

December 9, 2019

VIA ELECTRONIC FILING SYSTEM AND HAND DELIVERY

The Honorable Scott S. Harris
Clerk of the Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543-0001

Re: Waiver of Response to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit in *Winston-Salem Industries for the Blind v. United States of America; PDS Consultants, Inc.*, No. 19-329

To the Honorable Scott S. Harris, Clerk of the Supreme Court of the United States:

Pursuant to Supreme Court Rule 15.5, Respondent PDS Consultants, Inc. (“PDS”) hereby waives its right to file a response to the petition for a writ of certiorari in the above-referenced case, unless one is requested by the Court. A signed copy of the Court’s waiver form is enclosed with this letter.

The Court ruled as recently as three years ago in the unanimous decision of *Kingdomware Technologies, Inc. v. United States*, — U.S. —, 136 S. Ct. 1969, 1976, 195 L.Ed.2d 344 (2016), that the Veterans Benefits, Health Care, and Information Technology Act of 2006 (“VBA”) (codified in relevant part at 38 U.S.C. §§ 8127-8128) requires the United States Department of Veterans Affairs (the “VA”) “to apply the Rule of Two to all contracting determinations and to award contracts to veteran-owned small businesses” when utilizing the procedures under 38 U.S.C. § 8127(d).

In the opinion below, the United States Court of Appeals for the Federal Circuit correctly applied *Kingdomware* to hold that the VBA's Rule of Two takes precedence over the Javits-Wager-O'Day Act, 41 U.S.C. §§ 8501-8506 ("JWOD"), and thus, the VA is required to give priority under 38 U.S.C. §8127(d) to veteran-owned small businesses where two or more such businesses could provide goods or services at a fair and reasonable price. This is required notwithstanding the fact that those goods or services are on the AbilityOne procurement list and ordinarily would result in a contract being awarded to a qualified non-profit under JWOD.

Petitioner Winston-Salem Industries for the Blind and the various *amici* have proffered no meritorious basis for revisiting the Court's unanimous decision in *Kingdomware* or for overturning the Federal Circuit's opinion below applying this Court's unanimous decision. Nor have IFB or the *amici* raised any substantively new legal arguments that were not already considered by the lower courts. In truth, the main argument advanced by Petitioner and *amici* alike is that the policy implications of the lower courts' decisions will have a disparate impact on the JWOD community. But those kinds of policy concerns are to be set and weighed by Congress, not the courts. Simply put, there is nothing for the Court to do here.

In recognition of the fact that the case clearly does not warrant review by this Court (as demonstrated by the sound opinion below), Respondent waives the right to file a brief in opposition, unless one is requested by the Court.

The Hon. Scott S. Harris
December 9, 2019
Page 3

Respectfully submitted,



David S. Gallacher
Counsel of Record
Emily S. Theriault
Keeley A. McCarty
Adam A. Bartolanzo

SHEPPARD MULLIN RICHTER &
HAMPTON LLP
2099 Pennsylvania Avenue NW, Suite 100
Washington, DC 20006-6801
Telephone: (202) 747-1921
Direct Facsimile: (202) 747-3807
Email: dgallacher@sheppardmullin.com

*Counsel for Respondent PDS Consultants,
Inc.*

Enclosure (as stated)

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, Respondent PDS Consultants, Inc. states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

CERTIFICATE OF SERVICE

No. 19-329

I, David S. Gallacher, do hereby certify that on December 9, 2019, I caused one copy and an electronic copy of the above-referenced documents to be served by first-class mail and by email on the following parties:

Carter G. Phillips, Esq.
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
cphillips@sidley.com
(202) 736-8000

Noel J. Francisco, Esq.
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Robert Reeves Anderson, Esq.
Arnold & Porter Kaye Scholer LLP
370 Seventeenth Street, Suite 4400
Denver, CO 80202
Reeves.Anderson@arnoldporter.com
(303) 863-2325

Thomas Mark Bondy, Esq.
Orrick, Herrington & Sutcliffe LLP
1152 15 Street, NW
Washington, DC 20005
tbondy@orrick.com
(202) 339-8406

The Hon. Scott S. Harris
December 9, 2019
Page 5

Angela Ingram Carmon, Esq.
City of Winston-Salem
P.O. Box 2511
Winston-Salem, NC 27102
angelac@cityofws.org
(336) 747-7404

Lawrence S. Ebner, Esq.
Capital Appellate Advocacy PLLC
1701 Pennsylvania Ave., NW, Suite 200
Washington, DC 20006
lawrence.ebner@capitalappellate.com
(202) 729-6337

Tracye Winfrey Howard, Esq.
Wiley Rein, LLP
1776 K Street, NW
Washington, DC 20006
twhoward@wileyrein.com
(202) 719-7000

Donald B. Verrilli, Jr., Esq.
Munger, Tolles & Olson LLP
1155 F Street, NW, 7th Floor
Washington, DC 20004
donald.verrilli@mto.com
(202) 220-1101



David S. Gallacher

WAIVER

SUPREME COURT OF THE UNITED STATES

Supreme Court Case No. 19-329

Winston-Salem Industries for the Blind v. United States of America; PDS Consultants, Inc.
(Petitioner) (Respondent)

I DO NOT INTEND TO FILE A RESPONSE to the petition for a writ of certiorari unless one is requested by the Court.

Please check the appropriate boxes:

- Please enter my appearance as Counsel of Record for all respondents.
- There are multiple respondents, and I do not represent all respondents. Please enter my appearance as Counsel of Record for the following respondent(s):
PDS Consultants, Inc.

- I am a member of the Bar of the Supreme Court of the United States.
- I am not presently a member of the Bar of this Court. Should a response be requested, the response will be filed by a Bar member.

Signature 
Date: December 9, 2019

(Type or print) Name David S. Gallacher, Esq.

Mr. Ms. Mrs. Miss

Firm Sheppard Mullin Richter & Hampton LLP

Address 2099 Pennsylvania Avenue NW, Suite 100

City & State Washington, DC Zip 20006

Phone 202-747-1921 Email dgallacher@sheppardmullin.com

A COPY OF THIS FORM MUST BE SENT TO PETITIONER'S COUNSEL OR TO PETITIONER IF *PRO SE*. PLEASE INDICATE BELOW THE NAME(S) OF THE RECIPIENT(S) OF A COPY OF THIS FORM. NO ADDITIONAL CERTIFICATE OF SERVICE IS REQUIRED.

CC: See Certificate of Service attached to Letter