

1 JUSTICE SOTOMAYOR: Could you please --

2 JUSTICE ALITO: Could you explain --

3 JUSTICE SOTOMAYOR: -- explain to me --

4 JUSTICE ALITO: Could you -- could you
5 explain why the FS -- use of the FSS was important with
6 respect to this particular contract? You provide
7 examples of the VA's ordering standard commodities like
8 a stent, or pencils, or something like that. But this
9 was -- my understanding -- maybe this is not right --
10 this was a custom service that you were seeking, and --

11 MR. TRIPP: Yes.

12 JUSTICE ALITO: -- what you did was to
13 solicit a quote from a single contractor.

14 So how does that fit in with the arguments
15 you're making about the need to use the FSS?

16 MR. TRIPP: It -- it sort of -- two things
17 about this. The -- the -- this is a somewhat unusual
18 bid because -- there -- there is not explanation in the
19 record because -- because this case was just litigated
20 on the agreed facts about the procedure.

21 The much more common -- the -- the VA orders
22 a lot of services on the FSS. It's like one of the
23 major ways that people -- that agencies purchase
24 services. And the -- the standard way of doing it,
25 it's -- it's -- you know, it's not like Amazon.com, but

1 you can go on to a website, drill down, see all the
2 vendors who -- who are already prequalified to provide
3 that kind of service. And the standard way that you
4 would do this is that you would request -- request
5 quotes from at least three of them, and then consider
6 them when they come in.

7 And when you request -- request the quote
8 from them, even if you request it from three or four of
9 them, every vendor on the schedule who is preapproved
10 will -- will see that it's open and can submit an offer,
11 and then -- and then the -- the agency would consider
12 all the offers that were given to it, and it picks the
13 one that offers the best value.

14 So that's how it would work if we were doing
15 something like hiring a temporary psychiatrist at a --
16 at a new -- at a new -- expanding a medical center in
17 Des Moines or something.

18 JUSTICE KAGAN: One of the amicus briefs
19 suggests that the VA is now doing increasingly complex
20 procurements by way of the FSS. That we have it in our
21 heads that this is all about, you know, staples and
22 paperclips, but that, in fact, the FSS is being used to
23 do things that would previously have been done on the
24 open market.

25 MR. TRIPP: I -- I -- I -- well, first, I

1 want to emphasize that the VA's primary use of this,
2 again -- this is not -- I'm not talking about staples
3 and paperclips. We're talking about, you know, the --
4 the medical-related stuff, the, you know, wheelchairs,
5 stents, all that -- temporary staffing services.

6 But yes, a lot of the FSS -- even for more
7 complex procurement, the FSS is still substantially
8 easier. And the FSS, you tend to already be sort of
9 aggregating the government's buying power. And so the
10 pricing is -- the idea of the -- of the FSS is that it's
11 both easier to do and that the price will ordinarily be
12 lower.

13 And so -- I mean, the -- the agency wouldn't
14 be going into the FSS if the agency didn't think that
15 that was the -- the best approach. And in fact,
16 whenever the procurement is over half a million dollars,
17 I believe, the FAR requires the contracting officer to
18 make an affirmative, express determination on exactly
19 that point: That -- that going through the FSS is going
20 to provide the best value for us overall.

21 And I -- and just to respond to Petitioner's
22 effort to put a lot of weight onto the best-value
23 language in the -- in the Rule of Two, I'm a little
24 confused by that because -- exactly because when --
25 whenever the agency is placing an order under the FSS,

1 under the FAR, that -- that the -- the contracting
2 officer is making a determination that that order is the
3 best value. So I -- I guess I just -- I -- I feel like
4 that -- that may just collapse on its own weight. I
5 don't -- I don't quite understand where that argument
6 goes.

7 JUSTICE KAGAN: Mr. Tripp, can -- can I ask,
8 what effect would this statute really have on your view?
9 As I understand it, the government does have to use the
10 Rule of Two on all open-market purchases; is that right?

11 MR. TRIPP: Under the statute, our
12 regulations implemented it, yes.

13 JUSTICE KAGAN: Above, like, a very low
14 threshold? Is it 3,500, something like that?

15 MR. TRIPP: Yes. Right, right.

16 JUSTICE KAGAN: So -- so if you're right,
17 what did this statute actually accomplish? In other
18 words, you already have to use the Rule of Two for
19 open-market purchases, or almost all of them.

20 MR. TRIPP: Oh, right.

21 JUSTICE KAGAN: What does the statute do?

22 MR. TRIPP: Yes. It -- so 8127(d) has a --
23 has a huge effect, because under the -- just the -- sort
24 of the regular FAR, you just have to do a set-aside for
25 small businesses, right? That's -- that's sort of norm

1 under the -- under the Rule of Two.

2 But under 8127(d), this required to -- to
3 restrict competition only to veteran-owned small
4 businesses who are in our database. So this is a far
5 more --

6 JUSTICE KENNEDY: Who --

7 MR. TRIPP: Only in our -- who are verified
8 as veteran-owned in our database.

9 So this is a far more powerful preference
10 than the -- than -- than the ordinary preference in --
11 in the FAR, or even when you take that and you couple it
12 with section 8128, which they mention in the brief,
13 which gets at, again, just sort of putting a -- a bit of
14 a thumb on the scale. Restricting competition is a very
15 powerful thing, and it has a huge effect.

16 So again, I think, I just want to emphasize
17 at -- at closing that our -- our major concern is with
18 Petitioner's sort of blocking interpretation that would
19 prevent us from -- from placing orders at all, even when
20 we have them in place, and even when we could place
21 orders with another veteran-owned small business.

22 JUSTICE SOTOMAYOR: And you still haven't
23 answered my question fully.

24 If we limit that to preexisting orders where
25 there is two or more veterans --

1 MR. TRIPP: Yes. And I -- and -- and --

2 JUSTICE SOTOMAYOR: -- on the same practical
3 consequences.

4 MR. TRIPP: The -- the practical
5 consequences are much narrower. I have -- but I have a
6 lot of trouble seeing how you limit that to this statute
7 when the language of this statute is materially
8 identical to --

9 JUSTICE SOTOMAYOR: Like we limit everything
10 else. Once we say what we think, Congress then decides
11 what it's going to do in the future.

12 MR. TRIPP: Are -- are they --

13 JUSTICE SOTOMAYOR: Right now, there are no
14 statutes like that.

15 MR. TRIPP: No, no, no. There is -- there
16 is five others on -- on the exact subject of
17 small-business contracting preferences, and especially
18 644(j), which applies across the government and says
19 that each contract --

20 JUSTICE SOTOMAYOR: The Small Business
21 Administration has read it the way Kingdomware --

22 MR. TRIPP: No, that -- but that was
23 decisively rejected by the FAR counsel, the
24 government-wide body that considered this. They said it
25 was unworkable, and it was unclear that it was going to

1 have a significant upside. Congress responded to the
2 FAR council by enacting 644(r) and establishing a
3 procedure to do that, but making it discretionary in all
4 cases.

5 And if you extend the Rule of Two mandate
6 there, first of all, it would expose us to lots of
7 litigation. But I -- I -- again, I don't see how you
8 restrict that to this statute and not all the other
9 ones.

10 JUSTICE KENNEDY: Do -- do you know what
11 proportion of the VA's annual purchases are under the
12 FSS?

13 MR. TRIPP: By dollar?

14 JUSTICE KENNEDY: Yes. Is it 5 percent,
15 or --

16 MR. TRIPP: I think it's about 20 percent.

17 JUSTICE KENNEDY: 20?

18 MR. TRIPP: About 20 percent, yes.

19 JUSTICE GINSBURG: What was the 60 percent?
20 There was a 60 percent figure.

21 MR. TRIPP: The -- the 60 percent is by
22 transaction volume. You know, a lot of the FSS orders
23 tend to be relatively small dollar order. So there's a
24 lot more of them, but they don't add up to as many
25 dollars.

1 JUSTICE KENNEDY: I see.

2 JUSTICE KAGAN: What are the kinds of things
3 that aren't done under the FSS? Like, what's the
4 remaining 80?

5 MR. TRIPP: Well, you know, a big part of
6 that are orders that we do under other contracts. So --
7 so, right, we spend \$4 billion a year ordering
8 pharmaceuticals under a preexisting contract. And -- I
9 mean, if we couldn't do that, that would be really,
10 really devastating to our just basic operations.

11 CHIEF JUSTICE ROBERTS: Well, how -- do you
12 know how many veteran-owned businesses would be able to
13 offer the best value on pharmaceuticals to the VA?

14 MR. TRIPP: No. What I'm -- what I'm --
15 if -- I think actually if the question is just, you
16 know, to -- if -- if a small business needed to deliver
17 some penicillin to a -- a local hospital for an
18 individual order by a local hospital, I don't know,
19 maybe a veteran-owned small business could do that.

20 What we've done is to -- is -- as --
21 actually, as Congress directed us in Section 8125, they
22 required us to buy these things on national contracts or
23 on the FSS, and so that's what we've done. And so we
24 strategically source all of our pharmaceutical
25 purchases, or almost all of them, through this one

1 contract where we can get them in a matter of minutes.
2 We can place the order and we can get it delivered the
3 next day.

4 If there's no further questions.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Saunders, four minutes.

7 MR. SAUNDERS: Thank you.

8 REBUTTAL ARGUMENT OF THOMAS G. SAUNDERS

9 ON BEHALF OF THE PETITIONER

10 MR. SAUNDERS: Thank you.

11 This case should begin and end for this
12 Court with the concession that in the ordinary sense of
13 the term, an order under the FSS is a contract.
14 Congress chose sweeping language here in acting its
15 mandate, and that language encompasses FSS orders. And
16 to the extent there are, you know, changes that would
17 need to be made or other policy considerations, those
18 can be made by Congress in the future. But the policy
19 consideration it made is -- is embodied in the statutory
20 language it chose.

21 Now, the idea that we're going to come back
22 and limit this based on a specialized meaning of the
23 word "contract," we should remember that that argument
24 is not one that appeared in this case until the
25 government's merits brief in this Court.

1 If it's a settled background interpretation
2 that -- that Congress was incorporating that limitation
3 into the Act, you think it would have occurred to them
4 in the last decade, the carve-outs for the Small
5 Business Act exceptions were never justified based on
6 providing a narrower meaning of the word "contract," and
7 on their face were expressly limited to the Small
8 Business Act, the provision that applied to part 19 of
9 the FAR implementing the Small Business Act.

10 Well, to the extent there's an exception for
11 the Small Business Act, well, Congress came in here is
12 it rejected the Small Business Act approach. Rather
13 than continuing to tinker within the framework of the
14 Small Business Act where this exception applied, it said
15 we're taking this mandate out of the Small Business Act,
16 we're going to narrow it, it's not going to be a
17 government-wide mandate, but we're going to apply it
18 specifically to the VA in light of its unique
19 obligations and set the VA up as the driver of
20 procurement in this area; have it set the example for
21 the rest of the government.

22 Congress was making -- balancing these
23 policy considerations. It wasn't going to be blundering
24 into something that was administratively unworkable.
25 And if you -- the dire consequences that we're hearing

1 today really stood any chance of coming to pass, I don't
2 think that you would have the American Legion, the Iraq
3 and Afghanistan veterans, 41 members of Congress, who
4 care deeply about veterans issues, supporting
5 Kingdomware's position in this case.

6 The reality is if the government's only
7 doing 20 percent of its procurements from FSS, you're
8 already talking about a broad mandate. And then with
9 respect to those existing ones, you have to have a
10 business that is eligible, it has to appear in the
11 database, and it has to be able to offer a fair and
12 reasonable price and best value.

13 And as the -- the Chief Justice discussed
14 for some of these big order commodity contracts, that
15 it's going to be a difficult fight for the -- for the
16 drugs that are being offered here, there's a statutory
17 provision that says that the government acquires its
18 drugs at 76 percent of the average price that
19 wholesalers pay to the manufacturers. So take the
20 average price that anyone else in the world can get from
21 the manufacturer and do a big discount on top of that.
22 Those are tough terms to beat.

23 And so I think that there's going to be --
24 you know, the reality here is not the dire consequences
25 that you're seeing, and the policy judgment is for

1 Congress. And believe me, if anything in this mandate
2 enforced as written is going to hurt veterans in any
3 way, then you can expect Congress will act swiftly to
4 correct that problem.

5 But none of this supports the sweeping
6 carve-out that the government is saying that it doesn't
7 even have to look at its own database. It doesn't have
8 to consider a single veteran-owned small business, no
9 matter how competitive it would be, because it can go
10 straight to the Federal suppliers.

11 JUSTICE KENNEDY: What response do you have
12 to judge -- Justice Ginsburg's question that really
13 you're making us a court of first impression here?
14 Shouldn't we send this back?

15 MR. SAUNDERS: I don't think we should
16 because the meaning of "contract," this is a straight-up
17 question of law. And the reality is that the veterans
18 who are waiting for this law to be enforced as written
19 have already waited a decade. And for -- to send it
20 back and have additional delay on a pure question of law
21 based on a new argument that the government's making for
22 the first time here sets a very bad precedent.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 The case is submitted.

25 (Whereupon, at 11:04 a.m., the case in the

1 above-entitled matter was submitted.)
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