-53. Congress instead expressly addressed FSS set-asides in 15 U.S.C. 644(r), which provides that "agencies may, at their discretion, * * * set aside orders placed against [FSS] contracts for small business concerns," including specifically for small businesses owned by service-disabled veterans. *Ibid.*; see 15 U.S.C. 644(g)(2)(A). The decision whether to use an FSS set-aside is committed to the contracting officer's discretion and does not involve application of the Rule of Two. See 15 U.S.C. 644(r); 48 C.F.R. 8.405-5 (2014) (procedures for setting aside FSS orders).

In any event, this case is not an appropriate vehicle for deciding whether the Rule of Two should apply when the VA places an FSS order and chooses among FSS vendors. See U.S. Br. 44 n.9. Although veteran-owned small businesses can become authorized FSS vendors for the relevant category of information-technology services, and although petitioner asserts that many such businesses have done so, see CFC Doc. 22, at 3 (Sept. 18, 2012), petitioner has not. *Ibid.* Petitioner's own FSS contract does not make petitioner an authorized vendor for the categories of services applicable to the three procurements at issue here. Supplies and services are categorized in each FSS schedule by "Special Item Number." See 48 C.F.R 8.401 (2014). For example, Schedule 70 (information technology) consists of dozens of Special Item Numbers, including category 132-32 (term software licenses), which was used here. CFC Doc. 22, at 3; see U.S. Br. 6. But petitioner "is not on schedule 70 category 132-32." CFC Doc. 22, at 3; see *id.* at 3 n.2. Accordingly, even if the VA had restricted competition for these orders to veteran-owned small businesses on the

FSS, petitioner "could not have benefitted from [the] FSS set-aside." U.S. Br. 44 n.9.

3. Petitioner correctly states that performance of the underlying order with Everbridge Inc. was in effect until May 2013. Pet. Supp. Br. 3; see U.S. Supp. Br. 3-4. But petitioner misinterprets public information (Supp. Br. 3, 12 n.8) as suggesting that the VA did not exercise an option on that contract. In fact, "[t]he VA exercised the first option," but only for a three-month period rather than for a full year. Decl. of Corydon Ford Heard III ¶ 8. In any event, it is undisputed that performance was completed in May 2013, and that the total period of performance (less than two years) is common in this context and too short to enable full judicial review. Accordingly, without an exception to mootness, the precise issue in this case would recur yet evade review.

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For the foregoing reasons, this case is not moot. For the reasons set forth in the United States' merits brief, the judgment of the court of appeals should be affirmed. In the alternative, this Court could vacate the judgment below and remand the case to allow the court of appeals to address the mootness issue in the first instance.

Respectfully submitted.

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