



U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, DC 20416

**MEMORANDUM**

20 October 2016

From: Director/Office of Government Contracting  
To: Area Directors

Subj: SBA Kingdomware Guidance for Procurement Center Representative (PCR)

Encl: (1) AA/GCBD Memorandum of 17 Oct 16

1. Enclosure (1) is forwarded. All PCRs are to take appropriate action and advise their procurement centers.

  
Sean F. Crean



U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, DC 20416

MEMORANDUM

**From:** A. John Shoraka   
Associate Administrator  
Government Contracting and Business Development  
U.S. Small Business Administration

**To:** Sean Crean  
Director, Government Contracting  
U.S. Small Business Administration

**Date:** 17 October 2016

**Subj:** SBA Kingdomware Guidance for Procurement Center Representative (PCR)

**Ref:** (a) *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016)  
(b) FAR 7.102(a)  
(c) FAR 7.103(u)

This guidance provides SBA's Procurement Center Representatives (PCR) information and follow-up on reference (a) the Supreme Court's unanimous decision in *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016). The Supreme Court concluded that the Department of Veterans Affairs (VA) violated the VA-specific statutory "rule of two" favoring veteran-owned small business concerns (VOSBs) when the VA failed to conduct VOSB market research before issuing Federal Supply Schedule (FSS) orders to a non-VOSB. Though the Kingdomware case only directly addressed a statute applying solely to the VA, the case represents the Supreme Court's first analysis of the FSS program and the "rule of two." As such, it is vital for PCRs to understand the potential implications the Kingdomware decision has on the small business programs of the Small Business Administration (SBA) and their roles in advocating maximum practicable opportunity at their procurement centers.

Following the Supreme Court's June 2016 issuance of the decision in Kingdomware, SBA General Counsel Melvin F. Williams, Jr. issued an opinion concluding that the Supreme Court's rationale should be applied broadly to similarly worded Federal statutes, including specifically section 15(j) of the Small Business Act, 15 U.S.C. § 644(j). This reading would mandate that Federal Supply Schedule (FSS) orders between \$3,500 and \$150,000 be set aside for small business concerns (SBCs). The General Counsel also concluded that PCRs have existing authority to review FSS purchases and to recommend that agencies set aside orders at any value. The General Counsel's opinion relies in large part on the Supreme Court's finding in Kingdomware that FSS orders are unmistakably "contracts" under the common law and the Federal Acquisition Regulation. The Court held that an order under an existing FSS contract is itself a



contract for purposes of the VA's statutory rule of two. Since Kingdomware, the United States Court of Appeals for the Federal Circuit has interpreted the Supreme Court's orders-as-contracts analysis to apply other than to the VA. Coast Prof'l, Inc. v. U.S., Case No. 2015-5077 (Fed. Cir. 2016).

The Small Business Act provides that contracts valued between \$3,500 and \$150,000 shall be set aside exclusively for SBCs unless the contacting officer is unable to obtain offers from two or more SBCs that are competitive with market prices and competitive with regard to the quality and delivery of the goods or services being purchased. (see 15 USC 644(j)). In 2010, Congress also directed SBA and other agencies to establish guidance, under which agencies may, at their discretion, set aside orders placed against multiple award contracts for SBCs. (see 15 USC 644(r)(2)). SBA's guidance established that the definition of "contract" includes orders issued against multiple award contracts. (see 13 CFR 125.1).

The Kingdomware decision supports SBA's guidance on the definition of "contract."

Pursuant to the Small Business Act, it is the declared policy of the Congress that the Government should aid, counsel, assist, and protect the interests of SBCs in order to preserve free competitive enterprise and to ensure that a fair proportion of the total purchases and contracts for property and services for the Government are placed with SBCs. (see 15 USC 631(a)). To effectuate this purpose, SBCs shall receive any award or contract or any part thereof, where it is determined to be in the interest of maintaining the industrial base and national security or in the interest of ensuring that a fair proportion of contracts are awarded to SBCs. (see 15 USC 644(a)). Congress has also provided that the President shall establish an annual government-wide goal for SBC participation of not less than 23 percent of the total value of all prime contract awards. (see 15 USC 644(g)(1)(i)). Each agency, after consultation with SBA, then establishes its own goal for the participation of SBCs in the agency's procurement contracts. (see 15 USC 644(g)(2)(A)). For the purposes of interpreting "procurement contracts" in the goaling statute, an agency's order under another agency's pre-existing contract counts toward the ordering agency's prime contract goals.

The Kingdomware decision supports the counting of orders toward an agency's prime contract goals.

In accordance with references (b) and (c), acquisition begins with planning and market research. Acquisition planning enables agencies to consider the acquisition of commercial items, maximize competition, select the appropriate contract type and consider the use of pre-existing contracts. In addition, to the maximum extent practicable, acquisitions should be structured to facilitate competition by and among small business concerns. Thus, if as part of acquisition planning and market research, and in coordination with the assigned Procurement Center Representative (PCR), an agency determines that SBCs can or will provide a product or service in a timely and qualitative manner at a reasonable price, the agency then should proceed with a strategy that allows for exclusive small business participation (including exclusive participation among 8(a), HUBZone, Service-Disabled Veteran-Owned and Women-Owned small business concerns).

The rule of two analysis on whether exclusive small business competition applies should occur before the agency decides to award a new contract or order off of an existing multiple award or FSS contract.

The Supreme Court in Kingdomware found that use of the FSS is not required, writing that an FSS contract “does not require the Government to make a purchase or expend funds.” By contrast, market research, acquisition planning, and small business preferences are all mandatory.

The policies and goals established by law are clear, and agencies have the requisite tools to receive best value at fair market prices exclusively from SBCs when appropriate, regardless of the mechanism the agency chooses to utilize to acquire those goods or services. Therefore, PCRs should, to the extent possible, review requirements between \$3,500 and \$150,000 which have not been unilaterally set-aside for SBCs, regardless of which mechanism the agency chooses to obtain said requirement, in order to determine if small business can reasonably compete for these opportunities. PCRs should endeavor to use their full authority to review contracts and orders to encourage small business participation.