

**THE PROCUREMENT SYSTEM WOULD HAVE BROKEN
EINSTEIN'S BRAIN: GOVERNMENT CONTRACTING
AFTER KINGDOMWARE**

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*[T]his is a new kind of provision, this mandatory set-aside; isn't that true? So we don't have any -- any logic. We don't have any experience at all.*¹

I. Introduction

The rarity of a Supreme Court decision dealing with a bid protest warrants attention when one occurs.² Indeed, in the last thirty years, only

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¹ Transcript of Oral Argument at 15, *Kingdomware Tech., Inc., v. United States*, 136 S. Ct. 1969 (2016) (No. 14-916), 2016 WL 1028391 (Ginsburg, J.) (United States Reports number forthcoming; commenting on lack of empirical evidence comparing simplified acquisition and supply schedule procedures).

² See Daniel I. Gordon, *Bid Protests: The Costs are Real, But the Benefits Outweigh Them*, 42 PUB. CONT. L.J. 489, 497-499 (2013) (estimating that “99% of procurements are not protested” and calculating a “16% sustain rate” for Fiscal Year 2010).

one Supreme Court decision involved a bid protest.³ The Supreme Court recently decided *Kingdomware Technologies, Inc. v. United States*.⁴ The Court held that the Rule of Two set-aside provision at 38 U.S.C. § 8127(d) imposed a mandatory, rather than permissive, duty on the Department of Veterans Affairs (VA) to set aside procurements for small businesses.⁵ This statute addressed set-asides by the VA to veteran-owned small business (VOSB) and service-disabled veteran-owned small business (SDVOSB) concerns.⁶ In reversing the Court of Appeals for the Federal Circuit, the Supreme Court disagreed that 38 U.S.C. § 8127(d) allowed contracting officer discretion in determining whether to set aside a procurement for small businesses.⁷ The decision holds high importance: During fiscal year 2012, the year of the Government Accountability Office (GAO) opinion in this case,⁸ the VA completed approximately \$3.4 billion in contract actions with SDVOSB concerns and \$6.1 billion with other small businesses, to include VOSBs.⁹

Relevant to Judge Advocate practice, *Kingdomware*, while not directly applicable to DoD procurements, signifies the need to correctly provide contracting advice in order to minimize bid protest litigation and thus, avoid procurement delays.¹⁰ Government contracting practitioners

³ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (concerning a bid protest arising from a city set-aside program held to violate the Fourteenth Amendment's Equal Protection Clause).

⁴ *Kingdomware Tech., Inc. v. United States*, 136 S. Ct. 1969 (2016).

⁵ *Id.* at 1976. The Court also considered applicability of the section to orders placed under the Federal Supply Schedule (FSS). *Id.* at 1979.

⁶ Veterans Benefits, Health Care, and Technology Act of 2006 § 502, 38 U.S.C. § 8127(d) (2018). This statute applies to procurements conduct by the VA and not other federal agencies including the Department of Defense.

⁷ *Kingdomware*, 136 S. Ct. at 1979 (additionally, the Court resolved the issue that FSS "orders" are indeed "contracts").

⁸ *Matter of Kingdomware Tech.*, B-406507, 2012 WL 1942256 (Comp. Gen. May 30, 2012) (during Fiscal Year 2012, the GAO sustained a protest by Kingdomware Technologies of a Department of Veterans Affairs award of a contract to provide employee emergency notification services).

⁹ See *Department of Veterans Affairs FY2012 Small Business Procurement Scorecard*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/sites/default/files/files/FY12_Final_Scorecard_VA_2013-06-20.pdf (last visited Mar. 22, 2018).

¹⁰ See *Matter of Aldevra*, B-411752, 2015 WL 6723876 (Comp. Gen. Oct. 16, 2015) [hereinafter 2015 GAO *Aldevra*], *reconsideration dismissed*, *Matter of Aldevra-Reconsideration*, B-411752.2, 2016 WL 5846457 (Comp. Gen. Oct. 5, 2016). See also Gordon, *supra* note 2, at 507 ("it is quite possible that the fear of protests, whether justifiable or not, is harming the acquisition system by driving bad decisions by federal contracting personnel.").

likely assume that a 2010 amendment to the Small Business Act¹¹ removed mandatory small business set-asides under multiple award contracts.¹² However, this article demonstrates that the *Kingdomware* decision applies beyond the VA and affects current Army contracting practices regarding set-asides.¹³ This article shows that the legal rationales behind *Kingdomware* should be applied to the Small Business Act.

Although the *Kingdomware* decision involved the VA Act Rule of Two, the decision and its reasoning apply in other contexts. Beyond the VA, *Kingdomware* applies to analyzing set-asides under the Small Business Act. Furthermore, its rationales require mandatory set-asides under the Small Business Act Rule of Two such that federal agencies must award contracts to small businesses in every acquisition meeting the Rule of Two.¹⁴

Two approaches exist for set-aside provisions and their relationship to goals for set-asides.¹⁵ One approach holds that set-aside provisions allow

¹¹ See Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1331, 124 Stat. 2504, 2541 (2010) (amending the Small Business Act by adding subsection (r) at 15 U.S.C. § 644(r) (2016)).

¹² See Bruce L. Mayeaux, *Non-Economy Act Authorities: The Other White Meat of Interagency Acquisitions—Their Uses, Mechanics, and Limitations*, ARMY LAW., Nov. 2016, at 15, 24 (“you remember a logistics team member saying something to the effect that [Federal Supply Schedule (FSS)] orders under the [Simplified Acquisition Threshold (SAT)] must be set aside for small businesses. However, you find that in 2010, Congress amended the Small Business Act to remove the nature of the small business set-asides under multiple award contracts like the FSS.”). See also *id.* n. 102 (“Prior to 2010, the Small Business Act required all contracts under the [Simplified Acquisition Threshold] to be exclusively set aside for small businesses.”) (citing 2015 GAO *Aldevra*, *supra* note 10).

¹³ See Transcript of Oral Argument at 50, *Kingdomware Tech., Inc., v. United States*, 136 S. Ct. 1969 (2016) (No. 14-916), 2016 WL 1028391 (“I don’t see how you restrict [the Rule of Two mandate] to this statute [the VA Act] and not all the other ones.”) (Zachary Tripp, Assistant to the Solicitor General, referring to Rule of Two set-asides present in the Small Business Act at 15 U.S.C. § 644(j)). See also *id.* at 35 (“Right now, our choice of whether to do a set-aside when choosing among [Federal Supply Schedule (FSS)] vendors, that is committed to agency discretion by law because when Congress amended this point head-on in 644(r), it said that agencies may, at their discretion do this. But, if suddenly the Rule of Two applies in every case, then in every case a disappointed bidder can come in and say, ‘oh no, you’ve misapplied the Rule of Two.’”).

¹⁴ See Federal Acquisition Regulation [48 C.F.R.] 19.502-2 (2017) [hereinafter FAR].

¹⁵ See *Kingdomware*, 136 S. Ct. at 1973 (2016) (“In this case, we consider whether the [VA] must use the Rule of Two every time it awards contracts or whether it must use the Rule of Two only to the extent necessary to meet annual minimum goals for contracting with veteran-owned small businesses.”).

contracting officer discretion to consider agency contract achievements vis-à-vis contracting goals in considering restricted competition.¹⁶ The second approach holds that contracting officers do not have discretion to determine set-asides, and contracting goals do not affect the requirement to set-aside a contract.¹⁷

This article addresses how the *Kingdomware* decision affects set-asides by agencies when awarding contracts under the Small Business Act.¹⁸ It also focuses on whether *Kingdomware* affects the Small Business Act to require mandatory set-asides and to require contract award to small businesses in all acquisitions meeting the Rule of Two.

First, this article discusses *Kingdomware*'s procedural history. The procedural history begins by providing context to the issues raised in the decisions by the GAO, the Court of Federal Claims (COFC), and the Court of Appeals for the Federal Circuit (CAFC). After examining the procedural history, this article examines the Supreme Court's decision.

Second, this article analyzes the relevant contracting statutory framework. It analyzes the Small Business Act's statutory structure, history, amendments, and Rule of Two. Then, the statutory structure of the Competition in Contracting Act relevant to the Small Business Act is addressed. Finally, it analyzes the *Kingdomware* decision and its result of requiring the Rule of Two to apply in all procurements.

Although the *Kingdomware* decision only applied to the VA Act Rule of Two, the decision should logically be extended to the Small Business

¹⁶ See *Matter of Aldevra*, B-406205, 2012 WL 860813 at *3 (Comp. Gen. Mar. 14, 2012) (“according to the agency, the statute should be interpreted to mean that the VA may consider its current achievements vis-à-vis attaining the Secretary’s SDVOSB/VOSB contracting goals in deciding to do restricted competitions.”). See also *Kingdomware Tech., Inc. v. United States*, 107 Fed. Cl. 226, 239 (2012) (“The government asserts, when read as a whole, the Act provides that a contracting officer need only use SDVOSB and VOSB set-asides when it is necessary ‘for purposes of meeting the goals’ established by the Secretary.”).

¹⁷ See *Kingdomware Tech., Inc. v. United States*, 754 F.3d 923, 933 (Fed. Cir. 2014). “Indeed, Kingdomware conceded at oral argument that under its interpretation of 38 U.S.C. § 8127(d), the VA must continue to apply a Rule of Two analysis for every contract even *after* it has met the goals set under § 8127(a).” *Id.* (emphasis in original).

¹⁸ 15 U.S.C. § 644 (2016). Specifically, the article focuses on a recent amendment by the Small Business Jobs Act of 2010 Pub. L. No. 111-240, § 1331, 124 Stat. 2504, 2541 (2010)). See 15 U.S.C. 644(r) (2016).

Act Rule of Two and applied in all domestic procurements.¹⁹ First, the plain meaning of 15 U.S.C. § 644(j) supports mandatory set-asides in all procurements meeting the Rule of Two. Second, even if ambiguity exists in the Small Business Act, *Chevron* deference supports mandatory set-asides in all procurements meeting the Rule of Two.²⁰ Finally, *Kingdomware* affects the 2015 GAO *Aldevra* decision to result in mandatory set-asides for domestic procurements meeting the Rule of Two.

II. Decisions Background

A. Procedural History of *Kingdomware*

The procedural history of *Kingdomware* involved several decisions below the Supreme Court, with decisions by the GAO, COFC, and CAFC. This article discusses each in turn.

1. *The GAO Decision in Kingdomware*

Kingdomware Technologies, Inc. (Kingdomware) filed a bid protest at the GAO after the VA awarded a contract to a non-VOSB.²¹ Kingdomware alleged that the VA had violated 38 U.S.C. § 8127 by using the Federal Supply Schedule (FSS) without applying the Rule of Two.²² Specifically, Kingdomware alleged, the VA Act Rule of Two required a contracting officer to restrict competition to veteran-owned small

¹⁹ See 15 U.S.C. § 644(l)(9)(B) (2018) (limiting the scope of review by procurement center representatives for Department of Defense procurements for contingency operations and procurements where both the place of award and the place of performance are outside of the United States and its territories).

²⁰ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (courts will defer to an agency's regulatory interpretation of an ambiguous statute after applying a two-step analysis: first, ambiguity must exist in the statute, and second, the agency's regulatory interpretation of the statute must be reasonable).

²¹ Joint Appendix at 31, *Kingdomware Tech., Inc., v. United States*, 136 S. Ct. 1969 (2016) (No. 14-916), 2015 WL 5000098 (filed on March 14, 2012). The VA awarded a task order contract to an FSS vendor, Everbridge, Inc., for the procurement of an Emergency Notification System (ENS) for a grouping of four VA medical centers. *Id.* at 30-31. The contract consisted of a base year cost of \$33,824.10 with two option years at \$33,824.10 each, and a total amount of \$101,472.30 if both option years were exercised. *Id.* at 31.

²² *Matter of Kingdomware Tech.*, B-406507, 2012 WL 1942256 at *1 (Comp. Gen. May 30, 2012).

businesses when its conditions are met.²³ The Rule of Two requires a contracting officer to award contracts, on a restricted basis, to small businesses when there is a reasonable expectation that two or more small businesses will submit offers, and that award can be made at a fair and reasonable price.²⁴

The GAO sustained Kingdomware's protest.²⁵ The GAO reasoned 38 U.S.C. § 8127's plain language mandated the agency to conduct a set-aside, and the mandate applied to FSS acquisitions.²⁶ The GAO *Kingdomware* decision incorporated reasoning set forth in the *Matter of Aldevra*,²⁷ a 2012 GAO opinion that interpreted the VA Act Rule of Two.²⁸ The 2012 GAO *Aldevra* decision noted, without resolving, the VA's argument that the agency could consider its current contract achievements relative to small business contracting goals.²⁹ Instead, the GAO found 38 U.S.C. § 8127(d)'s plain language mandated the VA to use

²³ 38 U.S.C. § 8127(d) (2006).

²⁴ *Id.* Although existing at different authorities, the VA Act Rule of Two and the Small Business Act Rule of Two involve the same practical conditions. Compare 38 U.S.C. § 8127(d) (2006) with FAR 19.502-2 (2017).

²⁵ *Matter of Kingdomware Tech.*, B-406507, 2012 WL 1942256 at *1 (Comp. Gen. May 30, 2012).

²⁶ *Id.* at *2 (“the plain language of the VA Act mandates that the VA ‘shall’ conduct its procurements, including the FSS acquisitions, using an SDVOSB set-aside when there is a reasonable expectation that two or more SDVOSB concerns can meet its requirements at a reasonable price.”).

²⁷ *Matter of Aldevra*, B-406205, 2012 WL 860813 (Comp. Gen. Mar. 14, 2012) (decided on the same date as the filing of Kingdomware's protest to the GAO) [hereinafter 2012 GAO *Aldevra* Decision].

²⁸ 38 U.S.C. § 8127(d) (2006).

(d) Use of restricted competition.--Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall 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.

Id. See 2012 GAO *Aldevra* Decision, *supra* note 27, at *1 n. 2 (“Subsections (b) and (c), permit the use, under certain circumstances, of noncompetitive procedures when the VA enters into contracts with SDVOSB and VOSB concerns.”).

²⁹ See 2012 GAO *Aldevra* Decision, *supra* note 27, at *3.

set-asides when the procurements met the requirements under the VA Act Rule of Two.³⁰

Ultimately, the GAO found the VA Act unambiguous and declined to extend *Chevron* deference.³¹ *Chevron* deference arises when a tribunal defers to an agency's construction of a statute after the tribunal finds ambiguity when interpreting a statute.³² In *Kingdomware*, the GAO declined to apply *Chevron* deference because the GAO found the statute unambiguous.³³ Analyzing the statute's plain meaning, the GAO noted the importance of the mandatory term ("shall") relative to introductory phrases describing purposes of meeting set-aside goals.³⁴ Of note, the GAO recognized that the VA had not performed notice-and-comment procedures, and thus had no agency rules for deference.³⁵

³⁰ See *id.* at *4 ("We find that the plain language of 38 U.S.C. § 8127(d) mandates that the VA shall conduct its procurements using an SDVOSB (or VOSB) set-aside when there is a reasonable expectation that two or more SDVOSB (or VOSB) concerns can meet the requirement at a reasonable price.").

³¹ See *id.* (citing *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). The GAO also noted that the legislative history of the VA Act underscored that 38 U.S.C. § 8127 "was intended to broadly foster participation in VA procurements by SDVOSB and VOSB concerns," and read the legislative history "to reflect a congressional expectation that the VA generally will conduct procurements with the purpose of meeting the SDVOSB and VOSB participation goals." *Id.* (citing H.R. REP. NO. 109-592 (2006) (Veterans and Small Business Memorial Act of 2006)). The GAO noted that the language of the statute as enacted by Congress was identical to the language in the bill described in the House report. *Id.* n. 6 (citing H.R. REP. NO. 109-592 at *3).

³² See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

³³ See *Matter of Kingdomware Tech.*, B-406507, 2012 WL 1942256 at *2 (Comp. Gen. May 30, 2012) (referring to the same reasons discussed at length in the 2012 GAO *Aldevra* Decision, *supra* note 27). "We disagreed on the basis that the plain language of the VA Act mandates that the VA 'shall' conduct its procurements, including FSS acquisitions, using an SDVOSB set-aside when there is a reasonable expectation that two or more SDVOSB concerns can meet its requirements at a reasonable price." *Id.* (citing 2012 GAO *Aldevra* Decision, *supra* note 27 at *5).

³⁴ See *id.* See also 2012 GAO *Aldevra* Decision, *supra* note 27, at *4 (noting that the exceptions set out at 38 U.S.C. §§ 8127(b) & (c) use a discretionary term "may" in contrast to "shall" set out at 38 U.S.C. § 8127(d)).

³⁵ See *id.* (referring to reasoning in the 2012 GAO *Aldevra* Decision, *supra* note 27, at *3–4, which cited *Chevron*, 467 U.S. at 842–43 (1984)). The GAO noted that courts defer to agency interpretation of an ambiguous statute unless the resulting regulation or ruling is procedurally defective, arbitrary or capricious in substance. 2012 GAO *Aldevra* Decision, *supra* note 27, at *4 n. 7 (citing *Chevron*, 467 U.S. at 843–45 (1984)).

2. Court of Federal Claims Decision in Kingdomware

Kingdomware also filed a bid protest with COFC.³⁶ After the GAO sustained Kingdomware's protest, the VA notified the GAO that it would not follow the GAO decision.³⁷ Kingdomware sought injunctive relief to compel the VA to comply with the VA Act.³⁸ Contrasting with the GAO decision, the COFC Judge denied Kingdomware's bid protest.³⁹ Significantly, COFC reasoned that analogy to the Small Business Act⁴⁰ was "misplaced" and not applicable to the *Kingdomware* set-aside occurring under the FSS.⁴¹

The COFC found the VA Act Rule of Two set-aside clause ambiguous based on its goal-setting nature.⁴² The court applied *Chevron's* two-

³⁶ See *Kingdomware Tech., Inc. v. United States*, 107 Fed. Cl. 226, 229 (2012). See also *Kingdomware Tech., Inc. v. United States*, 754 F.3d 923, 929 (Fed. Cir. 2014).

³⁷ See Memorandum from Lynn H. Gibson, U.S. Gov't Accountability Off., to Congressional Committees, subject: Kingdomware Technologies, B-405727, Dec. 19, 2011 CPD ¶ 283; Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ ____; Crosstown Courier Service, Inc., B-406262, Mar. 21, 2012, 2012 CPD ¶ ____ at 7 (30 Mar. 2012), <https://www.gao.gov/assets/650/649957.pdf>.

³⁸ See *Kingdomware*, 107 Fed. Cl. at 229.

³⁹ *Id.* at 244 (decided on November 27, 2012, and approximately six months after the GAO's decision). The individual judges of the COFC issue decisions. 28 U.S.C. 174 (2018). As an Article I court established pursuant to the Tucker Act, decisions are not precedential and thus each Judge is free to rule how they see fit and is only required to follow CAFC case law. See 28 U.S.C. 1491 (2018).

⁴⁰ *Id.* at 239 n. 9 (referring to the Historically Underutilized Business Zone (HUBZone) provisions of 15 U.S.C. § 632(p)(1) and FAR 19.1301(b)).

⁴¹ See *id.* at 242. Kingdomware argued a line of cases concerning HUBZone set-asides, including *DGR Assocs., Inc. v. United States*, 94 Fed. Cl. 189 (2010), *Mission Critical Sol. v. United States*, 91 Fed. Cl. 386 (2010), and *Contract Mgmt., Inc. v. Rumsfeld*, 291 F. Supp. 2d 1166 (D. Haw. 2003). *Id.* at 239.

⁴² *Id.* at 241. The Court found ambiguity based on the "goal-setting nature of the statute cloud[ing] the clarity [Kingdomware] would attribute to the phrase 'shall award' in subsection (d) of the Act." *Id.* The Court presumed "that Congress was aware of the historic exception of the FSS from small business set-asides and [could not] presume as [Kingdomware] urge[d] that Congress intended to extinguish the exception by silence." *Id.* (rejecting GAO's analysis in a 2011 decision, *Matter of Aldevra*, B-405271 *et al.*, 2011 WL 4826148 (Comp. Gen. Oct. 11, 2011)).

pronged analysis,⁴³ and found that the VA Act satisfied the first prong.⁴⁴ The court found the VA Act failed *Chevron*'s second prong and declined to grant *Chevron* deference.⁴⁵ Although declining *Chevron* deference, the court deferred to the VA's agency-level interpretation of the VA Act.⁴⁶ The court departed from the GAO's interpretation of the VA Act, and found that the VA's interpretation of the VA Act was entitled to deference.⁴⁷

⁴³ *Kingdomware*, 107 Fed. Cl. at 237.

Under *Chevron*, this court first must determine 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of the Congress.'

Id. (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). "[I]f the statute is silent or ambiguous with respect to the specific issue, a court must proceed to the second step of *Chevron*, which is to ask whether the agency's interpretation of the statute is reasonable." *Id.* (citing *Chevron*, 467 U.S. at 843 (1984)).

⁴⁴ *Kingdomware*, 107 Fed. Cl. at 242 ("Taken as a whole, therefore, the court concludes that under *Chevron* step one the 2006 Act is not plain on its face as to its application to the FSS and is ambiguous with regard to the discretion left to VA in meeting the 2006 Acts' goals.").

⁴⁵ *See id.* at 243 ("The government asserts that VA's position that the 2006 Act's regulations 'do[] not apply to FSS task or delivery orders is reasonable, and entitled to deference. The court agrees."). *See also Kingdomware*, 754 F.3d at 930 (Fed. Cir. 2014) ("Because the regulations themselves do not expressly state that the subsection does not apply to the FSS, the [Court of Federal Claims] declined *Chevron* deference to the VA's interpretation.").

⁴⁶ *Id.* at 243 ("[T]he agency's interpretation of the statute found in the preamble is still entitled to deference so far as it has 'the power to persuade,' . . . based on the agency's consistency, formality, expertise and if the agency's determination fits with prior interpretations.") (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)).

⁴⁷ *Id.* at 244 ("the court . . . finds that [the] VA's decision not to set aside the ENS contract at issue was not arbitrary, capricious or contrary to law.").

3. *United States Court of Appeals for the Federal Circuit Decision in Kingdomware*

a. *Majority Opinion*

Kingdomware filed an appeal with CAFC.⁴⁸ A divided panel of the court affirmed in favor of the VA.⁴⁹ The Court of Appeals for the Federal Circuit reviewed the COFC decision without deference to the lower court, and analyzed the VA Act under *Chevron*.⁵⁰ The Court of Appeals for the Federal Circuit found that the VA Act Rule of Two was not ambiguous.⁵¹

The court reasoned that the statute clearly reflected Congress's intent to directly tie the mandatory Rule of Two to the achievement of small business set-aside goals.⁵² Concerning the VA Act Rule of Two's prefatory clause, CAFC construed the statute by giving effect to each word in the statute.⁵³ Interpreting the statutory scheme as a whole, the court linked the Rule of Two mandate to the goals in the VA Act.⁵⁴ The court found the VA did not need to perform a Rule of Two analysis for every contract, as long as its set-aside goals were met.⁵⁵

⁴⁸ *Kingdomware Tech., Inc., v. United States*, 754 F.3d 923, 924 (Fed. Cir. 2014), *reh'g en banc denied*, Sep. 10, 2014.

⁴⁹ *Id.* at 924–25 (decided on June 3, 2014).

⁵⁰ *Id.* at 930 (citing *Dominion Res., Inc. v. United States*, 681 F.3d 1313, 1317 (Fed. Cir. 2012)). This case involved no factual or mixed factual and legal issues, and the Court first applied the *Chevron* standard before addressing the Administrative Procedure Act's standard of review. *Id.* (citing 5 U.S.C. § 706(2)(A), (D)).

⁵¹ *Id.* at 931 (“We perceive no ambiguity in § 8127, which ‘is the end of the matter, for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress . . .’”) (citing *Chevron*, 467 U.S. at 843 (1984)).

⁵² *Id.* at 931 (“By directly tying the mandatory Rule of Two contracting procedure set forth in subsection (d) to the achievement of the goals set pursuant to subsection (a), Congress’s intent is clear.”).

⁵³ *Kingdomware*, 754 F.3d at 933 (citing *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995)).

⁵⁴ *Id.* at 933 (“The statutory scheme as a whole links the Rule of Two mandate (denoted by the word ‘shall’) in subsection (d) to the goals set under subsection (a). The mandate is, therefore, the required procedure for meeting these goals . . . the agency need not perform a VOSB Rule of Two analysis for every contract, as long as the goals set under subsection (a) are met.”).

⁵⁵ *Id.* at 934 (“The correct reading of the statute according to its plain meaning puts the ‘shall’ in subsection (d) in harmonious context with the discretionary ‘may’ provisions in subsections (b) and (c), and assures that the goals of subsection (a) will be set by the Secretary, not the success or failure of the Rule of Two in the marketplace.”).

b. Dissent by Judge Reyna

In the dissent, Judge Reyna criticized the statutory construction by the majority.⁵⁶ Judge Reyna posited that 38 U.S.C. § 8127(d) clearly provided an imperative to conduct a Rule of Two analysis in every VA procurement.⁵⁷ The dissent reasoned that the prefatory language could not limit the statute's operative clause.⁵⁸

Judge Reyna offered practical reasoning to require the VA to conduct Rule of Two set-asides in every procurement.⁵⁹ Referring to Federal Acquisition Regulation (FAR) Part 19.502-2, he highlighted the VA's existing obligation to conduct a Rule of Two analysis in nearly every acquisition exceeding the micro-purchase threshold.⁶⁰ He countered the majority's argument that the VA could consider agency contract achievements vis-à-vis contracting goals in considering whether to restrict competition.⁶¹ In support, the dissent highlighted FAR 19.502-6(f) to effectively require set-asides even if small businesses already received a fair proportion of agency contracts.⁶²

Separate from the VA Act, Judge Reyna had concerns about the majority's rationale and its implications for the Small Business Act.⁶³

⁵⁶ *Id.* at 934–38.

⁵⁷ *Id.* at 936.

⁵⁸ *Kingdomware*, 754 F.3d at 936–37 (citing *Dist. of Columbia v. Heller*, 554 U.S. 570, 578 (2008)).

⁵⁹ *Id.* at 938–40.

⁶⁰ *See Id.* at 938 n. 10. After the Federal Circuit's 2014 decision of *Kingdomware*, the FAR's Rule of Two subsequently increased the value of the micro-purchase threshold from \$3,000 to \$3,500. FAR 19.502-2(a) (2017). *See also* FAR 2.101 (2017) (reflecting increased amounts of the micro-purchase threshold (\$3,500) and the simplified acquisition threshold (\$150,000)). The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 increased the value of the micro-purchase threshold to \$10,000, and the value of the simplified acquisition threshold to \$250,000. *See* National Defense Authorization Act for FY 2018, Pub. L. No. 115-91, §§ 805, 806, 131 Stat. 1283 (Dec. 12, 2017). However, the increase in FY 2018 applied to agencies other than the Department of Defense (DoD). *Id.* The FY 2019 NDAA adjusted the value of the micro-purchase threshold for the DoD to \$10,000. *See* National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 821 (Aug. 13, 2017).

⁶¹ *Id.* at 938. “The majority seemingly believes it is bad policy to require an agency to continue efforts to award contracts to small businesses once its participation goals are met, overlooking that participation goals are aspirations, not destinations.” *Id.* (emphasis added).

⁶² *Id.* at 938–39.

⁶³ *Kingdomware*, 754 F.3d at 939.

Judge Reyna highlighted that the majority's decision would render unnecessary the existing FAR Small Business Act goals.⁶⁴

B. Supreme Court Decision in *Kingdomware*

Kingdomware petitioned the Supreme Court for certiorari.⁶⁵ Notably, the government modified its argument when it filed its brief to the Court,⁶⁶ as compared to the arguments made to lower level courts.⁶⁷ Previously, the government argued that the VA Act afforded the contracting officer with discretion to determine set-asides as needed to meet agency goals.⁶⁸

Although the government's argument to the Supreme Court conceded the mandatory nature of the statute, the government shifted its argument to another area.⁶⁹ Instead of focusing on the statute's mandatory or discretionary nature, the government focused on the situations requiring application of the VA Act Rule of Two.⁷⁰ The government argued that the VA Act Rule of Two applied only to situations when new contracts were

⁶⁴ *Id.* at 939 (citing 15 U.S.C. § 644(g)(1) and FAR 19.502-1). The dissent's position was that the majority's holding would upset over thirty years of federal procurement law concerning validity of the Small Business Act Rule of Two to ensure small businesses receive a fair proportion of contracts. *Id.* at 939. Judge Reyna further noted that the origin of the Rule of Two predated the FAR. *Id.* n. 12.

⁶⁵ Petition for Writ of Certiorari, *Kingdomware*, 136 S. Ct. 1969 (No. 14-916), 2015 WL 410706.

⁶⁶ See Brief for the United States at *24, *Kingdomware Tech., Inc., v. United States*, 136 S. Ct. 1969 (2016) (No. 14-916), 2015 WL 5719745 ("Section 8127(d) imposes a mandate . . . the disputed question in this case concerns *when* Section 8127(d)'s Rule of Two mandate applies." (emphasis in original)).

⁶⁷ See Brief for the Defendant-Appellee, the United States at *12, *Kingdomware Tech., Inc., v. United States*, 754 F.3d 923 (Fed. Cir. 2014) (No. 2013-5042), 2013 WL 6221879.

⁶⁸ See *id.* ("[S]ection 8217(d) provides that [VA] contracting officers retain the discretion to determine which procurements to set aside as needed to meet the Secretary's goals."). See also *Kingdomware*, 107 Fed. Cl. at 239 ("According to the government, the 2006 Act gives VA discretion to determine when it will use the set-aside procedures found in the Act to meet those goals.").

⁶⁹ Brief for the United States at *24, *Kingdomware Tech., Inc., v. United States*, 136 S. Ct. 1969 (2016) (No. 14-916), 2015 WL 5719745 ("Section 8127(d) imposes a mandate . . . [t]he disputed question in this case concerns *when* Section 8127(d)'s Rule of Two mandate applies." (emphasis in original)).

⁷⁰ *Id.* at *25 ("VA contracting officers must apply Section 8127's contracting preference whenever they solicit and award new contracts on the open market—*i.e.*, through simplified acquisition procedures, sealed bidding, or contracting by negotiation—even if it is clear that the Secretary's goals for a particular year will be achieved.").

awarded on the open market.⁷¹ By arguing an open-market difference for simplified acquisitions, sealed bidding, and contracting by negotiation, the government distinguished these situations from orders placed under pre-existing FSS contracts.⁷²

In a unanimous opinion, the Supreme Court rejected the government's arguments and reversed the decision of the COFC.⁷³ The Court concluded the statute required the VA to use the Rule of Two even when the VA would otherwise meet its set-aside goals.⁷⁴ The Court held that 38 U.S.C. § 8127 was mandatory and not discretionary.⁷⁵ In holding 38 U.S.C. § 8127(d) unambiguously required the VA to use the Rule of Two before contracting under competitive procedures,⁷⁶ the Court declined to apply *Chevron* deference.⁷⁷

III. Analysis of the Small Business Act Rule of Two Applying to Procurements

Although *Kingdomware* addressed the VA Act Rule of Two, the Supreme Court's decision influences the Small Business Act Rule of

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Kingdomware*, 136 S. Ct. at 1979 (2016).

⁷⁴ *Id.* at 1973.

⁷⁵ *Id.* at 1976.

⁷⁶ *Id.*

⁷⁷ *Id.* at 1979.

Two⁷⁸ as previously interpreted through GAO and court decisions.⁷⁹ The following section addresses how the Small Business Act amendment history, statutory structure, and context relative to CICA⁸⁰ support set-asides when the Rule of Two is met.

A. The Small Business Act Amendment History and Statutory Structure Support Set-Asides

The Small Business Act's amendment history and statutory structure support small business set-asides when the Rule of Two is met. In 1953, Congress enacted the Small Business Act.⁸¹ Importantly, the legislation aimed to assist and protect the interests of small business concerns by ensuring they received a "fair proportion" of the total government

⁷⁸ See Federal Acquisition Regulation (FAR) "Rule of Two"; Requirements for Setting Aside Acquisitions for Small Businesses, 49 Fed. Reg. 40,135-01, 40,135 (Oct. 12, 1984) (describing the Rule of Two in FAR Part 19).

The "rule of two" appears in FAR 19.502 which provides the requirements for setting aside acquisitions for small business . . . The key to this issue is in the Small Business Act (15 U.S.C. 644) requirement that " * * * a fair proportion of the total purchases and contracts for property and services for the Government are placed with small business concerns * * *".

Id. See also LBM, Inc., B-290682, 2002 WL 31086989 at *6 (Comp. Gen. Sept. 18, 2002) (discussing the Rule of Two at FAR 19.502), *request for modification denied*, Dep't of the Army—Request for Modification of Recommendation, B-290682.2, 2003 WL 103408 at *6 (Comp. Gen. Jan. 9, 2003).

⁷⁹ See Matter of Aldevra-Reconsideration, B-411752.2, 2016 WL 5846457 (Comp. Gen. Oct. 5, 2016) (dismissing the request for reconsideration without addressing the merits of the request; the first GAO decision post-*Kingdomware* citing the Supreme Court's decision). Additionally, few GAO opinions have cited the initial 2015 *Aldevra* GAO opinion. See Matter of InfoReliance Corp., B-413298, 2016 WL 5050841 at*2 (Comp. Gen. Sept. 19, 2016) (denying protest of an agency's small-business set-aside in an FSS procurement; citing Matter of Aldevra, B-411752, 2015 WL 6723876 (Comp. Gen. Oct. 16, 2015)).

⁸⁰ Pub. L. No. 98-369, Division B, Title VII, §§2701-2753, 98 Stat. 1175 (July 18, 1984) (codified at 10 U.S.C. §§ 2302-2339 (2015) and 41 U.S.C. §§ 3301-3312 (2011)) [hereinafter CICA].

⁸¹ An Act to dissolve the Reconstruction Finance Corporation, to establish the Small Business Administration, and for other purposes, Pub. L. No. 163, § 201, 67 Stat. 230, 232 (Jul. 30, 1953) [hereinafter Small Business Act of 1953].

contracts.⁸² A national defense rationale for the Small Business Act posits that broad-based and dispersed industry in which many small businesses nation-wide contribute strength and health to the economy.⁸³ The next section examines the Small Business Act amendment history and structure, which support mandatory set-asides when the Rule of Two is met.

1. *The Small Business Act History of Amendments Supports Mandatory Set-Asides*

Several amendments to the Small Business Act occurred between its enactment in 1953 and its current form.⁸⁴ In 1978, amendments to the Small Business Act directed procurement goals for federal agencies on an annual basis.⁸⁵ Ten years later, Congress amended the goals to mandate a twenty percent government-wide goal for small business participation in all prime contracts awarded.⁸⁶

⁸² *Id.* at § 202, (“It is the declared policy of Congress that the Government should aid, counsel, assist and protect insofar as possible the interests of small-business concerns in order . . . to insure that a *fair proportion* of the total purchases and contracts for supplies and services for the Government be placed with small-business enterprises”) (emphasis added); *see id.* at § 203 (establishing the Small Business Administration under the general direction and supervision of the President). *See also* 15 U.S.C. § 631(a) (2016).

⁸³ Irving Maness, *The Emergence of the Current Interest in the Defense Small Business and Labor Surplus Area Subcontracting Programs*, 18 *MIL. L. REV.* 119, 121 (1962) (noting the defense establishment’s economic expansion and the increasing need to make use of small business productive resources)

⁸⁴ *See, e.g.*, An Act to Amend the Small Business Act of 1953, as amended, Pub. L. No. 85-536, 72 Stat. 384 (Jul. 18, 1958); An Act to Amend the Small Business Act and the Small Business Investment Act of 1958 to Increase Loan Authorization and Surety Bond Guarantee Authority; and to Improve the Disaster Assistance, Certificate of Competency and Small Business Set-aside Programs, and for other purposes, Pub. L. No. 95-89, § 502, 91 Stat. 553, 562 (Aug. 4, 1977) (amending § 15 of the Small Business Act, 15 U.S.C. § 644 (2010)). *See also* An Act to Amend the Small Business Act of 1953, as amended, Pub. L. No. 85-536, 72 Stat. 384 (Jul. 18, 1958).

⁸⁵ *See* An Act to Amend the Small Business Act and the Small Business Investment Act of 1958, Pub. L. No. 95-507, § 221, 92 Stat. 1757, 1760 (Oct. 24, 1978) (adding new subsection (g) to 15 U.S.C. § 644). *See also* Max V. Kidalov, *Small Business Contracting in the United States and Europe: A Comparative Assessment*, 40 *PUB. CONT. L.J.* 443, 481 (Winter 2011).

⁸⁶ Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, § 502, 102 Stat. 3853, 3881 (Nov. 15, 1988).

Later amendments to the Small Business Act resulted in requiring set-asides. In 1994, the Federal Acquisition Streamlining Act (FASA)⁸⁷ amended the Small Business Act at 15 U.S.C. § 644(j) and mandated small business set-asides within a fixed price range.⁸⁸ Thereafter, the Small Business Act has provided at 15 U.S.C. § 644(j) for small business set-asides between the micro-purchase threshold and the simplified acquisition threshold.⁸⁹ Importantly, on the date of the passage of FASA, the President issued a memorandum to the heads of executive departments and agencies.⁹⁰ The memorandum addressed the fair proportion policy in awarding government contracts to small businesses, and the priority to encourage small business participation in federal procurements.⁹¹

Following major reforms of FASA, the 1996 Federal Acquisition Reform Act (FARA) did not substantively change 15 U.S.C. § 644.⁹² In

⁸⁷ Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 4004, 108 Stat. 3243, 3338–39 (Oct. 13, 1994) [hereinafter FASA].

⁸⁸ *Id.* The FASA amended the Small Business Act at 15 U.S.C. § 644(j) to state:

(j)(1) Each contract for the purchase of goods and services that has an anticipated value greater than \$2,500 but not greater than \$100,000 shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased.

(2) In carrying out paragraph (1), a contracting officer shall consider a responsive offer timely received from an eligible small business offeror

Id.

⁸⁹ *See id.* *See also* FAR 2.101 (2017) reflecting increased amounts of the micro-purchase threshold (\$3,500) and the simplified acquisition threshold (\$150,000). Note that the NDAA for FY 2018 increased the value of the micro-purchase threshold to \$10,000, and the value of the simplified acquisition threshold to \$250,000. *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, §§ 805, 806, 131 Stat. 1283 (Dec. 12, 2017). However, the increase in FY 2018 applied to agencies other than the DoD. *Id.* The FY 2019 NDAA adjusted the value of the micro-purchase threshold for the Department of Defense to \$10,000. *See* National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 821 (Aug. 13, 2019).

⁹⁰ Memoranda of President, subject: Continued Commitment to Small, Small Disadvantaged, and Small Women-Owned Businesses in Federal Procurement, 59 Fed. Reg. 52,397 (Oct. 13, 1994).

⁹¹ *Id.*

⁹² Federal Acquisition Reform Act of 1996, Pub. L. No. 104-106, § 4321(c)(3), 110 Stat. 186, 674 (Feb. 10, 1996) (providing only minor change to 15 U.S.C. § 644: “Section 15(g)(2) (15 U.S.C. 644(g)(2) is amended by striking out the second comma after the first appearance of ‘small business concerns’.”).

the following year, the Small Business Reauthorization Act of 1997 increased contracting goals, last modified in 1988, from twenty percent to twenty-three percent.⁹³ Because no exceptions were ever enacted to the Small Business Act's Rule of Two, the amendment history supports concluding that set-asides must occur when the Rule of Two is met. The next section addresses the structure of the Act.

2. *The Statutory Structure of the Small Business Act Supports Mandatory Set-Asides*

Significant to considering *Kingdomware*'s effect on the Rule of Two, the Small Business Jobs Act of 2010 amended the Small Business Act by adding 15 U.S.C. § 644(r) for the context of a multiple award contract.⁹⁴ Currently in effect, the plain language of section 644(r) makes no reference to section 644(j).⁹⁵ Notably, in the context of multiple award contracts, section 644(r) provides operative discretionary language ("may"), in contrast with section 644(j), which provides mandatory language ("shall") for all contexts.⁹⁶

⁹³ Small Business Reauthorization Act of 1997, Pub. L. No. 103-135, § 603(b)(1)(B), 111 Stat. 2592, 2632 (Dec. 2, 1997) (amending (15 U.S.C. § 644(g)(1)(B) "by striking '20 percent' and inserting '23 percent' . . .").

⁹⁴ Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1331, 124 Stat. 2504, 2541 (Sept. 27, 2010) (reservation of prime contract awards for small businesses). Section 1331 of the Small Business Jobs Act of 2010 amended the Small Business Act, at 15 U.S.C. § 644, by adding subsection (r):

(r) Multiple Award Contracts. Not later than 1 year after the date of enactment of this subsection [September 27, 2010], the Administrator for Federal Procurement Policy and the Administrator, in consultation with the Administrator of General Services, shall, by regulation, *establish guidance under which Federal agencies may, at their discretion—*

- (1) set aside part or parts of a multiple award contract for small business concerns . . . ;
- (2) notwithstanding the fair opportunity requirements under section 2304c(b) of title 10, United States Code, . . . set aside orders placed against multiple award contracts for small business concerns . . . ; and
- (3) reserve 1 or more contract awards for small business concerns under full and open multiple award procurements

Id. (emphasis added).

⁹⁵ Compare 15 U.S.C. § 644(r) (2016) with 15 U.S.C. § 644(j) (2016).

⁹⁶ Compare 15 U.S.C. § 644(r) (2016) with 15 U.S.C. § 644(j) (2016). Note that "[w]hen a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes

Internal to the Small Business Act, a statutory provision supports the FAR's regulatory implementation of the Rule of Two.⁹⁷ The statute requires small business concerns to receive a "fair proportion" of government contracts, and thus supports the FAR Rule of Two.⁹⁸ Significantly, and noted by Judge Reyna's dissent to the CAFC *Kingdomware* opinion, the Small Business Act's Rule of Two pre-dates the FAR.⁹⁹ The Small Business Act's fair proportion standard existed in its initial 1953 statute,¹⁰⁰ and not until 1984 did the FAR implement the Small Business Act's existing fair proportion requirement.¹⁰¹ The FAR's Rule of Two requires a contracting officer to determine whether a reasonable expectation exists of obtaining offers from two or more responsible small business concerns.¹⁰² The FAR's Rule of Two also requires competitive offers in terms of market prices, quality, and delivery.¹⁰³

Consistent with Judge Reyna's dissent to the CAFC *Kingdomware* opinion, the FAR's Rule of Two arises under two situations where a contracting officer must apply its analysis.¹⁰⁴ For acquisitions exceeding \$3,500, but not over \$150,000, a contracting officer must apply the Rule of Two.¹⁰⁵ In this range, the contracting offer must automatically set aside

a mandatory duty." *Kingdomware*, 136 S. Ct. at 1977 (2016) (citing *United States ex rel. Siegel v. Thoman*, 156 U.S. 355, 359–60 (1895)).

⁹⁷ Federal Acquisition Regulation (FAR) "Rule of Two"; Requirements for Setting Aside Acquisitions for Small Businesses, 49 Fed. Reg. 40,135, 40,135–36 (Oct. 12, 1984) (noting the Rule of Two appears in FAR 19.502 and "[t]his method of implanting the fair proportion of total contracts has been upheld by the Courts and the Comptroller General.").

⁹⁸ See 15 U.S.C. § 644(a)(1)(C) (2016); See also 15 U.S.C. § 644(a)(5) (2016).

⁹⁹ See *Matter of Delex Sys., Inc.*, B-400403, 2008 WL 4570635 at *5 (Oct. 8, 2008) ("The origin of the Rule of Two predates the FAR; when the FAR was promulgated, the Office of Federal Procurement Policy (OFPP) prepared a Federal Register notice seeking comments on the rule's inclusion in the new government-wide procurement regulation."); see also *Kingdomware Tech., Inc. v. United States*, 754 F.3d 923, 939 n. 12 (Fed. Cir. 2014) (J. Reyna, dissenting).

¹⁰⁰ Small Business Act of 1953, *supra* note 81, at § 202.

¹⁰¹ See Federal Acquisition Regulation (FAR) "Rule of Two"; Requirements for Setting Aside Acquisitions for Small Businesses, 49 Fed. Reg. 40,135 (Oct. 12, 1984) (citing FAR 19.502).

¹⁰² FAR 19.502-2(a) (2017).

¹⁰³ *Id.*

¹⁰⁴ See FAR 19.502-2(a), (b) (2017). See also *Kingdomware Tech., Inc. v. United States*, 754 F.3d 923, 938 n. 10 (Fed. Cir. 2014) (J. Reyna, dissenting) (discussing the two situations in which a contracting officer must conduct a Rule of Two analysis).

¹⁰⁵ See FAR 19.502-2(a) (2017). Note that the NDAA for FY 2018 increased the value of the micro-purchase threshold to \$10,000, and the value of the simplified acquisition

the acquisition for small business concerns unless the Rule of Two is not met.¹⁰⁶ If the Rule of Two is not met, the contracting officer can solicit the acquisition on an unrestricted basis.¹⁰⁷ For acquisitions over \$150,000, a contracting officer must apply the Rule of Two and conduct set-asides for small businesses when the Rule of Two is met.¹⁰⁸

Because of the Small Business Act's statutory structure, no exceptions allow deviation from applying the Rule of Two. In addition to the statutory structure of the Small Business Act and the implementing FAR provisions of the Rule of Two, other sources relate to applying the Rule of Two. External to the Small Business Act, CICA supports concluding that the Rule of Two applies in all domestic procurements where the rule is met.

The next section analyzes how CICA's statutory framework and its relationship with the Small Business Act support mandatory set-asides in procurements meeting the Rule of Two.

B. The Competition in Contracting Act Framework and the Small Business Act

The Competition in Contracting Act's statutory framework and its relationship with the Small Business Act support mandatory set-asides in procurements meeting the Rule of Two. Since Congressional enactment in 1984, CICA has provided a statutory framework for government contracting competition requirements.¹⁰⁹ It requires federal agencies to accomplish full and open competition when procuring property or

threshold to \$250,000. *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, §§ 805, 806, 131 Stat. 1283 (Dec. 12, 2017). However, the increase in FY 2018 applied to agencies other than the DoD. *Id.* The FY 2019 NDAA adjusted the value of the micro-purchase threshold for the DoD to \$10,000. *See* National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 821 (Aug. 13, 2017).

¹⁰⁶ FAR 19.502-2(a) (2017).

¹⁰⁷ *Id.*

¹⁰⁸ *See* FAR 19.502-2(b) (2017). Consistent with the update to FAR 19.502-2(a), the threshold value at 19.502-2(b) received an increase by the FY 2018 NDAA and its change of the simplified acquisition threshold to \$250,000. *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 805, 131 Stat. 1283 (Dec. 12, 2017) (affecting 41 U.S.C. § 134 (2011)).

¹⁰⁹ *See* CICA, 10 U.S.C. §§ 2302–2339 (2015); 41 U.S.C. §§ 3301–3312 (2011).

services.¹¹⁰ It allows that a separate federal statute may expressly authorize deviating from its default rule to accomplish full and open competition,¹¹¹ and internally provides statutory exceptions.¹¹²

Relevant to *Kingdomware's* effects, CICA contains an exception allowing for full and open competition after exclusion of sources.¹¹³ Within this exception, CICA expressly invokes the Small Business Act.¹¹⁴ Within CICA's overall statutory structure, internal references link the Small Business Act to exemptions from certain requirements.¹¹⁵ For example, a contracting officer does not need to provide separate written justification or determination and findings to support certain small business set-asides.¹¹⁶ Thus, CICA's statutory framework and its connection to the Small Business Act support mandatory set-asides in all procurements meeting the Rule of Two. The next section analyzes how *Kingdomware* affects the Rule of Two's application in all procurements.

IV. Analysis of *Kingdomware* and How the Rule of Two Applies to Procurements

Although *Kingdomware* addressed the VA Act Rule of Two, the decision supports arguments that the Small Business Act Rule of Two applies in domestic procurements to require set-asides. Since an open

¹¹⁰ 10 U.S.C. § 2304(a)(1)(A) (2011) (“obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the Federal Acquisition Regulation . . .”).

¹¹¹ 10 U.S.C. § 2304(a)(1) (2011). “‘Full and open competition’ is obtained when ‘all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.’” Dep’t of the Army—Request for Modification of Recommendation, B-290682.2, 2003 WL 103408 at *4 (Jan. 9, 2003) (citing 10 U.S.C. § 2302(3)(D)).

¹¹² 10 U.S.C. § 2304(a)(1)(A) (2011) (citing subsections (b), (c), and (g) of 10 U.S.C. § 2304 (2011)).

¹¹³ 10 U.S.C. § 2304(b) (2011).

¹¹⁴ 10 U.S.C. § 2304(b)(2) (2011).

The head of an agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding concerns other than small business concerns in furtherance of sections 9 and 15 of the *Small Business Act* (15 U.S.C. 638, 644) and concerns other than small business concerns . . .

Id. (emphasis added).

¹¹⁵ 10 U.S.C. § 2304(f)(2)(D) (2011).

¹¹⁶ *Id.* (exemption from justification and approval for procurement under section 8(a) of the Small Business Act (15 U.S.C. § 637a)).

FAR case may result in future changes to this issue, the following section provides helpful insight to the relevant statutory interpretation.¹¹⁷ First, the plain meaning of 15 U.S.C. § 644(j) supports mandatory set-asides in all procurements meeting the Rule of Two. Second, even if ambiguity exists in the Act, *Chevron* deference supports mandating set-asides in all procurements where the Rule of Two is met. Finally, *Kingdomware* affects the GAO *Aldevra* decision to result in mandatory set-asides in all procurements meeting the Small Business Act Rule of Two.

A. The Plain Meaning of the Small Business Act Results in Mandating Set-Asides in All Procurements Meeting the Rule of Two

The *Kingdomware* decision emphasized the plain meaning of the statute. This section analyzes how *Kingdomware*'s statutory construction analysis affects the Rule of Two.

1. The Plain Meaning of Section 644(j) Mandates Set-Asides in All Procurements

The *Kingdomware* decision established that a court (and the GAO) will afford a high degree of weight toward statutory construction to resolve how to apply the Rule of Two.¹¹⁸ Notably, the filings in *Kingdomware* focused on statutory construction as the main issue in deciding the mandatory nature of the VA Act Rule of Two.¹¹⁹ Similarly, the Small Business Act's Rule of Two requires assessing the plain reading of the underlying statute before addressing collateral policy or regulatory concerns, such as contracting inefficiency.¹²⁰

¹¹⁷ See *Defense Acquisition Regulations System Open FAR Cases as of 3/8/2019*, U.S. DEP'T OF DEFENSE, <https://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (last visited Mar. 11, 2019).

¹¹⁸ *Kingdomware*, 136 S. Ct. at 1976 (2016) (applying plain meaning to reason that 38 U.S.C. § 8127(d) unambiguously required the VA to use the Rule of Two before contracting under competitive procedures).

¹¹⁹ Reply Brief for Petitioner at *1, *Kingdomware Tech., Inc., v. United States*, 136 S. Ct. 1969 (2016) (No. 14-916), 2015 WL 2375829 (“The government does not dispute that this case presents a pure question of statutory construction.”).

¹²⁰ See *id.* at *9 (“It is a bedrock principle . . . that any ‘appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute.’”) (citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978)).

The plain language of 15 U.S.C. § 644(r) makes no reference to 15 U.S.C. § 644(j).¹²¹ Neither section refers to the other by expressly establishing an exception dependent on the other.¹²² Notably, 15 U.S.C. § 644(r) provides operative discretionary language (“may”), in contrast with 15 U.S.C. § 644(j) providing mandatory language (“shall”).¹²³ *Kingdomware*’s reasoning provided that usage of “shall” imposes a mandatory duty when the statute distinguishes between the terms “may” and “shall.”¹²⁴ Therefore, 15 U.S.C. § 644(j)’s plain meaning provides a mandate unaffected by 15 U.S.C. § 644(r)’s discretionary language.¹²⁵

Since the plain meaning of 15 U.S.C. § 644(j) mandates set-asides in all procurements meeting the Rule of Two, the next section analyzes how 15 U.S.C. § 644(r) affects set-asides.

2. *15 U.S.C. § 644(r) Does Not Affect Set-Asides Required by 15 U.S.C. § 644(j)*

Enactment of 15 U.S.C. § 644(j) provided statutory authority to ensure small business concerns receive a “fair proportion” of government contracts.¹²⁶ Analyzed in Section IIIA, *supra*, the Small Business Act’s “fair proportion” standard existed from the initial passage of the 1953 Small Business Act.¹²⁷ Prior-in-time enactment of 15 U.S.C. § 644(j) created a statutory mandate, and later-in-time enactment of 15 U.S.C. § 644(r) did not affect 15 U.S.C. § 644(j)’s priority, especially because neither section refers to the other.¹²⁸ Furthermore, the nature of 15 U.S.C. § 644(r) provides discretionary authority for promulgating FAR provisions that address multiple award schedule contracts.¹²⁹ The absence of any

¹²¹ Compare 15 U.S.C. § 644(r) (2016) with 15 U.S.C. § 644(j) (2016).

¹²² Compare 15 U.S.C. § 644(r) (2016) with 15 U.S.C. § 644(j) (2016).

¹²³ Compare 15 U.S.C. § 644(r) (2016) with 15 U.S.C. § 644(j) (2016). Note, “When a statute distinguishes between ‘may’ and ‘shall,’ it is generally clear that ‘shall’ imposes a mandatory duty.” *Kingdomware*, 136 S. Ct. at 1977 (2016) (citing *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359–60 (1895)).

¹²⁴ *Kingdomware*, 136 S. Ct. at 1977 (2016) (citing *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359–60 (1895) (“[w]hen a statute distinguishes between ‘may’ and ‘shall,’ it is generally clear that ‘shall’ imposes a mandatory duty.”)).

¹²⁵ *Id.*

¹²⁶ See 15 U.S.C. § 644(a)(1)(C) (2016); see also 15 U.S.C. § 644(a)(5) (2016).

¹²⁷ See *supra* text accompanying notes 81–93.

¹²⁸ Compare 15 U.S.C. § 644(r) (2016) with 15 U.S.C. § 644(j) (2016).

¹²⁹ See Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1331, 124 Stat. 2504, 2541 (Sept. 27, 2010).

mention within either 15 U.S.C. § 644(j) or 15 U.S.C. § 644(r) supports the overall point that the mandate of 15 U.S.C. § 644(j) remains in effect.¹³⁰ Each section exists independently of the other without affecting the overall structure of the Small Business Act.¹³¹

3. *The Small Business Act Section 644(r) Does Not Affect Section 644(j)*

An important point for *Kingdomware*'s application to the Small Business Act arises from the nature of the plain mandate at 15 U.S.C. § 644(j). Neither 15 U.S.C. § 644(j) nor 15 U.S.C. § 644(r) contains an express exemption to allow deviation from the statute's plain mandate.¹³² Because the Act requires agencies to apply the Rule of Two in all cases, it equally applies to multiple award contracts.¹³³ In the alternative, should the statute prove ambiguous, the next section addresses *Chevron* analysis.

B. Even if Ambiguity Exists in the Small Business Act, *Chevron* Deference Supports Mandatory Set-Asides in All Procurements Meeting the Rule of Two

Even if 15 U.S.C. § 644(r) affects the plain meaning of 15 U.S.C. § 644(j), *Chevron* deference supports mandatory set-asides in all procurements meeting the Rule of Two. Described earlier in Section I, *Chevron* deference arises when a tribunal defers to an agency's interpretation of a statute if the tribunal finds ambiguity in the statute.¹³⁴ In the context of the Small Business Act, the Small Business Administration (SBA) provided Federal Register comments upon the amendment adding 15 U.S.C. § 644(r).¹³⁵

¹³⁰ Compare 15 U.S.C. § 644(r) (2016) with 15 U.S.C. § 644(j) (2016).

¹³¹ See *Kingdomware*, 136 S. Ct. at 1976 (2016) (citing *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)). "If the statutory language is unambiguous and 'the statutory scheme is coherent and consistent'—as is the case here—'[t]he inquiry ceases.'" *Id.*

¹³² See *Kingdomware*, 136 S. Ct. at 1976 (2016).

¹³³ See *id.*

¹³⁴ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

¹³⁵ Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation, 78 Fed. Reg. 61114-01 (Oct. 2, 2013).

The SBA clearly announced that the addition of 15 U.S.C. § 644(r) did not change the mandatory requirement of a set-aside if the Rule of Two is met.¹³⁶ Rather than shifting analysis to the FAR provisions that depend on 15 U.S.C. § 644(r), the *Chevron* analysis properly begins with the agency interpretation of the statute.¹³⁷

The SBA's Federal Register comments provide the SBA's interpretation of the statute, and deserve priority before considering conflicting FAR provisions. Notably, the SBA stated that proceeding to 15 U.S.C. § 644(r)'s multiple award contract authority would be permissible only when the Rule of Two could not be determined through market research.¹³⁸ Thus, the SBA clearly announced the proper statutory interpretation requires mandatory set-asides.¹³⁹ Therefore, if a court views the Small Business Act as ambiguous, it should defer to the SBA's interpretation of the statute and require set-asides when the Rule of Two is met.

C. *Kingdomware* Affects the 2015 GAO *Aldevra* Decision and Results in Mandatory Set-Asides in Domestic Procurements Meeting the Rule of Two

The *Kingdomware* decision affects the analysis of the 2015 GAO *Aldevra* decision that denied a protest under the Small Business Act's Rule of Two.¹⁴⁰ Although the Army prevailed against that protest, *Kingdomware* occurred after the 2015 GAO *Aldevra* decision and applies to future cases involving the Small Business Act.¹⁴¹

The *Kingdomware* decision affects the 2015 GAO *Aldevra* decision by providing increased support to the position the SBA took before the

¹³⁶ *Id.* at 61122 (“[15 U.S.C. § 644(r)] will come into play only on a multiple award acquisition if the “rule of two” cannot be determined through market research prior to the issuance of a solicitation.”).

¹³⁷ *See Chevron*, 467 U.S. at 842 (1984) (providing *Chevron*'s two-step analysis).

¹³⁸ Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation, 78 Fed. Reg. 61114-01, 61122 (Oct. 2, 2013).

¹³⁹ *Id.* (“[15 U.S.C. § 644(r)] will come into play only on a multiple award acquisition if the “rule of two” cannot be determined through market research prior to the issuance of a solicitation.”).

¹⁴⁰ *See* 2015 GAO *Aldevra*, *supra* note 10.

¹⁴¹ Matter of *Aldevra*-Reconsideration, B-411752.2, 2016 WL 5846457 at *3 (Comp. Gen. Oct. 5, 2016) (specifically mentioning *Kingdomware*'s prospective nature in its dismissal).

GAO.¹⁴² The SBA had joined Aldevra’s position against the U.S. Army and the General Services Administration.¹⁴³ *Kingdomware* relied on consistency and coherency when analyzing the VA Act, which supports the SBA’s arguments to the GAO.¹⁴⁴ This reasoning supports the SBA’s “repeal by implication argument” that left the GAO unconvinced.¹⁴⁵ Furthermore, this reasoning differs from the Army’s protest response and the Army’s cited statutory construction authority.¹⁴⁶

A recent 2018 GAO decision, *American Relocation*, provided the GAO with an opportunity to address the issue of interpreting 15 U.S.C. § 644(j).¹⁴⁷ Different from the 2015 GAO *Aldevra* decision, the GAO in *American Relocation* dismissed the protest, rather than denying the protest on the merits.¹⁴⁸ In the 2018 *American Relocation* decision, the GAO noted that interpreting the provisions of 15 U.S.C. § 644(j) was irrelevant due to the contract size in *American Relocation*.¹⁴⁹

In dismissing the protest, the GAO reasoned that an internal SBA memorandum concerning the Supreme Court’s holding in *Kingdomware* was internal guidance that was not reviewable by the GAO in its bid protest function.¹⁵⁰ The GAO also noted that the classification code of the award at issue in *American Relocation* resulted in dismissing the protest, rather than denying the protest on the merits.¹⁵¹

¹⁴² Memorandum from Michael D. Tully—U.S. Government Services Administration to Ms. Paula A. Williams—U.S. Government Accountability Office, subject: B-411752.1 – Protest of Aldevra, LLC (16 Sep. 2015) at 1.

¹⁴³ *Id.* at 5–6. “GSA agrees with the Army’s position that it is not mandatory that schedule orders below the simplified acquisition threshold . . . be set aside for small business.” *Id.* at 3.

¹⁴⁴ See *Kingdomware*, 136 S. Ct. at 1976 (citing *Barnhart*, 534 U.S. at 450 (2002)). The inquiry ceases if “the statutory scheme is coherent and consistent” and the statutory language is unambiguous statutory. *Id.*

¹⁴⁵ See 2015 GAO *Aldevra*, *supra* note 10, at *4 (“According to SBA, a contrary interpretation would effectively repeal section 644(j) by implication. We disagree.”).

¹⁴⁶ Memorandum from Major Michael Pond—U.S. Army Legal Services Agency to Ms. Paula A. Williams—U.S. Government Accountability Office, subject: GAO Protest of Aldevra B-411752 (21 Aug. 2015) at 5 (citing *Ashland Sales & Serv. Co.*, B-401481, 2009 WL 318914 at *5 (Comp. Gen. Sep. 15, 2009)).

¹⁴⁷ See *American Relocation Connections, LLC*, B-416035 (Comp. Gen. May 18, 2018).

¹⁴⁸ *Id.* at *1.

¹⁴⁹ *Id.* at *6 (“any interpretation of the provisions of 15 U.S.C. § 644(j), which apply to procurements below the simplified acquisition threshold, is irrelevant to this protest.”).

¹⁵⁰ *Id.* (citing *LCPP, LLC*, B-413513.2 at *5 (Comp. Gen. Mar. 10, 2017)).

¹⁵¹ *Id.* at *7 n. 5 (citing 4 C.F.R. § 21.5(b)).

The above reasons support a conclusion that the logic of *Kingdomware* continues to affect the 2015 GAO *Aldevra* decision and results in mandatory set-aside in domestic procurements meeting the rule of two. Additionally, neither the COFC nor CAFC have provided additional decisions on the issue.

V. Conclusion

Kingdomware illustrates the need to correctly provide contracting advice, thereby minimizing bid protests and procurement delays. This article has clearly demonstrated that *Kingdomware* should apply to the Small Business Act. The case requires mandatory set-asides under the Small Business Act Rule of Two such that agencies should award domestic contracts to small businesses whenever the Rule of Two is met.

Contracting practitioners should not assume that the Small Business Act's 2010 amendment removes mandatory small business set-asides under multiple award contracts. Since contracting officers follow the FAR rather than interpret statutes, this article provides insight to a practice area that can result in protests and delay procurements notwithstanding contracting officer compliance with the FAR. Importantly, there is an open FAR case on this issue that may result in future changes to this issue.¹⁵² Finally, practitioners should heed *Kingdomware*'s effect on the 2015 GAO *Aldevra* decision to result in mandatory set-asides in all domestic procurements meeting the Rule of Two.

¹⁵² See *Defense Acquisition Regulations System Open FAR Cases as of 3/8/2019*, U.S. DEP'T OF DEFENSE, <https://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (last visited Mar. 11, 2019).