APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT

2017-2379, 2017-2512

PDS CONSULTANTS, INC.,

Plaintiff-Appellee,

v.

UNITED STATES,
WINSTON-SALEM INDUSTRIES FOR THE BLIND,

Defendants-Appellants.

Decided: October 17, 2018

O'Malley, Circuit Judge.

This case concerns the relationship between two statutory regimes designed to benefit two historically disadvantaged groups: veterans and disabled persons. The United States and Winston-Salem Industries for the Blind ("Industries for the Blind") (together, "Appellants") appeal from a decision of the U.S. Court of Federal Claims ("Claims Court") holding that section 502 of the Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403, 3431–35 (2006) ("VBA"), requires the Department of Veterans Affairs ("VA") to consider awarding contracts for prescription eyewear based on competition restricted to veteran-owned small business—i.e., to undertake a "Rule of Two" analysis—before

procuring such eyewear from any other source, including a nonprofit agency for the blind or significantly disabled, designated as such under the Javits-Wagner-O'Day Act ("JWOD"), 41 U.S.C. § 8504. *See PDS Consultants, Inc. v. United States*, 132 Fed.Cl. 117 (2017). For the reasons that follow, we affirm.

I. BACKGROUND

A. Overview of the Federal Procurement Process

A bevy of statutes and regulations govern the federal procurement process. As explained below, these authorities impose a number of restrictions on executive branch agencies seeking to procure goods and services. At the same time, they permit—or, sometimes, mandate—that preferential treatment be given to certain contractors, including those that are owned by or employ veterans or employ blind or otherwise significantly disabled individuals. This case concerns the relative priority of those mandates for VA procurements.

1. The Competition in Contracting Act

In 1984, Congress enacted the modern statutory framework for federal procurement, the Competition in Contracting Act of 1984, Pub. L. No. 98-369, div. B, tit. VII, 98 Stat. 494, 1175, which is codified, as amended, in various sections of titles 10, 31, and 41 of the United States Code. The Competition in Contracting Act generally requires that all executive agencies "obtain full and open competition through the use of competitive procedures" when procuring goods or services. 41 U.S.C. § 3301(a). An agency uses "competitive procedures" when it permits any responsible source to compete for a procurement; it also uses "competitive

procedures" when it appropriately restricts competition to "small business concerns." *Id.* § 152.

The Competition in Contracting Act expressly exempts agencies from having to use "competitive procedures" for procurements where (1) procurement procedures are "otherwise expressly authorized by statute," *id.* § 3301(a); or (2) "a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source," *id.* § 3304(a)(5). The parties do not dispute that the JWOD is a statute that expressly requires that certain procurements be made "from a specified source." They dispute, however, whether and to what extent the VBA contains a separate exception from the Competition in Contracting Act's "competitive procedures" requirement, one that applies before resort to the requirements of the JWOD.

2. The Javits-Wagner-O'Day Act

The JWOD was enacted in 1938 to provide employment opportunities for the blind, and was amended in 1971 to provide such opportunities for "other severely disabled" individuals. To effectuate these goals, the JWOD established the Committee for Purchase from People Who Are Blind or Severely Disabled ("AbilityOne"), a fifteen-member body appointed by the President that includes one representative from the VA. 41 U.S.C. § 8502.

One of AbilityOne's primary duties is to create and maintain a procurement list ("List") that identifies products and services produced by nonprofit entities that are operated in the interest of, and employ, individuals who are blind or significantly disabled. *Id.* § 8503(a). The JWOD generally requires that federal agencies, which on its face would include but not be

limited to the VA, purchase products and services on the List from designated nonprofits. Specifically, the JWOD provides that:

> An entity of the Federal Government intending to procure a product or service on the procurement list referred to in section 8503 of this title [i.e., the List] *shall procure the product or service from a qualified nonprofit agency* for the blind or a qualified nonprofit agency for other severely disabled in accordance with regulations of [AbilityOne] and at the price [AbilityOne] establishes if the product or service is available within the period required by the entity.

Id. § 8504(a) (emphasis added). Regulations promulgated under the JWOD mandate that AbilityOne, in deciding what items to place on the List, consider, among other things, the additional service or commodity's potential to generate employment, the nonprofit agency's qualifications and capability to meet Government standards and schedules, and the impact on private contractors. 41 C.F.R. § 51–2.4. AbilityOne can make changes to the List by posting a notice in the Federal Register and following the notice and comment procedures set forth in the Administrative Procedure Act. 41 U.S.C. § 8503(a)(2).

3. The Small Business Act and Amendments Thereto

The Competition in Contracting Act permits agencies to restrict competition for some federal contracts. For example, the Small Business Act ("SBA") "requires many federal agencies, including the [VA], to set aside contracts to be awarded to small businesses," and specifically requires that each agency set "'an annual goal that presents, for that agency, the maximum practicable

opportunity' for contracting with small businesses, including those 'small business concerns owned and controlled by service-disabled veterans.'" *Kingdomware Techs., Inc. v. United States*, —— U.S. ——, 136 S.Ct. 1969, 1973, 195 L.Ed.2d 334 (2016) (quoting 15 U.S.C. § 644(g)(1)(B)). Federal regulations, such as 48 C.F.R. § 19.502-2(b), moreover, "set forth procedures for most agencies to 'set aside' contracts for small businesses." *Id.*

Congress, through the SBA, established a goal for all agencies to obtain 23% of the value of contracts from "small business concerns." 15 U.S.C. § 644(g)(1)(A) (2012). Congress then expanded small-business opportunities for veterans by passing section 502 of the Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233, which amended the SBA and established a government-wide contracting goal for agencies to obtain at least 3% of the value of contracts from service-disabled veteran-owned small businesses. *Id.*

Congress further amended the SBA by passing the Veterans Benefits Act of 2003, Pub. L. No. 108-183, 117 Stat. 2651. Section 308 of the 2003 Act, as codified, provides that contracting officers "may award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans," provided "the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price." 15 U.S.C. § 657f(b). It also provides, however, that such a procurement may not be made from a source on this basis "if the procurement would otherwise be made from a different source under section 4124 or 4125 of

title 18 or chapter 85 of title 41," the latter including the JWOD. *Id.* § 657f(c).[1]

4. The VBA and the VA's Regulations and Guidance

Congress enacted the VBA in 2006, seeking to remedy federal agencies' failures to meet these contracting goals.[2] In section 502 of the VBA, Congress required the Secretary of Veterans Affairs to establish specific annual goals for the VA's own contract awards to veteran-owned small business and to service-disabled veteran-owned small businesses. *See* 38 U.S.C. § 8127(a). Congress also created a preference for awarding contracts restricted to veteran-owned small business, known as the "Rule of Two," which provides:

> (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 [VA] 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. § 8127(d). Subsections (b) and (c) give contracting officers discretion to award contracts below certain

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[1] Sections 4124 and 4125 govern federal procurements of prison-made products and prisoner-conducted public services, respectively.

[2] The VBA is codified, in relevant part, at 38 U.S.C. §§ 8127–8128 (2016).

dollar thresholds to veteran-owned small businesses without using competitive procedures (very small contracts) or on a sole-source basis (slightly larger contracts). *Id.* §§ 8127(b) & (c). Unlike the 2003 Act, the VBA contains no express exception for procurements which would "otherwise be made from a different source under section 4124 or 4125 of title 18 or chapter 85 of title 41."

In response to the VBA, the VA established the "Veterans First Contracting Program" on June 20, 2007. Under the program, contracting officers were directed to give service-disabled veteran-owned small businesses and veteran-owned small businesses first and second priority status when awarding contracts for VA procurements by undertaking the Rule of Two analysis set forth in § 8127(d). After a period for notice and comment, the VA published its final rules implementing this program with an effective date of January 7, 2010. *See VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses*, 74 Fed. Reg. 64,619 (Dec. 8, 2009). Notably, though the regulations do not say so, in response to comments regarding the interaction between the new program and the AbilityOne program, the VA indicated that the rule would "not alter AbilityOne's status in the ordering preference for current or future items on the AbilityOne procurement list." *Id.* at 64,622.

5. The FAR and VAAR

The Federal Acquisition Regulation ("FAR") is a set of uniform policies and procedures for government acquisition of supplies and services, codified at 48 C.F.R. Part 19, that implements, among other statutes, the Competition in Contracting Act, the JWOD, and the SBA. Prior to the promulgation of FAR, the General Services Administration issued regulations that provided guidance to agencies as to how they should

prioritize the myriad policies that affect government procurement. *See Procurement Sources and Programs; Priorities for Use of Supply Sources*, 44 Fed. Reg. 47,934, 47,935 (Aug. 16, 1979). In Part 8, FAR adopted a prioritization schedule providing that, subject to certain exceptions, "agencies shall satisfy requirements for supplies and services from or through the mandatory Government sources and publications" according to a "descending order of priority." 48 C.F.R. § 8.002(a) (2002). This regulation explains that procurement of "[s]upplies which are on the [AbilityOne List]" takes priority over the procurement of supplies listed in Federal Supply Schedules or government acquisition contracts. *Id.*; *id.* § 8.004; *see generally Federal Acquisition Regulation*; *Prioritizing Sources of Supplies and Services for Use by the Government*, 77 Fed. Reg. 54,872 (Sept. 6, 2012) (explaining the reorganization of FAR).

The VA's Acquisition Regulation ("VAAR") is a subset of the FAR that governs, among other things, VA acquisition procedures. One such VAAR, 48 C.F.R. § 808.002, contains a priority order for supplies. The 2009 regulations referenced above are part of the VAAR.

6. The 2010 Letter and *Angelica Textile*

On April 28, 2010, the VA issued a letter setting forth guidelines to its contracting staff about the Veterans First Program and addressed its interaction with the AbilityOne program. The stated purpose of the letter was to "set forth new procedures for gaining approval to request new requirements be placed on the AbilityOne Procurement List," and it directed contracting officers to take a series of steps to explore whether veteran-owned small businesses and service-disabled veteran-owned small businesses could provide the needed services before proposing a requirement for the List. J.A. 969–71. Among the new steps, a

contracting officer must (1) perform market research in accordance with Part 10 of the FAR and Part 810 of the VAAR, and (2) prepare a determination and findings which document the requirement, the results of the market research performed, and the contracting officer's findings. The letter also stated that all contracting officers must "adhere to the authorities of [the VBA] prior to placing new requirements on the AbilityOne Procurement List," but it distinguished between items that were on the List as of January 7, 2010 and those that were not:

> [A]ll items *currently* on the AbilityOne Procurement List as of January 7, 2010, will continue to take priority over the contracting preferences mandated by [the VBA]. However, all *new requirements* will be subject to the contracting preferences mandated by [the VBA] prior to being considered for placement with the AbilityOne Program. . . . To ensure appropriate business opportunities are properly afforded to [service-disabled veteran-owned small businesses] and [veteran-owned small businesses], all [contracting officers] must adhere to the authorities and requirements of [the VBA] (38 U.S.C. [§§] 8127–8128) prior to placing new requirements on the AbilityOne Procurement List.

J.A. 1338 (emphases added). Thus, the letter indicated that items that had been added to the List prior to January 2010 would be grandfathered in and continue to receive priority.

About six months after the VA published its 2010 letter, the Claims Court issued its decision in *Angelica Textile Services, Inc. v. United States*, 95 Fed.Cl. 208 (2010), a bid-protest case concerning the relationship between the VBA and the JWOD. The Claims Court ruled that a contracting officer "intentionally side-

stepped required procedure" when she failed to follow the steps outlined in the 2010 letter for adding *new* services to the List. *Angelica Textile*, 95 Fed.Cl. at 221. The court required the VA and its contracting officers to follow the procedures set forth in the 2010 letter in follow-on procurements. *Id.* at 223. The court did not address items on the list prior to January 2010.

Following the Claims Court's *Angelica Textile* decision, AbilityOne "ended cooperation and collaboration between the AbilityOne Program staff and VA contracting officers regarding [List] additions." *PDS Consultants*, 132 Fed.Cl. at 122. It then began to add items to the List unilaterally, taking the position that, because the VBA only applied to the VA, and not AbilityOne, it was not required to perform a Rule of Two analysis before adding items to the List. *Id.*

7. *Kingdomware*

In 2016, the Supreme Court decided *Kingdomware*, in which it held that, "[e]xcept when the [VA] uses the noncompetitive and sole-source contracting procedures in subsections (b) and (c), § 8127(d) requires the [VA] to use the Rule of Two before awarding a contract to another supplier." 136 S.Ct. at 1977. *Kingdomware* did not directly address the interaction between § 8127 and the JWOD, however. Its focus, instead, was on whether the VA had the discretion under § 8127(d) to place orders under a preexisting Federal Supply Schedule before resorting to the Rule of Two.

In response to the Supreme Court's decision, the VA issued a new policy memorandum, dated July 25, 2016, again seeking to reconcile the requirements of the VBA and the JWOD. The memorandum stated that the VA has a "continuing requirement to comply with all statutory mandates," including an obligation to purchase

items on the List. J.A. 1301. The memorandum also included a decision tree, which explained that, if there is a mandatory source, such as an item on the List, then the Rule of Two "does not apply." J.A. 1336. Nevertheless, the memorandum explained that the VA will continue to require contracting officers to "conduct market research" and "apply the VA Rule of Two" as required under the VBA before the officer can propose an addition to the List. J.A. 1313.

Then, on March 1, 2017, the VA sent a memorandum to the heads of contracting activities proposing to amend VAAR § 808.002 to "further define use of the . . . Rule of Two when considering procuring supplies or services on the AbilityOne Procurement List" and to require procurement officials to apply the Rule of Two before procuring an item on the List if that item was added to the List on or after January 7, 2010—the date on which the VA's revised regulations implementing the VBA became effective—if such an analysis was not performed before the item was added. J.A. 1549, 1551.[3]

With this background in mind, we next review the procedural history before determining which statute—the VBA or JWOD—controls when VA procurements are made.

B. Procedural History

1. The VISNs and Associated Contracts

The items and services at issue in this case are eyewear and eyewear prescription services that the VA provides through two of its regional Veterans Integrated Service Networks ("VISNs") and associated facilities:

[3] 48 C.F.R. § 808.002 does not yet reflect the changes proposed by the VA in this memorandum.

VISNs 2 and 7.[4] Eyewear products and services for VISNs 2 and 7 were added to the List before January 7, 2010—the date on which the revised regulations implementing the VBA became effective—while those for VISNs 6 and 8 were added to the List after January 7, 2010.[5]

Prior to the passage of the VBA, AbilityOne, working in coordination with the VA, added eyewear and eyewear prescription services provided by the Industries for the Blind to the List for VISNs 2 and 7. It added eyewear prescription services for VISN 7 in 2002 and added eyewear for VISN 2 in 2005. Once the products and services for these VISNs were added to the List, the VA entered into contracts with the Industries for the Blind "to produce and provide prescription eyeglasses and associated services to eligible veteran beneficiaries serviced by VA Medical Centers and all affiliated out-patient clinics," specifying that "eyeglasses will be made to the individual veteran's prescription." *PDS Consultants*, 132 Fed.Cl. at 121.

After the VA published its 2010 letter, coordination between VA contracting officers and AbilityOne effec-

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[4] VISNs 6 and 8 were also initially at issue, but the parties agreed at oral argument that they were no longer relevant. Oral Arg. at 9:16–9:37, 16:47–18:09, *available at* http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2017-2379.mp3.

[5] The Industries for the Blind initially received contracts to provide products and services under VISN 7 in 2002 and under VISN 2 in 2005, and has continuously contracted for these VISNs since these initial contracts. The Industries for the Blind's VISN 2 contract was extended for five months on August 30, 2016, and then again under a sole-source contract that expired on September 30, 2017. Its VISN 7 contract was extended on July 15, 2016, and is set to expire on July 14, 2021. *PDS Consultants*, 132 Fed.Cl. at 124.

tively ended. Between 2013 and 2015, AbilityOne, over negative comments from certain service-disabled veteran-owned small businesses, added prescription eyewear requirements for portions of VISN 8 to the List, leading to a new contract with the Industries for the Blind. *Id.*

In February 2016, AbilityOne published a notice in the Federal Register proposing the addition of eyewear for all of the VA's requirements in VISN 6 to the List. *See Procurement List, Proposed Additions and Deletion*, 81 Fed. Reg. 7,510, 2016 WL 538665 (Feb. 12, 2016). Shortly after the issuance of *Kingdomware*, PDS Consultants, Inc. ("PDS Consultants"), which alleges that it can provide eyewear for VISN 6, wrote a letter to AbilityOne "stating that many of the eyewear products and services that AbilityOne had proposed adding to the List 'are the same or similar to the types of eyeglasses many veteran-owned and service-disabled veteran-owned businesses currently provide' to the VA." *PDS Consultants*, 132 Fed.Cl. at 123. PDS Consultants "asserted that adding VISN 6 to the List would cause the VA to violate § 8127 of the VBA, because *Kingdomware* found that the Rule of Two was mandatory and Congress intended it to cover 'all VA procurements, including items already on the AbilityOne Procurement List.'" *Id.* (emphasis omitted). On July 19, 2016, PDS Consultants wrote AbilityOne "another letter encouraging it to 'work with the VA to ensure that the [VA] performs the necessary market research to determine whether the Rule of Two can be satisfied for VISN 6' before adding that VISN to the List." *Id.*

On August 1, 2016, AbilityOne voted to add eyewear for VISN 6 to the List. In the notice published in the Federal Register, AbilityOne addressed PDS Consultants' comments, stating that, although it appreciated that

it may be possible to purchase eyewear from veteran-owned small businesses:

> [T]he Commission's mission and duty is to provide employment opportunities for people who are blind or have significant disabilities, many of whom are veterans . . . . Adding the proposed products to the Commission's Procurement List will provide employment opportunities to a portion of the U.S. population that has a historically high rate of unemployment or underemployment, and is consistent with the Commission's authority established by 41 U.S.C. Chapter 85.

Additions to and Deletions from the Procurement List, 81 Fed. Reg. 51,863, 51,864–65, 2016 WL 4138446 (Aug. 5, 2016) (footnote omitted).

2. The Claims Court Proceedings

PDS Consultants initiated this bid protest in the Claims Court on August 25, 2016, alleging that it is a service-disabled veteran-owned small business "engaged in the business of providing vision related products" and seeking declaratory and injunctive relief. Specifically, it sought an injunction requiring the VA to perform the Rule of Two analysis for VISNs 2, 6, 7, and 8, and a separate injunction requiring AbilityOne to remove VISNs 6 and 8 from the List.

The Claims Court, after receiving briefing and holding a hearing, ruled that the VA is required to perform a Rule of Two analysis for *all* procurements that post-date 2006, when the VBA was passed, and not just for those items added to the List after January 7, 2010, when the regulations implementing the VBA became effective. *PDS Consultants*, 132 Fed.Cl. at 120. The court first determined that it had jurisdiction over

PDS Consultants' complaint, disagreeing with the government's position that PDS Consultants was required to challenge additions to the List in federal district court under the Administrative Procedure Act. *Id.* at 126. Turning to the merits, the Claims Court reasoned that, even though the VBA and the JWOD are not necessarily in conflict in all instances, (1) the VA is required to follow one of the two statutes first when a product or service appears on the List, (2) the Supreme Court in *Kingdomware* held that § 8127(d) obligates the VA to use the Rule of Two "in all contracting before using competitive procedures," and (3) the VBA is "more specific" than the JWOD in that it applies only to the VA for all of its procurements while the JWOD addresses agency procurements generally. *Id.* at 127–28 (quoting *Kingdomware*, 136 S.Ct. at 1977). The court concluded that the VA has a legal obligation under the VBA to perform a Rule of Two analysis when it seeks to procure eyewear for VISNs 2 and 7 that have not gone through such an analysis. *Id.* at 128. The Claims Court then enjoined the VA from entering into future contracts with the Industries for the Blind without first performing a Rule of Two analysis and entered judgment in favor of PDS Consultants.

The United States and the Industries for the Blind timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

II. DISCUSSION

A. Standard of Review

"In a given case, whether Tucker Act jurisdiction exists is a question of law that we review without deference to the decision of the trial court." *Metz v. United States*, 466 F.3d 991, 995 (Fed. Cir. 2006)

(citation omitted). PDS Consultants, as the plaintiff below, "bears the burden of proving that" the Claims Court "possessed jurisdiction over his complaint." *Sanders v. United States*, 252 F.3d 1329, 1333 (Fed. Cir. 2001) (citing *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991)).

We review the Claims Court's rulings on motions for judgment on the administrative record de novo and review its factual findings based on the administrative record for clear error. *PAI Corp. v. United States*, 614 F.3d 1347, 1351 (Fed. Cir. 2010) (citations omitted). In a bid protest case, we apply the standard of review set forth in the Administrative Procedure Act to determine whether the agency's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Bannum, Inc. v. United States*, 404 F.3d 1346, 1351 (Fed. Cir. 2005) (quoting 5 U.S.C. § 706(2)(A)).

We generally review an agency's statutory interpretations pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997); and *United States v. Mead Corp.*, 533 U.S. 218, 229–30, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). *Chevron* requires that a court reviewing an agency's construction of a statute that it administers first discern "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842, 104 S.Ct. 2778. If the answer is yes, the inquiry ends, and the reviewing court must give effect to Congress's unambiguous intent. *Id.* at 842–43, 104 S.Ct. 2778. If the answer is no, the court must defer to the agency's construction of the statute as long as that construction is a reasonable one. *Id.* at 843, 104 S.Ct. 2778. Notably, "we owe an

agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning." *SAS Inst. Inc. v. Iancu*, —— U.S. ——, 138 S.Ct. 1348, 1358, 200 L.Ed.2d 695 (2018) (quoting *Chevron*, 467 U.S. at 843 n.9, 104 S.Ct. 2778).

Here, despite the existence of various regulations and internal documents purporting to implement the VBA, neither party argues that the VBA is ambiguous or that the VAAR regulations or the 2010 and 2016 memoranda are entitled to deference under *Chevron*. Rather, both parties argue that the statutes before us—when properly construed and reconciled—unambiguously compel the result they seek.

Before turning to the statutory interpretations the parties urge, we must first consider the question of the Claims Court's jurisdiction over PDS Consultants' complaint.

B. The Claims Court Properly Exercised Subject-Matter Jurisdiction over the Action

The Industries for the Blind argues that the Claims Court lacked jurisdiction to rule on PDS Consultants' claims for two reasons.[6] First, the Industries for the Blind contends that PDS Consultants challenges "the validity of the VAAR and the AbilityOne Program as a whole," and that such a challenge to the validity of a regulation or statute "rests exclusively with the federal district courts under the authority of the

[6] The Government does not appeal this issue. Rather, the Government has taken the opposing view in related litigation, contending that such actions are essentially bid protests that fall under the Claims Court's jurisdiction. *See Nat'l Indus. for the Blind v. Dep't of Veterans Affairs*, No. 1:17-cv-00992-KBJ (D.D.C. Aug. 22, 2017), ECF No. 30 at 11–14.

[Administrative Procedure Act]." Indus. for the Blind Br. 22, 24. Second, the Industries for the Blind argues that purchases from the List "are not 'procurements' for purposes of Tucker Act jurisdiction." *Id.* at 28. Instead, the only List procurements arising under Tucker Act jurisdiction, according to the Industries for the Blind, are AbilityOne's decisions to add or remove products and services from the List. *See id.* at 28–29.

The Claims Court can exercise jurisdiction under the Tucker Act over "an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award . . . or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1). The Tucker Act further provides that the Claims Court "shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded." *Id.*

PDS Consultants' claims fall squarely within Tucker Act jurisdiction. An "interested party" under the Tucker Act is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. § 3551(2)(A); *see Am. Fed'n of Gov't Emps., AFL-CIO v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) ("We . . . construe the term 'interested party' in § 1491(b)(1) in accordance with the [Competition in Contracting Act] . . . ."). PDS Consultants meets this requirement, as it is an actual or prospective service-disabled veteran-owned small business bidder on the VISNs 2 and 7 eyewear procurements whose direct economic interest would be affected by the contract award (or failure thereof). And, rather than challenge the validity of the VAAR and AbilityOne programs as

the Industries for the Blind contends, PDS Consultants alleged a statutory violation—namely, that the VA acted in violation of the VBA by awarding contracts without first conducting the Rule of Two analysis. Industries for the Blind does not—nor could it—dispute that the VBA is a statute that relates to all VA procurements. Far from being "tangentially related to a government procurement," *Cleveland Assets, LLC v. United States*, 883 F.3d 1378, 1381 (Fed. Cir. 2018) (finding appropriations provision tangential to, and thus, not "related to" a procurement), the VBA dictates the methodology the VA must employ for its procurements. As an "alleged violation of statute or regulation in connection with a procurement or a proposed procurement," PDS Consultants' action arises under the Claims Court's jurisdiction.

Regarding whether the Industries for the Blind's contracts are procurements, we have found "procurements" under the Tucker Act to encompass "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." *Distributed Sols., Inc. v. United States*, 539 F.3d 1340, 1345–46 (Fed. Cir. 2008) (emphasis omitted). "To establish jurisdiction pursuant to this definition, [PDS Consultants] must demonstrate that the government at least initiated a procurement, or initiated 'the process for determining a need' for" eyewear for VISNs 2 and 7. *Id.* at 1346. PDS Consultants has satisfied this requirement. The Industries for the Blind's agreements in VISNs 2 and 7, stemming from VA procurements, are legally binding contracts requiring the Industries for the Blind to furnish eyewear and related services and the VA to pay for it. Such contracts are encompassed within the Tucker Act's broad coverage of "procurements."

Accordingly, the Claims Court did not err in finding that it had jurisdiction over PDS Consultants' claims.

C. The VA is Required to Use the Rule of Two Even When Goods and Services Are on the List

Now that we have determined that the Claims Court properly exercised jurisdiction over PDS Consultants' complaint, we next examine whether the Claims Court erred in its substantive legal analysis. We conclude that it did not.

"As in any case of statutory construction, our analysis begins with the language of the statute." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999) (internal quotation marks omitted). "The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)). We "must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King v. Burwell*, —— U.S. ——, 135 S.Ct. 2480, 2489, 192 L.Ed.2d 483 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)). This is because statutory "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994).

The two statutory provisions at the heart of this case are the VBA, 38 U.S.C. § 8127(d), and the JWOD, 41 U.S.C. § 8504(a). Section 8127(d) of the VBA provides that, subject to two exceptions not relevant here, VA

contracting officers "shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans," provided they have a "reasonable expectation" (1) "that two or more small business concerns owned and controlled by veterans will submit offers" and (2) "that the award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). The Supreme Court in *Kingdomware* held that, because it contains the word "shall," § 8127(d) "unambiguously requires the [VA] to use the Rule of Two before contracting under the competitive procedures." 136 S.Ct. at 1976.

Section 8504(a) of the JWOD also contains the word "shall." It provides that "[a]n entity of the Federal Government intending to procure a product or service on the [List] . . . *shall* procure the product or service from a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled" in accordance with regulations promulgated by and prices set by AbilityOne, "if the product or service is available within the period required by the entity." 41 U.S.C. § 8504(a) (emphasis added). Because § 8504(a) includes the word "shall" and because it specifies the terms by and conditions under which federal agencies, which would include the VA, shall procure products or services that are on the List, § 8504(a) on its face seems to also obligate the VA to procure products and services on the List from qualified nonprofit agencies for the blind or other severely disabled individuals where such products and services are "available within the period required by the entity." *See Kingdomware*, 136 S.Ct. at 1977 ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement.").

As both statutes contain mandatory language, we must determine whether and to what extent they conflict with one another. If it is possible to give effect to both statutes, we must do so. *Watt v. Alaska*, 451 U.S. 259, 267, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981) (court must read statutes to give effect to each if it can do so while preserving their sense and purpose). If any interpretation of the statutory provisions at issue allows both statutes to remain operative, the court must adopt that interpretation absent a clear congressional directive to the contrary. *Miccosukee Tribe of Indians of Fla. v. United States Army Corps of Eng'rs*, 619 F.3d 1289, 1299 (11th Cir. 2010) (interpretation that allows both statutes to stand must be employed).

The government argues that any statutory conflict can be avoided by interpreting § 8127(d) "as applying only to non-mandatory, competitive awards." Gov't Br. 19. It argues that the mandatory procurements under the JWOD are not governed by § 8127(d), despite the absence of an express exception to that effect. We do not read § 8127(d) so narrowly.

Rather than limit its application to competitive contracts, § 8127(d) requires the VA to "award contracts on the basis of competition." That is, by its express language, the statute applies to *all* contracts—not only *competitive* contracts. The statute requires that, when the Rule of Two is triggered—i.e., when "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"—the VA must apply competitive mechanisms to determine to whom the contract should be awarded. *See Kingdomware*, 136 S.Ct. at 1976 (finding that the text of § 8127 "requires the [VA]

to apply the Rule of Two to *all contracting determinations*." (emphasis added)). And, while § 8127(d) applies only when the Rule of Two is satisfied, § 8127(i) is broader and requires the VA to prioritize veterans (with and without service-connected disabilities) under subsections (b) and (c), even when the Rule of Two is not satisfied.

So, we must turn to the question of whether an alternative means for reconciling these provisions can be found in standard principles of statutory interpretation. We find that it can.

"A basic tenet of statutory construction is that a specific statute takes precedence over a more general one." *Arzio v. Shinseki*, 602 F.3d 1343, 1347 (Fed. Cir. 2010) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general.")); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012) ("The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one."). While the JWOD applies to all agencies of the federal government, the VBA applies only to VA procurements and only when the Rule of Two is satisfied. The express, specific directives in § 8127(d), thus, override the more general contracting requirements of the JWOD.

A comparison of the provisions and stated goals of the VBA with those of its predecessor, the Veterans Benefit Act of 2003, reinforces this conclusion. The 2003 Act, unlike the VBA, authorized but did not require *all* contracting officers within the federal

government to apply the Rule of Two when contracting with service-disabled veteran-owned small businesses (as opposed to all veteran-owned small businesses) under title 15 of the United States Code. Specifically, it amended 15 U.S.C. § 657(f) to add the following provision:

> a contracting officer *may* award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price.

Pub. L. No. 108-183 § 308, 117 Stat. 2651, 2662 (2003) (emphasis added). Importantly, the 2003 Act, in addition to applying to all agency procurement decisions involving service-disabled veteran-owned small businesses, conferred *discretion* on contracting officers to apply the Rule of Two through the use of the permissive word "may." *See United States v. Rodgers*, 461 U.S. 677, 706, 103 S.Ct. 2132, 76 L.Ed.2d 236 (1983) (explaining that "[t]he word 'may,' when used in a statute, usually implies some degree of discretion"). The 2006 VBA, however, includes the *mandatory* requirement that VA contracting officers "*shall* award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans" if the Rule of Two is satisfied, subject to two statutorily defined, noncompetitive exceptions. 38 U.S.C. § 8127(d) (emphasis added).

The VBA, moreover, was expressly enacted to "increase contracting opportunities for small business concerns owned and controlled by veterans and . . . by veterans with service-connected disabilities." 38

U.S.C. § 8127(a)(1). Consistent with the VA's duty to support and champion the veteran community, the VBA created the Veterans First Contracting Program ("Veterans First"), which requires the VA to give "contracting priority" to qualified service-disabled veteran-owned small businesses *and* veteran-owned small businesses. *See* 38 U.S.C. §§ 8127–8128. And it specifies that the Secretary, "[i]n procuring goods and services pursuant to a contracting preference under this title *or any other provision of law . . . shall give priority* to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference." *Id.* § 8128(a) (emphasis added).

The VBA also lacks any exception for procurements that would otherwise be governed by the JWOD. We assume that Congress was aware that it wrote an exception into the agency-wide Veterans Benefits Act in 2003 when it left that very same exception out of the VBA only three years later.

Additionally, "when two statutes conflict, the later-enacted statute controls." *Miccosukee Tribe*, 619 F.3d at 1299; *see also United States v. Estate of Romani*, 523 U.S. 517, 532, 118 S.Ct. 1478, 140 L.Ed.2d 710 (1998) (finding later-enacted, more specific statute controlling). As the VBA was enacted over 30 years after the JWOD was last amended,[7] we can infer that Congress intended the VBA to control in its narrower arena, and the JWOD to dictate broader procurements outside of the VA. Because we can give meaning to both statutes under this interpretation, we avoid any repeal of the JWOD by implication. *See Morton v. Mancari*, 417

[7] Title 41 was reorganized in 2011, but that recodification did not substantively amend the relevant language here.

U.S. 535, 549, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) ("[R]epeals by implication are not favored."). That is, agencies outside of the VA must still comply with the JWOD, as does the VA when the Rule of Two is not implicated. We, therefore, conclude that the requirements of the more specific, later-enacted VBA take precedence over those of the JWOD when the two statutes are in apparent conflict.

Our conclusion finds support in the Supreme Court's decision in *Kingdomware*. There, the Court considered whether the VA must use the Rule of Two every time it awards contracts, or whether it instead must use the rule only to the extent necessary to meet annual minimum goals for contracting with veteran-owned small businesses. *Kingdomware*, 136 S.Ct. at 1973. The Court stated that the VBA's requirement to set aside contracts for veteran-owned small businesses "is mandatory, not discretionary," and held that the text of § 8127(d) "unambiguously" requires that the VA "apply the Rule of Two to *all* contracting determinations and to award contracts to veteran-owned small businesses." *Id.* at 1976 (emphasis added). It reasoned that § 8127(d) expressly provides that the VA "shall award contracts" to veteran-owned small businesses and service-disabled veteran-owned small businesses except in two statutorily defined circumstances, and that the provision "requires" the VA to "use the Rule of Two *before* awarding a contract to another supplier." *Id.* at 1977 (emphasis added). The Court held that these mandatory requirements in the VBA override the purchase requirements set forth in the Federal Supply Schedules included in FAR Part 8. *Id.* at 1978–79. While the precise question we consider today was not presented in *Kingdomware*, we may not ignore the Court's finding that the VBA "is mandatory, not discretionary" and that § 8127(d) "requires the Department

to apply the Rule of Two to *all* contracting determinations and to award contracts to veteran-owned small businesses." 136 S.Ct. at 1975–76 (emphasis added). Competitive or not, placing an item on the List, or choosing an item therefrom under the JWOD, is a form of awarding a contract. And under § 8127(d) and *Kingdomware*, the VA, in such a situation, is required to first conduct a Rule of Two analysis.

Our conclusion is not, as the government and the Industries for the Blind contend, inconsistent with the FAR. They argue that, even if § 8127(d) applies to all VA contracts, it is superseded by Part 8 of the FAR, which "expressly recognizes the AbilityOne Program as . . . a mandatory Government source requirement." Indus. for the Blind Br. 38; *see also* Gov't. Br. 30. According to the Appellants, the FAR requires use of mandatory sources like AbilityOne prior to competitive sources. We disagree. Even if a regulation could ever overrule a clear statutory mandate, the FAR does not purport to do so with respect to § 8127(d). FAR Part 8 begins by stating, "[e]xcept . . . as otherwise provided by law," therefore expressly acknowledging that the use of "mandatory . . . sources," like AbilityOne, can be superseded. 48 C.F.R. § 8.002.

Indeed, under § 8128(a), the Secretary of Veterans Affairs, when "procuring goods and services pursuant to a contracting preference under [title 38] *or any other provision of law . . . shall give priority* to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference." 38 U.S.C. § 8128(a) (emphases added). The phrase "or any other provision of law" by its terms encompasses the JWOD.

Thus, where a product or service is on the List and ordinarily would result in the contract being awarded

to a nonprofit qualified under the JWOD, the VBA unambiguously demands that priority be given to veteran-owned small businesses. While we are mindful of Appellants' policy arguments, we must give effect to the policy choices made by Congress. We find that by passing the VBA, Congress increased employment opportunities for veteran-owned businesses in a narrow category of circumstances, while leaving intact significant mechanisms to protect such opportunities for the disabled.

III. CONCLUSION

Considering the plain language of the more specific, later-enacted VBA, as well as the legislative history and Congress's intention in enacting it, we affirm.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 16-1063C

PDS CONSULTANTS, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

WINSTON-SALEM INDUSTRIES FOR THE BLIND,

Defendant-Intervenor.

(Filed: May 30, 2017)

OPINION

FIRESTONE, Senior Judge.

This bid protest concerns the construction of two statutes: the Veterans Benefits Act of 2006 ("VBA"), 38 U.S.C. § 8127(a), and the Javits-Wagner-O'Day Act, 41 U.S.C. § 8501–06 ("JWOD"). The VBA requires the Department of Veteran's Affairs ("VA") to set goals for providing contracts to veteran-owned small businesses, and with exceptions not relevant here, mandates that before procuring goods and services the VA first determine whether there are at least two veteran-owned small businesses capable of performing the work. If so, the VA must limit competition to veteran-owned small

businesses.[1] This process is known as a "Rule of Two" analysis. The JWOD requires government agencies, including but not limited to the VA, to purchase products and services from designated non-profits that employ blind and otherwise severely disabled people when those products or services appear on a list known as the "AbilityOne List" or "List." The entity responsible for placing goods and services on the List is known as the "AbilityOne Commission." The question before the court in this case is which procurement priority must the VA first employ: the requirement that the VA conduct a Rule of Two analysis to determine whether it must restrict the procurement to veteran-owned small businesses under the VBA or the requirement

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[1] The priority system is set forth in 38 U.S.C. § 8127(i). It establishes a first priority for small businesses owned and controlled by veterans with service-connected disabilities. In this opinion both preferences are labeled as a priority for small business owned and controlled by veterans:

> Priority for contracting preferences.—Preferences for awarding contracts to small business concerns shall be applied in the following order of priority:
>
> (1) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and controlled by veterans with service-connected disabilities.
>
> (2) Contract awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and controlled by veterans that are not covered by paragraph (1).
>
> (3) Contracts awarded pursuant to—
>
> (A) section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or
>
> (B) section 31 of such Act (15 U.S.C. 657a).
>
> (4) Contracts awarded pursuant to any other small business contracting preference.

38 U.S.C. § 8127(i).

that the VA use the AbilityOne List under the JWOD, regardless of whether the VA has conducted a VBA Rule of Two analysis.

The VA, faced with these potentially contradictory contracting preferences, originally took the position in this litigation that if a product or service appears on the AbilityOne List for a particular region of the country the JWOD requires the VA to purchase that product off of the List without first performing a Rule of Two analysis. However, during the pendency of the litigation, the VA changed its position through regulation.[2] The VA now agrees that if a product or service was added to the AbilityOne List after 2010, the VA will perform the Rule of Two analysis before purchasing off of the List. The new regulation provides, however, that the VA will continue to purchase items off of the AbilityOne List without first performing a Rule of Two analysis for items added to the List before 2010. Plaintiff, PDS Consultants, Inc. ("PDS"), is a service-disabled veteran-owned small business that provides eyewear and other vision-related products to the VA under a number of contracts corresponding to different regions of the country. PDS argues that under the Supreme Court's recent decision in *Kingdomware Technologies, Inc. v. United States*, —— U.S. ——, 136 S.Ct. 1969, 195 L.Ed.2d 334 (2016), the VA is required to perform a Rule of Two analysis for all procurements, regardless of when the item was listed on the AbilityOne List.[3]

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[2] *See* Veterans Administration Regulation 808.002 issued March 6, 2017.

[3] As discussed below, PDS initially challenged the validity of all existing contracts with IFB that the VA had entered into without performing a Rule of Two analysis. Following the government's change in its regulations, PDS now appears to be challenging

The government, defendant-intervenor, Winston-Salem Industries for the Blind ("IFB") and *amicus curiae*, National Industries for the Blind ("NIB")[4] (collectively, "the defendants") argue that the JWOD trumps the VA's VBA obligations if the product or service was added to the AbilityOne List before 2010, when the VA implemented the VBA priority system. In effect, the defendants argue that for products and services in the VA regions that were added to the List before 2010 the VA is permanently exempt from having to perform the Rule of Two analysis.[5]

For the reasons that follow, the court finds that the VA is required to perform a Rule of Two analysis for all procurements after the VBA was passed. Accordingly, the VA may not enter into future contracts with IFB until it performs a Rule of Two analysis and determines whether two or more veteran-owned small-businesses can perform the subject work.

I. BACKGROUND

A. The AbilityOne Program

The JWOD, initially passed in 1938 and as amended in 1971, requires federal agencies to procure products

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only "new contracting determinations," Pl.'s Supp. Brief 3, including renewing or extending existing contracts, for the contracting regions in which the VA maintains that it need not perform a Rule of Two analysis before renewing or issuing a new contract to organizations on the AbilityOne List.

[4] NIB is the non-profit agency designated to represent non-profit agencies for the blind before the AbilityOne Commission. As such, NIB determines the suitability of products or services for the AbilityOne List and recommends fair market prices for items on the list.

[5] The VBA was passed in 2006. However, as discussed below, the VA's implementing regulations were issued in 2010.

and services from qualified non-profit agencies that employ people who are blind or otherwise severely disabled under a program known as "AbilityOne." 41 U.S.C. § 8501–06. To that end, the JWOD requires AbilityOne, acting through the presidentially-appointed AbilityOne Commission ("Commission"), to establish and maintain a procurement list ("AbilityOne List" or "List") of "suitable" products and services produced by non-profits that AbilityOne has qualified as a non-profit organization for the blind or severely disabled. *Id.* at § 8503(a). After AbilityOne adds a product or service to the List using the Administrative Procedures Act's ("APA") notice and comment procedures, *id.* at § 8503(a)(2), the JWOD states "[a]n entity of the Federal Government intending to procure a product or service on the procurement list . . . shall procure the product or service" from a qualified non-profit agency for the blind or severely disabled. 41 U.S.C. § 8504. In other words, once an item is added to the AbilityOne List, the JWOD requires federal agencies to purchase that product from the designated non-profit. According to *amicus* NIB, the VA accounts for approximately 15.1% of the AbilityOne sales to government agencies in 2015, and "provided jobs for approximately 630 blind or visually impaired individuals, many of whom are veterans." NIB Brief at 1.

While the AbilityOne Commission has final authority for adding products and services to the List, it has historically worked with agencies, including the VA, when determining what items should be added to the List. 41 U.S.C. § 8503(d) (giving the Commission authority to add items to the procurement list); Administrative Record ("AR") 708 ("Although the Javits-Wagner O'Day Act gives the Commission statutory authority to determine which products or services are suitable to be added to the [AbilityOne List], the Commission strives

to accomplish its mission of creating employment through cooperation and collaboration between the Commission and other federal agencies.").

Prior to the passage of the VBA in 2006, AbilityOne added eyewear and eyewear prescription services provided by defendant-intervenor IFB, a qualified nonprofit, to the List for specific regions, referred to as Veterans Integrated Service Network ("VISNs"). The eyewear and eyewear prescription services were added with the VA's concurrence and participation. Working in coordination with the VA, AbilityOne added to the List eyewear prescription services for VISN 7 in 2002, and added VISN 2 in 2005. Once on the List the VA entered into contracts with IFB "to produce and provide prescription eyeglasses and associated services to eligible veteran beneficiaries serviced by VA Medical Centers and all affiliated out-patient clinics . . . . The eyeglasses will be made to the individual veteran's prescription." AR 275.

B. The Veterans Benefit Act

Congress passed the current version of the VBA on December 22, 2006, PL 109-461, December 22, 2006, 120 Stat. 3403. The purpose of the VBA was to "increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities." 38 U.S.C. § 8127(a). To that end, the VA is required to set specific annual goals for VA contracts to be awarded to veteran-owned small businesses and service-disabled veteran-owned small businesses. *Id.* at § 8127(a)(1). Further, the VBA included the "Rule of Two," which restricts competition for contracts to veteran-owned small businesses and service-disabled veteran-owned small businesses in cases where the contracting officer "has a reason-

able 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.* at § 8127(d). Unlike the JWOD which applies across government agencies, the VBA applies only to services and supplies procured by the VA. *See* 48 C.F.R. § 819.7002; *Angelica Textile Servs., Inc. v. United States*, 95 Fed.Cl. 208, 222 (2010).

C. The VA's Attempts to Integrate their Obligations under the JWOD with their Obligations under the VBA

1. The 2010 Guidelines

In 2010, the VA issued its initial guidelines addressing the potential conflict between the VBA and the JWOD. As this court explained in *Angelica Textile*, 95 Fed.Cl. at 213–214, the VA's guidelines stated that the agency would give first priority to all items already on the AbilityOne List. However, the VA determined that before working with AbilityOne to add any new items to the AbilityOne List, the VA's contracting officer ("CO") would first perform a Rule of Two analysis to determine whether qualifying veteran-owned small businesses were able to perform the procurement. *Id.*

In *Angelica Textile*, the court found that the VA contracting officer did not follow the VA's guidelines when laundry services formerly performed by a veteran-owned small business were added to the AbilityOne List without the VA performing a Rule of Two analysis first. *Id.* at 214.[6] The court found that the

[6] The government argued that the CO's actions were not arbitrary and capricious because the guidelines did not go into effect until after the CO began the procurement process. *Id.* at

question of whether the VA's failure to follow its guidelines was arbitrary, capricious, or not in conformity with the law turned on "the relationship between the [VBA] and [JWOD], and the degree of deference the court owes to the [VA]'s New Guidelines." *Id.* at 220. The court found that the VA's guidelines did not have the force of law, but were nevertheless entitled to *Skidmore* deference. *Id.* at 221–22. In finding that the VA's decision to give veteran-owned small businesses priority when adding items to the List was reasonable, the court noted that it is "a general maxim of statutory interpretation that a specific statute of specific intention takes precedence over a general statute, particularly when the specific statute was later enacted." *Id.* at 222 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384–85, 112 S.Ct. 2031, 119 L.Ed.2d 157, (1992); *NISH v. Rumsfeld*, 348 F.3d 1263, 1272 (10th Cir. 2003); *NISH v. Cohen*, 247 F.3d 197, 205 (4th Cir. 2001)). The court found that "[w]here there is a conflict between the two statutes, the more specific Veterans Benefits Act would control." *Id.* The court found, however, that though the statutes were in "tension," they were not "in direct conflict" with each other. *Id.*

Under those circumstances, the court found the VA's "action in giving first priority to [veteran-owned small businesses] is justified in light of the terms of the [VBA]." *Id.* Accordingly, the court concluded that that the CO's actions in assisting AbilityOne in adding the laundry services to the List before following the guidelines' instruction to first perform a Rule of Two analysis "lacked a rational basis and were arbitrary and capricious." *Id.* Therefore, the court held that "the laundry services listing shall be elided from the

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220. The court rejected this argument because the guidelines explicitly stated that they were to go into effect immediately. *Id.*

AbilityOne List without prejudice against future placement." *Id.* at 223.

Following the VA 2010 guidance documents and the *Angelica Textiles* decision, AbilityOne "ended cooperation and collaboration between the AbilityOne Program staff and VA contracting officers regarding PL additions." AR 708. Thereafter, AbilityOne began to add items unilaterally. AbilityOne took the position that because the VBA only applied to the VA, and not to AbilityOne, therefore AbilityOne was not required to perform the Rule of Two analysis before adding items to the List. *Id.* Rather, AbilityOne contends it has a statutory mandate to continue to add items to the List. *Id.* Because the VA could no longer participate in List additions without first performing a Rule of Two analysis, the AbilityOne Commission determined that the VA "has effectively made unilateral decisions by the Commission the only means to accomplish its statutory obligations when making additions to the PL for VA optical products and/or dispensary services." *Id.*

In 2013, 2014, and 2015, AbilityOne added and expanded the List for parts of VISN 8, again leading to a contract between IFB and the VA. Def.'s MJAR 6 (citing AR Tabs 24, 25, 28, and 10).

2. The *Kingdomware* Decision and the VA's July 2016 Policy Memorandum

The scope of the VA's VBA responsibilities was recently addressed by the Supreme Court in *Kingdomware Technologies, Inc. v. United States*, —— U.S. ——, 136 S.Ct. 1969, 1977, 195 L.Ed.2d 334 (2016). At issue in that case was the VA's position that if the VA was meeting its annual goals for contracts with veteran-owned small businesses as required by law, the VA had the discretion to issue contract awards under the

Federal Supply Schedule ("FSS") (a list of certain products and services that government agencies can quickly acquire without having to go through the ordinary procurement process) without performing a Rule of Two analysis. *See* 74 Fed. Reg. 64624 (2009). Kingdomware Technologies, Inc., a veteran-owned small business, challenged the VA's interpretation of the VBA, and on June 16, 2016, the Supreme Court issued a unanimous decision finding that the VBA's Rule of Two was mandatory for the procurement of all VA goods and services and not, as the VA argued, discretionary if the VA was meeting its VBA contracting goals.

In rejecting the government's argument that the VA could purchase items from the FSS without performing a Rule of Two analysis, the Court explained that the text of § 8127 "requires the Department to apply the Rule of Two to all contracting determinations and to award contracts to veteran-owned small businesses." *Id.* at 1975. The Court noted that the VBA stated that the contracting officer "shall award contracts" using restricted competition except for certain enumerated exceptions, and found that the use of the word "shall" "demonstrates that § 8127(d) mandates the use of the Rule of Two in *all* contracting before using competitive procedures." *Id* at 1977 (emphasis added) (citing 38 U.S.C. § 8127(d)). The court found that "[e]xcept when the Department uses the noncompetitive and sole-source contracting procedures in subsections (b) and (c), § 8127(d) requires the Department to use the Rule of Two before awarding a contract to another supplier. The text also has no exceptions for orders from the FSS system." *Id.* at 1977.

In response to the *Kingdomware* decision, the VA issued a policy memorandum, dated July 25, 2016,

attempting to reconcile the requirements of the VBA and the JWOD. AR 656–701. The memorandum stated that the VA had a "continuing requirement to comply with all statutory mandates," including an obligation to purchase items listed on the AbilityOne List. *Id.* at 666. A decision tree attached to the memorandum provided that if there was a mandatory source, including items on the AbilityOne List, then the Rule of Two "does not apply." *Id.* at 701. However, the VA continued to take the position that before a contracting officer could propose an addition to the AbilityOne List, the contracting officer was required to "conduct market research" and "apply the VA Rule of Two" as required under the VBA. *Id.* at 678.

On February 12, 2016, AbilityOne issued a notice in the Federal Register proposing the addition of eyewear for all the VA's requirements in VISN 6 to the AbilityOne List. AR 758–59 (81 Fed. Reg. 7510–11). After the Supreme Court issued its decision in *Kingdomware*, PDS wrote a letter to the AbilityOne Commission stating that many of the eyewear products and services that AbilityOne had proposed adding to the List "are the same or similar to the types of eyeglasses many veteran-owned and service-disabled veteran-owned businesses currently provide" to the VA. AR 702. PDS asserted that adding VISN 6 to the List would cause the VA to violate § 8127 of the VBA, because *Kingdomware* found that the Rule of Two was mandatory and Congress intended it to cover "*all* VA procurements, including items already on the AbilityOne Procurement List." *Id.* at 703. On July 19, 2016, PDS wrote the Commission another letter encouraging it to "work with the VA to ensure that the [VA] performs the necessary market research to determine whether the Rule of Two can be satisfied for VISN 6" before adding that VISN to the List. *Id.* at 704.

On August 1, 2016, the AbilityOne Commission voted to add eyewear for VISN 6 to the List. *Id.* at 727. In the notice published in the Federal Register, AbilityOne addressed PDS's comments, noting that while the AbilityOne Commission appreciated that it may be possible to purchase eyewear from veteran-owned small businesses:

> [T]he Commission's mission and duty is to provide employment opportunites for people who are blind or have significant disabilities, many of whom are veterans . . . . Adding the proposed products to the Commission's Procurement List will provide employment opportunities to a portion of the U.S. population that has a historically high rate of unemployment or underemployment, and is consistent with the Commission's authority established by 41 U.S.C. Chapter 85.

Id. at 761–62 (81 Fed. Reg. 51864).

3. Status of Current Contracts and the 2017 Changes to Interim Regulations

According to the Administrative Record, the VISN 2 contract to IFB was last extended August 30, 2016. AR Tab 2 at AR 75 (stating that the subject contract is extended for five months, ending January 31, 2017). At oral argument, the government stated that there is a sole-source contract extension in place that expires on September 30, 2017. Oral Argument Tr. 81:15–23. The current VISN 7 contract with IFB was awarded July 15, 2016, and is a "five year BPA to be reviewed annually and updated at that time." AR 282, Oral Argument Tr. 82:1–4. This contract expires on July 14, 2021. Oral Argument Tr. 82:4.

VISN 6 was added more recently to the AbilityOne List and thus there is no current contract with an

AbilityOne contractor. There is a current contract in place with a service-disabled veteran-owned small business in VISN 8. Oral Argument Trans. 83:8–10. In VISN 8, the VA's contract with an AbilityOne contractor expires in May of 2017. Oral Argument Trans. 83:8–10.

On February 13, 2017, two days before oral argument was scheduled on the parties' cross-motions for judgment on the Administrative Record in this case, the government filed a notice of proposed changes in the VA's guidelines that would require VA procurement officials to apply the Rule of Two before procuring an item from the AbilityOne List if that item was added to the List on or after January 7, 2010 (the date the VA issued its initial regulations implementing the VBA) if the Rule of Two analysis was not performed before the item was added to the List. ECF No. 67. On March 6, 2017, the government filed a notice that it had issued a final amendment to its guidelines, codified in Veterans Administration Acquisition Regulation 808.002, with the requirements outlined above. In light of the government's change in position, the court asked the parties to submit supplemental briefing explaining what issues still remained to be decided in the pending case. Supplemental briefing was concluded on March 20, 2017.

The government, plaintiff, and defendant-intervenor all agree that in light of the new regulations, the plaintiff's challenges to the addition of VISN 6 and VISN 8, which were added to the List after January 10, 2010, are now moot because the VA has agreed to

perform a Rule of Two analysis before entering into a contract with a vendor on the List.[7]

With respect to VISN 2 and VISN 7, the plaintiff states that the issue still before the court is "[w]hether the VA must apply the Rule of Two prior to making new contracting determinations, including contract awards . . . ." Pl.'s Supp. Brief (ECF No. 71) at 2. The court understands from this that PDS is no longer challenging existing contracts in VISN 2 and VISN 7. Instead, PDS is challenging the VA's position that it may issue new contracts in VISN 2 and VISN 7 without first performing a Rule of Two analysis after the existing contracts expire. Accordingly, the only issue that remains before the court is whether the VA may issue additional contracts for VISN 2 and VISN 7 (which were both added to the List prior to the passage of the VBA) to vendors on the List before performing a Rule of Two analysis.[8]

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[7] The plaintiff argues that because the VA did not use notice-and-comment rulemaking, and because there appear to be errors in the new guidance, the VA will have to revise the guidance again. Accordingly, plaintiff argues, the VA could amend or revoke the new guidance at any time "making the issues raised in this case ones that could easily recur and that are not completely mooted by the corrective action." Pl.'s Supp. Brief 3. In light of the court's ruling discussed below—that the VA is required to apply the Rule of Two before entering into a contract for items on the List and not previously subject to a Rule of Two analysis—the court rejects the plaintiff's request for an injunction expressly barring the VA from deviating from the regulation presented to the court with regard to post-2010 AbilityOne items that the VA can change its practice in such a manner.

[8] PDS states in its supplemental brief that the question of whether the AbilityOne Commission can unilaterally add products and services to the List without VA input is also an issue before this court. This issue was discussed at oral argument, but was not addressed in any of the parties' cross-motions for

II. STANDARDS OF REVIEW

The government has moved to dismiss this case for lack of jurisdiction under Rule of the Court of Federal Claims ("RCFC") 12(b)(1) and the parties have cross-moved for judgment on the administrative record under RCFC 52.1.

The Tucker Act provides this court with jurisdiction to hear bid protests alleging "violation of a statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1). As the Federal Circuit has explained, the court's bid protest jurisdiction is "very sweeping in scope." *RAMCOR Servs. Group v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999). A procurement or proposed procurement for the purposes of the Tucker Act "includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340, 1345–46 (Fed. Cir. 2008). In considering a motion to dismiss for lack of jurisdiction, "a court must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Acevedo v. United States*, 824 F.3d 1365, 1368 (quoting *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011)).

The APA, 5 U.S.C. § 706(2)(A), provides the applicable standard of review for a bid protest. *Advanced*

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judgment on the administrative record. Because the plaintiff did not challenge AbilityOne's authority in its initial briefing, and because this issue was affected by the government's change in its guidance letter, the court finds that this issue is not properly before the court.

Data Concepts, Inc. v. United States, 216 F.3d 1054, 1057–1058 (Fed. Cir. 2000). Accordingly, the court's review is limited to determining whether an agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 1057. In this case, the plaintiffs are only alleging a violation of the law. Under the Supreme Court's decision in *Chevron, U.S.C.* [sic] *v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), when reviewing a challenge to an agency's interpretation of a statute, a court must first determine whether the statute is ambiguous. If Congress's intent is unambiguous, the court must "give effect to the unambiguously expressed intent of Congress" and end the inquiry. *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778. In determining whether the statute is ambiguous, the court "employ[s] traditional tools of statutory construction and examine 'the statute's text, structure, and legislative history, and apply the relevant canons of interpretation.'" *Kyocera Solar, Inc. v. United States Int'l Trade Comm'n*, 844 F.3d 1334, 1338 (Fed. Cir. 2016) (quoting *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012)). If the statute is "silent or ambiguous," then the court must determine "whether the agency provided 'a permissible construction of the statute.'" *Fitzgerald v. Dep't of Homeland Security*, 837 F.3d 1346, 1353 (Fed. Cir. 2016) (quoting *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778).

III. DISCUSSION

A. The Court has Jurisdiction over PDS's Complaint

Before reaching the merits of the parties' arguments regarding the proper construction of the VBA and the JWOD, the court will address the government's argument that this court lacks jurisdiction over this case.

See Ultramercial, Inc. v. Hulu, LLC, 772 F.3d 709, 718 (Fed. Cir. 2014) (noting that "a court must assure itself of its own jurisdiction before resolving the merits of a dispute . . ." (citing *Diggs v. Dep't of Hous. & Urban Dev.*, 670 F.3d 1353, 1355 (Fed. Cir. 2011)). For the reasons stated below, the court finds that none of the government's objections deprive this court of jurisdiction over PDS's protest.

In its initial briefing, PDS challenged both existing contracts between the VA and IFB and the addition of VISNs to the List when the VA had not first performed a Rule of Two analysis. For the first time at oral argument, the government argued that PDS was required to challenge additions to the List as an APA challenge before a federal district court, not as a bid protest action in this court, and therefore, the court lacks jurisdiction over PDS's challenge. The court disagrees. Following the government's change in its regulations in March 2017, PDS is seeking to prevent the VA from awarding future contracts to IFB in VISNs 2 and 7 without first performing a Rule of Two analysis. This is a challenge to the VA's decision not to perform a Rule of Two analysis when the contract for VISN 2 and VISN 7 expire and are up for renewal. This court's bid protest jurisdiction is "very sweeping in scope." *RAMCOR*, 185 F.3d at 1289. In fact, the VA has made it clear that, absent intervention from this court, it will continue to enter into contracts with IFB for eyewear without performing a Rule of Two analysis in VISNs 2 and 7. Accordingly, PDS's challenge is "in connection with a procurement or a proposed procurement," 28 U.S.C. § 1491(b)(1), and thus is within the court's bid protest jurisdiction. The government's motion to dismiss is denied.

B. The VA is Required to Conduct a Rule of Two analysis for New Contracts Regardless of when the VISN was Added to the Procurement List

Turning to the merits of the parties' dispute the court finds the issue to be decided is correctly stated by the plaintiff. The plaintiff phrases its understanding of the issue remaining in this case as "[w]hether the VA must apply the VBA Rule of Two prior to making new contracting determinations, including contract awards, as indicated in *Kingdomware Technologies, Inc. v. United States*, —— U.S. ——, 136 S.Ct. 1969, 195 L.Ed.2d 334 (2016), for products and services currently listed on the Procurement List for VA facilities located in [VISN] 2 and VISN 7, which were added to the Procurement List prior to January 7, 2010." Pl.'s Supp. Brief at 2. The government phrases its understanding slightly differently: "Whether the VA reasonably interpreted the [VBA] of 2006 when it identified the pre-VBA List additions of VISN 2 and VISN 7 as mandatory sources and awarded two contracts to [IFB] without applying the Rule of Two." Def.'s Supp. Brief at 2. The court finds that the government misstates the issue at hand and that the plaintiff's statement of the issue is correct. The question before the court is not whether the VA was wrong to award the initial contract to IFB, but whether, after passage of the VBA in 2006, the VA was required to perform a Rule of Two analysis before treating the AbilityOne List as a mandatory source for any new contracts. The court finds that the VBA requires the VA to perform the Rule of Two analysis for *all* new procurements for eyewear, whether or not the product or service appears on the AbilityOne List, because the preference for veterans is the VA's first priority. If the Rule of Two analysis does not demonstrate that there are two qualified veteran-owned

small businesses willing to perform the contract, the VA is then required to use the AbilityOne List as a mandatory source.

The defendants argue that the JWOD and the VBA are not directly in conflict. Further, defendants argue that the VA's solution, as expressed in its new guidelines, which gives effect to both statutes by requiring the VA to perform a Rule of Two analysis for all procurements except for products and services that were put on the AbilityOne List before 2010 should be upheld. According to the government, neither the VBA nor the JWOD express a priority for competitive awards, and therefore, the VA's construction of the two statutes should be afforded deference under the Supreme Court's decision in *Chevron*. The government argues that Congress did not "unambiguously express[ ] a priority for veteran-owned small businesses over mandatory sources identified on the procurement list," Def.'s MJAR 21. Therefore, the government argues, "the VA is being required to apply two statutory mandates that Congress did not prioritize expressly, this Court should defer to the VA's reasonable construction of the Veterans Benefit Act." *Id.* at 23.

The court agrees that the VBA and the JWOD are not necessarily in conflict in all instances. However, the VA can necessarily only follow one of the statutes first when a product or service appears on the AbilityOne List. In that connection, the court must decide whether the VA's decision to exclude pre-2010 AbilityOne listed items from any VBA reevaluation after enactment of the VBA is lawful. The court finds that the statutory language of the VBA, as explicated by the Supreme Court in *Kingdomware*, establishes a preference for veteran-owned small businesses as the VA's first priority. As the Supreme Court stated in *Chevron*, if a

statute is clear, the court must "give effect to the unambiguously expressed intent of Congress." 467 U.S. at 843, 104 S.Ct. 2778. The statute is interpreted "employing traditional tools of statutory construction." *Id.* at 843 n.9, 104 S.Ct. 2778. If "the statutory language is unambiguous and 'the statutory scheme is coherent and consistent . . . the inquiry ceases.'" *Kingdomware*, 136 S.Ct. at 1976 (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002)).

Under the VBA, the VA must perform a Rule of Two inquiry that favors veteran-owned small businesses and service-disabled veteran-owned small businesses "in all contracting before using competitive procedures" and limit competition to veteran-owned small businesses when the Rule of Two is satisfied. *Id.* at 1977. The VBA states that, except for certain inapplicable exceptions:

> [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.

38 U.S.C. § 8127(d). The VBA also states that

> In procuring goods and services pursuant to a contracting preference under this title or any other provision of law, the Secretary shall give priority to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference.

38 U.S.C. § 8128(a). Based on this language, the Supreme Court found in *Kingdomware* that § 8127(d) was mandatory, and therefore "before contracting with a non-veteran-owned business, the Department must first apply the Rule of Two." 136 S.Ct. at 1977. The court found that the mandatory nature of the VBA "demonstrates that § 8127(d) mandates the use of the Rule of Two in *all contracting* before using competitive procedures." *Id.* at 1977 (emphasis added).

IFB argues that under the language of the VBA the JWOD can be reasonably interpreted as taking priority because the VBA only applies to competitive procurements, and that procurements under the JWOD are not "competitive" procurements. The court finds, however, that IFB's reading of the VBA is contrary to the Supreme Court's holding in *Kingdomware*, which expressly held that the Rule of Two was "mandatory, not discretionary," and that it thus covered the non-competitive procurements authorized under the FSS. *See* 136 S.Ct. at 1976. In this connection, the Supreme Court expressly noted that the VBA contained "no exceptions for orders from the FSS system." *Id.* at 1977. Importantly, like the FFS, the VBA also does not contain an exception for obtaining goods and services under the AbilityOne program. Indeed, the court finds it significant that an earlier version of the 2006 VBA, the Veterans Benefit Act of 2003, contained an explicit exception for contracts under the JWOD which was eliminated in the final legislation. *See* Pub. L. No. 108-183 § 308, December 16, 2003, 117 Stat. 2651 ("A procurement may not be made from a source on the basis of a preference provided under subsection (a) or (b) if the procurement would otherwise be made from a different source under section 4124 or 4125 of title 18, United States Code, or the Javits-Wagner-O'Day Act"). The fact that Congress did not include this

exception in the 2006 enactment strongly indicates that Congress meant for the VBA to apply before the VA was required to turn to the AbilityOne List under the JWOD. It is well settled, "[w]here Congress includes language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the [omitted text] was not intended." *Russello v. United States*, 464 U.S. 16, 23–24, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983).

Further, because the VBA is a more specific than the JWOD statute in that it applies only to the VA for all of its procurements, the VBA must be read to take precedence over the JWOD. *See Arzio v. Shinseki*, 602 F.3d 1343, 1347 (Fed. Cir. 2010) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992)) ("A basic tenet of statutory construction is that a specific statute takes precedence over a more general one."). This conclusion was stated in *Angelica Textiles* as follows:

> The Veterans Benefits Act is a specific mandate to the Department . . . to grant first priority to [service-disabled veteran-owned small businesses] and [veteran-owned small businesses] in the awarding of contracts. On the other hand, the Javits-Wagner-O'Day Act is a more general procurement statute. Were there a conflict between the two statutes, the more specific Veterans Benefits Act would control.

Angelica Textiles, 95 Fed.Cl. at 222. This court agrees with the *Angelica Textile* court's reading of the statutes and thus finds that the VA has a legal obligation to perform a Rule of Two analysis under the VBA when it seeks to procure eyewear in 2017 for VISNs 2 and 7 that have not gone through such analysis—even though the items were placed on the AbilityOne List before

enactment of the VBA. The VA's position that items added to the List prior to 2010 are forever excepted from the VBA's requirements is contrary to the VBA statute no matter how many contracts are issued or renewed.[9]

C. Laches

Regardless of the merits, the government also argues that PDS's claim for relief should be barred under the doctrine of laches with respect to PDS's challenges to contracts for VISNs 2 and 7, on the grounds that those items were listed on the AbilityOne List as far back as 2002. The affirmative defense of laches "bars a claim when a plaintiff's 'neglect or delay in bringing suit to remedy an alleged wrong, which taken together with lapse of time and other circumstances, causes prejudice to the adverse party.'" *Nat'l Telecommuting Inst., Inc. v. United States*, 123 Fed.Cl. 595, 602 (2015) (quoting *Land Grantors in Henderson, Union, & Webster Counties v. United States*, 86 Fed.Cl. 35, 47 (2009)). A party seeking to invoke laches must demonstrate two things: first "unreasonable and unexcused delay by the claimant," and second, "prejudice to the other party, either economic prejudice or 'defense prejudice'—impairment of the ability to mount a defense due to circumstances such as loss of records,

[9] The court rejects the defendants' contention that giving the VBA priority effectively repeals the JWOD by implication. The VBA is a specific priority statute that does not mandate a result but a process which may or may not result in a contract award to a veteran-owned small business. If the Rule of Two is not satisfied, the VA remains required under the JWOD to purchase products and services that appear on the AbilityOne List. By its terms the VBA did not repeal the JWOD. Rather, as the VBA states, where the VBA applies the Rule of Two is satisfied, veteran-owned small businesses have the first priority.

destruction of evidence, or witness unavailability." *JANA, Inc. v. United States*, 936 F.2d 1265, 1269–1270 (Fed. Cir. 1991) (citing *Cornetta v. United States,* 851 F.2d 1372, 1377–78 (Fed. Cir. 1988)).

With respect to the first element, the court finds PDS's delay in bringing this case was not "unreasonable and unexcused" in light of the recent decision in *Kingdomware*, which clarified the mandatory nature of the VBA and the VA's most procurement guidance which was issued on June 16, 2016. With respect to the element of prejudice the court finds that IFB's allegations of prejudice are not sufficient to warrant the application of laches in this case. IFB states:

> Since the inception the 2006 VA Act was passed through the current, IFB has spent considerable resources building an infrastructure to service the VISN 2, 7 and 8 contracts and to recruit and train the workers to perform under those contracts. As such, IFB stands to suffer substantial harm by Plaintiff's delay. IFB's financial investments and the human capital investments IFB's blind workers in reliance on the continuation of these contracts is clearly demonstrated . . .

IFB's MJAR 35–36.

As noted above, the court does not understand that PDS is challenging the existing contracts between IFB and the VA. Rather, it is seeking only to prevent the VA from "making new contracting determinations, including contract awards," for VISNs 2 and 7 without first applying the Rule of Two. Pl.'s Supp. Brief at 2. Thus IFB will not lose all of its investment immediately. In addition, the court is mindful that while IFB had expected that its contracts in VISNs 2 and 7 would be renewed as mandatory sources under the JWOD for

years to come, IFB has had more than ten years of business following enactment of the VBA. Indeed, application of the Rule of Two analysis may or may not result in loss of VISNs 2 and 7 work in the future. In such circumstances, prejudice is not so great as to outweigh the VA's obligation to meet its statutory mandate under the VBA. For these reasons, the government's laches defense is rejected.

IV. CONCLUSION

For the reasons stated above, IFB and the government's motions to dismiss under RCFC 12(b)(1) and motion for judgment on the administrative record are DENIED. PDS's cross-motion for judgment on the administrative record is GRANTED. The VA is ordered not to enter into any new contracts for eyewear in VISNs 2 and 7 from the AbilityOne List unless it first performs a Rule of Two analysis and determines that there are not two or more qualified veteran-owned small businesses capable of performing the contracts at a fair price.[10]

The parties shall have until Friday, May 26, 2017 to submit a joint proposed judgment that shall include the expiration dates of all active contracts in VISNs 2 and 7 under the AbilityOne program, and shall include a timeline of the VA's plan to conduct a Rule of Two analysis for any further contracts.

IT IS SO ORDERED.

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[10] In its supplemental briefing following the change in the VA's guidance documents, PDS requested an order granting costs and reasonable attorneys' fees based upon the government's corrective action. The court will address this issue at a later date if PDS files a motion for fees and costs in accordance with the court's rules.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2017-2379, 2017-2512

PDS CONSULTANTS, INC.,

Plaintiff-Appellee,

v.

UNITED STATES,
WINSTON-SALEM INDUSTRIES FOR THE BLIND,

Defendants-Appellants.

Appeals from the United States Court of
Federal Claims in No. 1:16-cv-01063-NBF,
Senior Judge Nancy B. Firestone.

ON PETITION FOR PANEL REHEARING
AND REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

ORDER

PER CURIAM.

Appellant Winston-Salem Industries For The Blind filed a combined petition for panel rehearing and rehear-

ing en banc. A response to the petition was invited by the court and filed by Appellee PDS Consultants, Inc. The petition was referred to the panel that heard the appeals, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on May 17, 2019.

FOR THE COURT

May 10, 2019
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX D

STATUTORY AND REGULATORY PROVISIONS INVOLVED

38 U.S.C. § 8127. Small business concerns owned and controlled by veterans: contracting goals and preferences

(a) Contracting goals.—

(1) In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities, the Secretary shall—

(A) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans who are not veterans with service-connected disabilities in accordance with paragraph (2); and

(B) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans with service-connected disabilities in accordance with paragraph (3).

(2) The goal for a fiscal year for participation under paragraph (1) (A) shall be determined by the Secretary.

(3) The goal for a fiscal year for participation under paragraph (1) (B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and

controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)).

(4) The Secretary shall establish a review mechanism to ensure that, in the case of a subcontract of a Department contract that is counted for purposes of meeting a goal established pursuant to this section, the subcontract was actually awarded to a business concern that may be counted for purposes of meeting that goal.

(b) Use of noncompetitive procedures for certain small contracts.—For purposes of meeting the goals under subsection (a), and in accordance with this section, in entering into a contract with a small business concern owned and controlled by veterans or a small business concern owned and controlled by veterans with service-connected disabilities for an amount less than the simplified acquisition threshold (as defined in section 134 of title 41), a contracting officer of the Department may use procedures other than competitive procedures.

(c) Sole source contracts for contracts above simplified acquisition threshold.—For purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department may award a contract to a small business concern owned and controlled by veterans or a small business concern owned and controlled by veterans with service-connected disabilities using procedures other than competitive procedures if—

(1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;

(2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 134 of title 41) but will not exceed $5,000,000; and

(3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

(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 or small business concerns owned and controlled by veterans with service-connected disabilities if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans or small business concerns owned and controlled by veterans with service-connected disabilities will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

(e) Eligibility of small business concerns.—A small business concern may be awarded a contract under this section only if the small business concern and the veteran owner of the small business concern are listed in the database of veteran-owned businesses maintained by the Secretary under subsection (f).

(f) Database of veteran-owned businesses.—

(1) Subject to paragraphs (2) through (6), the Secretary shall maintain a database of small business concerns owned and controlled by veterans, small business concerns owned and controlled by veterans

with service-connected disabilities, and the veteran owners of such business concerns.

(2)

(A) To be eligible for inclusion in the database, such a veteran shall submit to the Secretary such information as the Secretary may require with respect to the small business concern or the veteran. Application for inclusion in the database shall constitute permission under section 552a of title 5 (commonly referred to as the Privacy Act) for the Secretary to access such personal information maintained by the Secretary as may be necessary to verify the information contained in the application.

(B) If the Secretary receives an application for inclusion in the database from an individual whose status as a veteran cannot be verified because the Secretary does not maintain information with respect to the veteran status of the individual, the Secretary may not include the small business concern owned and controlled by the individual in the database maintained by the Secretary until the Secretary receives such information as may be necessary to verify that the individual is a veteran.

(3) Information maintained in the database shall be submitted on a voluntary basis by such veterans.

(4) No small business concern may be listed in the database until the Secretary has verified, using regulations issued by the Administrator of the Small Business Administration with respect to the status of the concern as a small business concern and the ownership and control of such concern, that—

(A) the small business concern is owned and controlled by veterans; and

(B) in the case of a small business concern for which the person who owns and controls the concern indicates that the person is a veteran with a service-connected disability, that the person is a veteran with a service-connected disability.

(5) The Secretary shall make the database available to all Federal departments and agencies and shall notify each such department and agency of the availability of the database.

(6) If the Secretary determines that the public dissemination of certain types of information maintained in the database is inappropriate, the Secretary shall take such steps as are necessary to maintain such types of information in a secure and confidential manner.

(7) The Secretary may not issue regulations related to the status of a concern as a small business concern and the ownership and control of such small business concern.

(8)

(A) If a small business concern is not included in the database because the Secretary does not verify the status of the concern as a small business concern or the ownership or control of the concern, the concern may appeal the denial of verification to the Office of Hearings and Appeals of the Small Business Administration (as established under section 5(i) of the Small Business Act). The decision of the Office of Hearings and Appeals shall be considered a final agency action.

(B)

(i) If an interested party challenges the inclusion in the database of a small business concern owned and controlled by veterans or a small business concern owned and controlled by veterans with service-connected disabilities based on the status of the concern as a small business concern or the ownership or control of the concern, the challenge shall be heard by the Office of Hearings and Appeals of the Small Business Administration as described in subparagraph (A). The decision of the Office of Hearings and Appeals shall be considered final agency action.

(ii) In this subparagraph, the term "interested party" means—

(I) the Secretary; or

(II) in the case of a small business concern that is awarded a contract, the contracting officer of the Department or another small business concern that submitted an offer for the contract that was awarded to the small business concern that is the subject of a challenge made under clause (i).

(C) For each fiscal year, the Secretary shall reimburse the Administrator of the Small Business Administration in an amount necessary to cover any cost incurred by the Office of Hearings and Appeals of the Small Business Administration for actions taken by the Office under this paragraph. The Administrator is authorized to accept such reimbursement. The amount of any such reimbursement shall be determined jointly by the Secretary and the Administrator and shall be provided from fees collected by the Secretary under multiple-

award schedule contracts. Any disagreement about the amount shall be resolved by the Director of the Office of Management and Budget.

(g) Enforcement penalties for misrepresentation.—

(1) Any business concern that is determined by the Secretary to have willfully and intentionally misrepresented the status of that concern as a small business concern owned and controlled by veterans or as a small business concern owned and controlled by service-disabled veterans for purposes of this subsection shall be debarred from contracting with the Department for a period of not less than five years.

(2) In the case of a debarment under paragraph (1), the Secretary shall commence debarment action against the business concern by not later than 30 days after determining that the concern willfully and intentionally misrepresented the status of the concern as described in paragraph (1) and shall complete debarment actions against such concern by not later than 90 days after such determination.

(3) The debarment of a business concern under paragraph (1) includes the debarment of all principals in the business concern for a period of not less than five years.

(h) Priority for contracting preferences.—Preferences for awarding contracts to small business concerns shall be applied in the following order of priority:

(1) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and controlled by veterans with service-connected disabilities.

(2) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and

controlled by veterans that are not covered by paragraph (1).

(3) Contracts awarded pursuant to—

(A) section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(B) section 31 of such Act (15 U.S.C. 657a).

(4) Contracts awarded pursuant to any other small business contracting preference.

(i) Applicability of requirements to contracts.—

(1) If after December 31, 2008, the Secretary enters into a contract, memorandum of understanding, agreement, or other arrangement with any governmental entity to acquire goods or services, the Secretary shall include in such contract, memorandum, agreement, or other arrangement a requirement that the entity will comply, to the maximum extent feasible, with the provisions of this section in acquiring such goods or services.

(2) Nothing in this subsection shall be construed to supersede or otherwise affect the authorities provided under the Small Business Act (15 U.S.C. 631 et seq.).

(j) Annual reports.—Not later than December 31 each year, the Secretary shall submit to Congress a report on small business contracting during the fiscal year ending in such year. Each report shall include, for the fiscal year covered by such report, the following:

(1) The percentage of the total amount of all contracts awarded by the Department during that fiscal year that were awarded to small business concerns owned and controlled by veterans.

(2) The percentage of the total amount of all such contracts awarded to small business concerns owned and controlled by veterans with service-connected disabilities.

(3) The percentage of the total amount of all contracts awarded by each Administration of the Department during that fiscal year that were awarded to small business concerns owned and controlled by veterans.

(4) The percentage of the total amount of all contracts awarded by each such Administration during that fiscal year that were awarded to small business concerns owned and controlled by veterans with service-connected disabilities.

(k) Definitions.—In this section:

(1) The term "small business concern" has the meaning given that term under section 3 of the Small Business Act (15 U.S.C. 632).

(2) The term "small business concern owned and controlled by veterans" has the meaning given that term under section 3(q)(3) of the Small Business Act (15 U.S.C. 632(q)(3)).

(3) The term "small business concern owned and controlled by veterans with service-connected disabilities" has the meaning given the term "small business concern owned and controlled by service-disabled veterans" under section 3(q)(2) of the Small Business Act (15 U.S.C. 632(q)(2)).

38 U.S.C. § 8128. Small business concerns owned and controlled by veterans: contracting priority

(a) Contracting priority.—In procuring goods and services pursuant to a contracting preference under this title or any other provision of law, the Secretary shall

give priority to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference.

(b) Definition.—For purposes of this section, the term "small business concern owned and controlled by veterans" means a small business concern that is included in the small business database maintained by the Secretary under section 8127(f) of this title.

41 U.S.C. § 3301. Full and open competition

(a) In general.—Except as provided in sections 3303, 3304(a), and 3305 of this title and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services shall—

(1) obtain full and open competition through the use of competitive procedures in accordance with the requirements of this division and the Federal Acquisition Regulation; and

(2) use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(b) Appropriate competitive procedures.—

(1) Use of sealed bids.—In determining the competitive procedures appropriate under the circumstance, an executive agency shall—

(A) solicit sealed bids if—

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other price- related factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid; or

(B) request competitive proposals if sealed bids are not appropriate under subparagraph (A).

(2) Sealed bid not required.—Paragraph (1)(A) does not require the use of sealed-bid procedures in cases in which section 204(e) of title 23 applies.

(c) Efficient fulfillment of Government requirements.—The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Federal Government's requirements.

41 U.S.C. § 3303. Exclusion of particular source or restriction of solicitation to small business concerns

(a) Exclusion of particular source.—

(1) Criteria for exclusion.—An executive agency may provide for the procurement of property or services covered by section 3301 of this title using competitive procedures but excluding a particular source to establish or maintain an alternative source of supply for that property or service if the agency head determines that to do so would—

(A) increase or maintain competition and likely result in reduced overall cost for the procurement, or for an anticipated procurement, of the property or services;

(B) be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the property or service in case of a national emergency or industrial mobilization;

(C) be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a Federally funded research and development center;

(D) ensure the continuous availability of a reliable source of supply of the property or service;

(E) satisfy projected needs for the property or service determined on the basis of a history of high demand for the property or service; or

(F) satisfy a critical need for medical, safety, or emergency supplies.

(2) Determination for class disallowed.—A determination under paragraph (1) may not be made for a class of purchases or contracts.

(b) Exclusion of other than small business concerns.—An executive agency may provide for the procurement of property or services covered by section 3301 of this title using competitive procedures, but excluding other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638, 644).

(c) Nonapplication of justification and approval requirements.—A contract awarded pursuant to the competitive procedures referred to in subsections (a) and (b) is not subject to the justification and approval required by section 3304(e)(1) of this title.

41 U.S.C. § 3304. Use of noncompetitive procedures

(a) When noncompetitive procedures may be used.—An executive agency may use procedures other than competitive procedures only when—

(1) the property or services needed by the executive agency are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency;

(2) the executive agency's need for the property or services is of such an unusual and compelling urgency that the Federal Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals;

(3) it is necessary to award the contract to a particular source—

(A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization;

(B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a Federally funded research and development center;

(C) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before a court, administrative tribunal, or agency, whether or not the expert is expected to testify; or

(D) to procure the services of an expert or neutral for use in any part of an alternative dispute resolution or negotiated rulemaking process, whether or not the expert is expected to testify;

(4) the terms of an international agreement or treaty between the Federal Government and a foreign government or an international organization, or the written directions of a foreign government reimbursing the executive agency for the cost of the procurement of the property or services for that government, have the effect of requiring the use of procedures other than competitive procedures;

(5) subject to section 3105 of this title, a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale;

(6) the disclosure of the executive agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; or

(7) the head of the executive agency (who may not delegate the authority under this paragraph)—

(A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned; and

(B) notifies Congress in writing of that determination not less than 30 days before the award of the contract.

(b) Property or services deemed available from only one source.—For the purposes of subsection (a)(1), in the case of—

(1) a contract for property or services to be awarded on the basis of acceptance of an unsolicited research proposal, the property or services are deemed to be available from only one source if the source has submitted an unsolicited research proposal that demonstrates a unique and innovative concept, the substance of which is not otherwise available to the Federal Government and does not resemble the substance of a pending competitive procurement; or

(2) a follow-on contract for the continued development or production of a major system or highly specialized equipment, the property may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures when it is likely that award to a source other than the original source would result in—

(A) substantial duplication of cost to the Federal Government that is not expected to be recovered through competition; or

(B) unacceptable delay in fulfilling the executive agency's needs.

(c) Property or services needed with unusual and compelling urgency.—

(1) Allowable contract period.—The contract period of a contract described in paragraph (2) that is entered into by an executive agency pursuant to the authority provided under subsection (a)(2)—

(A) may not exceed the time necessary—

(i) to meet the unusual and compelling requirements of the work to be performed under the contract; and

(ii) for the executive agency to enter into another contract for the required goods or services through the use of competitive procedures; and

(B) may not exceed one year unless the head of the executive agency entering into the contract determines that exceptional circumstances apply.

(2) Applicability of allowable contract period.—This subsection applies to any contract in an amount greater than the simplified acquisition threshold.

(d) Offer requests to potential sources.—An executive agency using procedures other than competitive procedures to procure property or services by reason of the application of paragraph (2) or (6) of subsection (a) shall request offers from as many potential sources as is practicable under the circumstances.

(e) Justification for use of noncompetitive procedures.—

(1) Prerequisites for awarding contract.—Except as provided in paragraphs (3) and (4), an executive agency may not award a contract using procedures other than competitive procedures unless—

(A) the contracting officer for the contract justifies the use of those procedures in writing and certifies the accuracy and completeness of the justification;

(B) the justification is approved, in the case of a contract for an amount—

(i) exceeding $500,000 but equal to or less than $10,000,000, by the advocate for competition for the procuring activity (without further delegation) or by an official referred to in clause (ii) or (iii);

(ii) exceeding $10,000,000 but equal to or less than $50,000,000, by the head of the procuring activity or by a delegate who, if a member of the armed forces, is a general or flag officer or, if a civilian, is serving in a position in which the individual is entitled to receive the daily equivalent of the maximum annual rate of basic pay payable for level IV of the Executive Schedule (or in a comparable or higher position under another schedule); or

(iii) exceeding $50,000,000, by the senior procurement executive of the agency designated pursuant to section 1702(c) of this title (without further delegation); and

(C) any required notice has been published with respect to the contract pursuant to section 1708 of this title and the executive agency has considered all bids or proposals received in response to that notice.

(2) Elements of justification.—The justification required by paragraph (1)(A) shall include—

(A) a description of the agency's needs;

(B) an identification of the statutory exception from the requirement to use competitive procedures and a demonstration, based on the proposed contractor's qualifications or the nature of the procurement, of the reasons for using that exception;

(C) a determination that the anticipated cost will be fair and reasonable;

(D) a description of the market survey conducted or a statement of the reasons a market survey was not conducted;

(E) a listing of any sources that expressed in writing an interest in the procurement; and

(F) a statement of any actions the agency may take to remove or overcome a barrier to competition before a subsequent procurement for those needs.

(3) Justification allowed after contract awarded.—In the case of a procurement permitted by subsection (a)(2), the justification and approval required by paragraph (1) may be made after the contract is awarded.

(4) Justification not required.—The justification and approval required by paragraph (1) are not required if—

(A) a statute expressly requires that the procurement be made from a specified source;

(B) the agency's need is for a brand-name commercial item for authorized resale;

(C) the procurement is permitted by subsection (a)(7); or

(D) the procurement is conducted under chapter 85 of this title or section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

(5) Restrictions on executive agencies.—

(A) Contracts and procurement of property or services.—In no case may an executive agency—

(i) enter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning or concerns related to the amount available to the agency for procurement functions; or

(ii) procure property or services from another executive agency unless the other executive agency complies fully with the requirements of this division in its procurement of the property or services.

(B) Additional restriction.—The restriction set out in subparagraph (A)(ii) is in addition to any other restriction provided by law.

(f) Public availability of justification and approval required for using noncompetitive procedures.—

(1) Time requirement.—

(A) Within 14 days after contract award.—Except as provided in subparagraph (B), in the case of a procurement permitted by subsection (a), the head of an executive agency shall make publicly available, within 14 days after the award of the contract, the documents containing the justification and approval required by subsection (e)(1) with respect to the procurement.

(B) Within 30 days after contract award.—In the case of a procurement permitted by subsection (a)(2), subparagraph (A) shall be applied by substituting "30 days" for "14 days".

(2) Availability on websites.—The documents referred to in subparagraph (A) of paragraph (1) shall be made available on the website of the agency and through a Government-wide website selected by the Administrator.

(3) Exception to availability and approval requirement.—This subsection does not require the public availability of information that is exempt from public disclosure under section 552(b) of title 5.

41 U.S.C. § 8501. Definitions

In this chapter:

(1) Blind.—The term "blind" refers to an individual or class of individuals whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses or whose visual acuity, if better than 20/200, is accompanied by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle of no greater than 20 degrees.

(2) Committee.—The term "Committee" means the Committee for Purchase From People Who Are Blind or Severely Disabled established under section 8502 of this title.

(3) Direct labor.—The term "direct labor"—

(A) includes all work required for preparation, processing, and packing of a product, or work directly relating to the performance of a service; but

(B) does not include supervision, administration, inspection, or shipping.

(4) Entity of the Federal Government and Federal Government.—The terms "entity of the Federal Government" and "Federal Government" include an entity of the legislative or judicial branch, a military department or executive agency (as defined in sections 102 and 105 of title 5, respectively) , the United States Postal Service, and a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces.

(5) Other severely disabled.—The term "other severely disabled" means an individual or class of individuals under a physical or mental disability, other than blindness, which (according to criteria

established by the Committee after consultation with appropriate entities of the Federal Government and taking into account the views of non-Federal Government entities representing the disabled) constitutes a substantial handicap to employment and is of a nature that prevents the individual from currently engaging in normal competitive employment.

(6) Qualified nonprofit agency for other severely disabled.—The term "qualified nonprofit agency for other severely disabled" means an agency—

(A)

(i) organized under the laws of the United States or a State;

(ii) operated in the interest of severely disabled individuals who are not blind; and

(iii) of which no part of the net income of the agency inures to the benefit of a shareholder or other individual;

(B) that complies with any applicable occupational health and safety standard prescribed by the Secretary of Labor; and

(C) that in the production of products and in the provision of services (whether or not the products or services are procured under this chapter) during the fiscal year employs blind or other severely disabled individuals for at least 75 percent of the hours of direct labor required for the production or provision of the products or services.

(7) Qualified nonprofit agency for the blind.—The term "qualified nonprofit agency for the blind" means an agency—

(A)

(i) organized under the laws of the United States or a State;

(ii) operated in the interest of blind individuals; and

(iii) of which no part of the net income of the agency inures to the benefit of a shareholder or other individual;

(B) that complies with any applicable occupational health and safety standard prescribed by the Secretary of Labor; and

(C) that in the production of products and in the provision of services (whether or not the products or services are procured under this chapter) during the fiscal year employs blind individuals for at least 75 percent of the hours of direct labor required for the production or provision of the products or services.

(8) Severely disabled individual.—The term "severely disabled individual" means an individual or class of individuals under a physical or mental disability, other than blindness, which (according to criteria established by the Committee after consultation with appropriate entities of the Federal Government and taking into account the views of non-Federal Government entities representing the disabled) constitutes a substantial handicap to employment and is of a nature that prevents the individual from currently engaging in normal competitive employment.

(9) State.—The term "State" includes the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

41 U.S.C. § 8502. Committee for purchase from people who are blind or severely disabled

(a) Establishment.—There is a Committee for Purchase From People Who Are Blind or Severely Disabled.

(b) Composition.—The Committee consists of 15 members appointed by the President as follows:

(1) One officer or employee from each of the following, nominated by the head of the department or agency:

(A) The Department of Agriculture.

(B) The Department of Defense.

(C) The Department of the Army.

(D) The Department of the Navy.

(E) The Department of the Air Force.

(F) The Department of Education.

(G) The Department of Commerce.

(H) The Department of Veterans Affairs.

(I) The Department of Justice.

(J) The Department of Labor.

(K) The General Services Administration.

(2) One member from individuals who are not officers or employees of the Federal Government and who are conversant with the problems incident to the employment of the blind.

(3) One member from individuals who are not officers or employees of the Federal Government and who are conversant with the problems incident to the employment of other severely disabled individuals.

(4) One member from individuals who are not officers or employees of the Federal Government and who represent blind individuals employed in qualified nonprofit agencies for the blind.

(5) One member from individuals who are not officers or employees of the Federal Government and who represent severely disabled individuals (other than blind individuals) employed in qualified nonprofit agencies for other severely disabled individuals.

(c) Terms of office.—Members appointed under paragraph (2), (3), (4), or (5) of subsection (b) shall be appointed for terms of 5 years and may be reappointed if the member meets the qualifications prescribed by those paragraphs.

(d) Chairman.—The members of the Committee shall elect one of the members to be Chairman.

(e) Vacancy.—

(1) Manner in which filled.—A vacancy in the membership of the Committee shall be filled in the manner in which the original appointment was made.

(2) Unfulfilled term.—A member appointed under paragraph (2), (3), (4), or (5) of subsection (b) to fill a vacancy occurring prior to the expiration of the term for which the predecessor was appointed shall be appointed only for the remainder of the term. The member may serve after the expiration of a term until a successor takes office.

(f) Pay and travel expenses.—

(1) Amount to which members are entitled.—Except as provided in paragraph (2), members of the Committee are entitled to receive the daily

equivalent of the maximum annual rate of basic pay payable for level IV of the Executive Schedule for each day (including travel-time) during which they perform services for the Committee. A member is entitled to travel expenses, including a per diem allowance instead of subsistence, as provided under section 5703 of title 5.

(2) Officers or employees of the Federal Government.—Members who are officers or employees of the Federal Government may not receive additional pay because of their service on the Committee.

(g) Staff.—

(1) Appointment and compensation.—Subject to rules the Committee may adopt and to chapters 33 and 51 and subchapter III of chapter 53 of title 5, the Chairman may appoint and fix the pay of personnel the Committee determines are necessary to assist it in carrying out this chapter.

(2) Personnel from other entities.—On request of the Committee, the head of an entity of the Federal Government may detail, on a reimbursable basis, any personnel of the entity to the Committee to assist it in carrying out this chapter.

(h) Obtaining official information.—The Committee may secure directly from an entity of the Federal Government information necessary to enable it to carry out this chapter. On request of the Chairman, the head of the entity shall furnish the information to the Committee.

(i) Administrative support services.—The Administrator of General Services shall provide to the Committee, on a reimbursable basis, administrative support services the Committee requests.

(j) Annual report.—Not later than December 31 of each year, the Committee shall transmit to the President a report that includes the names of the Committee members serving in the prior fiscal year, the dates of Committee meetings in that year, a description of the activities of the Committee under this chapter in that year, and any recommendations for changes in this chapter which the Committee determines are necessary.

41 U.S.C. § 8503. Duties and powers of the Committee

(a) Procurement list.—

(1) Maintenance of list.—The Committee shall maintain and publish in the Federal Register a procurement list. The list shall include the following products and services determined by the Committee to be suitable for the Federal Government to procure pursuant to this chapter:

(A) Products produced by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely disabled.

(B) The services those agencies provide.

(2) Changes to list.—The Committee may, by rule made in accordance with the requirements of section 553(b) to (e) of title 5, add to and remove from the procurement list products so produced and services so provided.

(b) Fair market price.—The Committee shall determine the fair market price of products and services contained on the procurement list that are offered for sale to the Federal Government by a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled. The Committee

from time to time shall revise its price determinations with respect to those products and services in accordance with changing market conditions.

(c) Central nonprofit agency or agencies.—The Committee shall designate a central nonprofit agency or agencies to facilitate the distribution, by direct allocation, subcontract, or any other means, of orders of the Federal Government for products and services on the procurement list among qualified nonprofit agencies for the blind or qualified nonprofit agencies for other severely disabled.

(d) Regulations.—The Committee—

(1) may prescribe regulations regarding specifications for products and services on the procurement list, the time of their delivery, and other matters as necessary to carry out this chapter; and

(2) shall prescribe regulations providing that when the Federal Government purchases products produced and offered for sale by qualified nonprofit agencies for the blind or qualified nonprofit agencies for other severely disabled, priority shall be given to products produced and offered for sale by qualified nonprofit agencies for the blind.

(e) Study and evaluation of activities.—The Committee shall make a continuing study and evaluation of its activities under this chapter to ensure effective and efficient administration of this chapter. The Committee on its own or in cooperation with other public or nonprofit private agencies may study—

(1) problems related to the employment of the blind and other severely disabled individuals; and

(2) the development and adaptation of production methods that would enable a greater utilization of the blind and other severely disabled individuals.

41 U.S.C. § 8504. Procurement requirements for the Federal Government

(a) In general.—An entity of the Federal Government intending to procure a product or service on the procurement list referred to in section 8503 of this title shall procure the product or service from a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled in accordance with regulations of the Committee and at the price the Committee establishes if the product or service is available within the period required by the entity.

(b) Exception.—This section does not apply to the procurement of a product that is available from an industry established under chapter 307 of title 18 and that is required under section 4124 of title 18 to be procured from that industry.

41 U.S.C. § 8505. Audit

For the purpose of audit and examination, the Comptroller General shall have access to the books, documents, papers, and other records of—

(1) the Committee and of each central nonprofit agency the Committee designates under section 8503(c) of this title; and

(2) qualified nonprofit agencies for the blind and qualified nonprofit agencies for other severely disabled that have sold products or services under this chapter to the extent those books, documents, papers, and other records relate to the activities of the agency in a fiscal year in which a sale was made under this chapter.

41 U.S.C. § 8506. Authorization of appropriations

Necessary amounts may be appropriated to the Committee to carry out this chapter.

48 C.F.R. § 8.000. Scope of part

This part deals with prioritizing sources of supplies and services for use by the Government.

48 C.F.R. § 8.001. General

Regardless of the source of supplies or services to be acquired, information technology acquisitions shall comply with capital planning and investment control requirements in 40 U.S.C. 11312 and OMB Circular A–130.

48 C.F.R. § 8.002. Priorities for use of mandatory Government sources

(a) Except as required by 8.003, or as otherwise provided by law, agencies shall satisfy requirements for supplies and services from or through the mandatory Government sources and publications listed below in descending order of priority:

(1) Supplies.

(i) Inventories of the requiring agency.

(ii) Excess from other agencies (see subpart 8.1).

(iii) Federal Prison Industries, Inc. (see subpart 8.6).

(iv) Supplies that are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see Subpart 8.7).

(v) Wholesale supply sources, such as stock programs of the General Services Administration

(GSA) (see 41 CFR 101–26.3), the Defense Logistics Agency (see 41 CFR 101–26.6), the Department of Veterans Affairs (see 41 CFR 101–26.704), and military inventory control points.

(2) Services. Services that are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see subpart 8.7).

(b) Sources other than those listed in paragraph (a) of this section may be used as prescribed in 41 CFR 101–26.301 and in an unusual and compelling urgency as prescribed in 6.302–2 and in 41 CFR 101–25.101–5.

(c) The statutory obligation for Government agencies to satisfy their requirements for supplies or services available from the Committee for Purchase From People Who Are Blind or Severely Disabled also applies when contractors purchase the supplies or services for Government use.

48 C.F.R. § 8.003. Use of other mandatory sources

Agencies shall satisfy requirements for the following supplies or services from or through specified sources, as applicable:

(a) Public utility services (see part 41).

(b) Printing and related supplies (see subpart 8.8).

(c) Leased motor vehicles (see subpart 8.11).

(d) Strategic and critical materials (e.g., metals and ores) from inventories exceeding Defense National Stockpile requirements (detailed information is available from the DLA Strategic Materials, 8725 John J. Kingman Rd., Suite 3229, Fort Belvoir, VA 22060–6223.

(e) Helium (see subpart 8.5—Acquisition of Helium).

48 C.F.R. § 8.004. Use of other sources

If an agency is unable to satisfy requirements for supplies and services from the mandatory sources listed in 8.002 and 8.003, agencies are encouraged to consider satisfying requirements from or through the non-mandatory sources listed in paragraph (a) of this section (not listed in any order of priority) before considering the non-mandatory source listed in paragraph (b) of this section. When satisfying requirements from non-mandatory sources, see 7.105(b) and part 19 regarding consideration of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business (including 8(a) participants), and women-owned small business concerns.

(a)

(1) Supplies. Federal Supply Schedules, Governmentwide acquisition contracts, multi-agency contracts, and any other procurement instruments intended for use by multiple agencies, including blanket purchase agreements (BPAs) under Federal Supply Schedule contracts (e.g., Federal Strategic Sourcing Initiative (FSSI) agreements accessible at http://www.gsa.gov/fssi (see also 5.601)).

(2) Services. Agencies are encouraged to consider Federal Prison Industries, Inc., as well as the sources listed in paragraph (a)(1) of this section (see subpart 8.6).

(b) Commercial sources (including educational and non-profit institutions) in the open market.

APPENDIX E

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BID PROTEST

No. 16-1063 C

PDS CONSULTANTS, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

COMPLAINT

FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff PDS Consultants, Inc., by counsel, files this Complaint for Declaratory Judgment, Preliminary Injunctive Relief, and Permanent Injunctive Relief against Defendant, the United States of America and states as follows:

PARTIES

1. Plaintiff PDS Consultants, Inc. ("PDS") is a corporation organized and existing under the laws of New York. Its principal place of business is 22 Rainbow Trail, Sparta, New Jersey. PDS is a service-disabled, veteran-owned small business, listed as verified in the Vendor Information Pages ("VIP") database to receive awards under the Veterans First Contracting Program. PDS is engaged in the business of providing vision-

related products (such as eyeglasses and eyeglass frames) and services to the federal government.

2. Plaintiff is one of at least two small businesses concerns that are owned and controlled by veterans and that compete in the vision-related product market. At least two of these small business concerns that are owned and controlled by veterans can and will submit bids or offers to the federal government in response to the government's needs for vision-related products and services. Award can be made to at least two of these small business concerns that are owned and controlled by veterans at a fair and reasonable price that offers best value to the United States.

3. Defendant is the United States of America, acting by and through the United States Department of Veterans Affairs ("VA" or "the Department") and the United States Committee for the Purchase From People Who Are Blind or Severely Disabled (the "Committee" or "AbilityOne").

NATURE OF THE ACTION

4. The Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403-3468 ("the Veterans Benefits Act" or "VBA," codified, in relevant part, at 38 U.S.C. §§ 8127-8128), establishes the Veterans First Contracting Program and requires the VA to set aside certain contracts for small business concerns owned and controlled by veterans, when "procuring goods and services pursuant to a contracting preference under [Title 38] or any other provision of law."

5. On June 16, 2016, the U.S. Supreme Court ruled that this set-aside requirement "is mandatory, not discretionary . . . [with the statutory] text requir[ing] the Department to apply the Rule of Two to all

contracting determinations and to award contracts to veteran-owned small businesses." *Kingdomware Technologies, Inc. v. United States*, 579 U.S. ___ (2016) (Slip. Op. at 8). The "Rule of Two" refers to the statutory requirement under the VBA to set aside a contracting action "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." 38 U.S.C. § 8127(d); *Kingdomware*, Slip Op. at 2-3. For purposes of the VBA, a "contract" award includes the issuance of an order by the VA under existing contracts or ordering agreements. *See Kingdomware*, Slip Op. at 11-12.

6. Plaintiff seeks review of the Department's continued ordering of certain vision-related products from Winston-Salem Industries for the Blind, Inc. ("IFB") for certain Veterans Integrated Service Networks ("VISN") (including, as of the date of this filing, VISN 2, VISN 7, and certain locations in VISN 8), despite the fact that the Department has not satisfied 38 U.S.C. § 8127(d) by conducting the necessary Rule of Two analysis prior to ordering from IFB. Plaintiff also seeks review of a recent VA Policy Memorandum that authorizes orders from the IFB and AbilityOne without first conducting a Rule of Two analysis, as required under the VBA and *Kingdomware*. Finally, Plaintiff seeks review of the Committee's impending restriction requiring the VA to purchase vision-related products from IFB as a mandatory source for VISN 6, as set forth in a final rule issued on August 5, 2016. *See* 81 Fed. Reg. 51863 (effective September 4, 2016).

7. The VA and the Committee's actions with respect to the foregoing issues are arbitrary and capricious,

without a rational basis, and contrary to applicable law. The Government's unreasonable actions directly harm Plaintiff, a prospective veteran-owned bidder that would submit a quotation if given the opportunity to compete for the procurements in any of the foregoing VISNs.

8. Plaintiff seeks a preliminary injunction and ultimately seeks permanent injunctive relief ordering the VA not to conduct any "contracting determination" (including award of a contract or issuance of an order) without first conducting a Rule of Two analysis, including a prohibition on awarding any contracts to or issuing orders to IFB before such analysis is completed. Plaintiff also seeks a declaratory judgment that VA procurements must be conducted in accordance with the plain language of the VBA, and that the VBA holds priority over purported "mandatory" purchasing requirements under the Javits-Wagner-O'Day Act, 41 U.S.C. §§ 8501-8506, via the AbilityOne Procurement List ("the Procurement List").

9. In addition, Plaintiff seeks a preliminary injunction and ultimately seeks permanent injunctive relief ordering the Committee to cease adding any new products or services relating to the VA without first ensuring that the VBA, guidelines issued by the VA in April 2010, and direction from the U.S. Court of Federal Claims in *Angelica Textile Services, Inc. v. United States*, 95 Fed. Cl. 208 (2010) (requiring that the VBA and related VA procedures be given priority over the Javits-Wagner-O'Day Act) are satisfied with respect to VA procurements. Plaintiff also seeks a declaratory judgment that the Committee's addition of vision-related products to the Procurement List in any VISN without conducting the necessary market research is

in contravention of the VBA and Department guidelines related thereto.

JURISDICTION AND STANDING

10. This court has jurisdiction of this matter pursuant to 28 U.S.C. § 1491(b)(1).

11. Plaintiff is an interested party under the statute because Plaintiff is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or order for vision-related products by the VA, or by failure to award the contract or order to a qualified veteran-owned business. This complaint is in connection with a procurement or proposed procurement because it involves a connection with any stage of the federal contracting acquisition process, including the process for determining a need for property or services, and the associated requirement to conduct the necessary market research required under the VBA.

12. Plaintiff has suffered a non-trivial competitive injury because the restriction of veteran opportunities in VISN 2, VISN 7, and certain locations in VISN 8 (as well as the impending restriction in VISN 6) has deprived and will deprive Plaintiff of the chance to submit a bid or offer for these VISN opportunities.

FACTUAL BACKGROUND

13. Since approximately 1998, PDS has provided the VA with vision-related products and services. PDS is a service-disabled, veteran-owned, small business, listed as verified in the VIP database to receive awards under the Veterans First Contracting Program. Currently, PDS has contracts with the VA in the following VISN regions: 1, 3, 5, 9, 10, 15, 16, 19, and 23.

14. Given the opportunity, PDS intends to submit a bid or offer to provide vision-related products and services in each VISN for which the VA has need. PDS has the capability to offer these products and services at reasonable prices to the government.

15. Moreover, PDS would have bid on procurements for vision-related products and services in VISN 2, 6, 7, and certain locations in VISN 8, if given the opportunity. PDS would have offered these products at reasonable prices to the government, as exemplified by its current contracts for such products in other VISNs.

16. Currently, there are approximately 31 vendors listed in the VIP database as potentially eligible to submit bids or offers to satisfy the VA's needs under the North American Industry Classification System ("NAICS") 339115 (Ophthalmic Goods Manufacturing).

A. The Javits-Wagner-O'Day Act and the AbilityOne Program

17. The Wagner-O'Day Act, passed in 1938, established the Committee on Purchases of Blind-Made Products to provide employment opportunities for the blind by authorizing them to manufacture products to sell to the federal government. In 1971, the act was amended to include people with severe disabilities, and expanded to provide services to the federal government. *See* 41 U.S.C. §§ 8501-8506 ("Javits-Wagner-O'Day Act" or "JWOD").

18. JWOD requires government purchasers to give priority to purchasing products and services from participating, community-based nonprofit agencies dedicated to training and employing individuals with disabilities. 41 U.S.C. § 8504(a). JWOD lists at least one exception, requiring that purchases of supplies

from the Federal Prison Industries take priority over JWOD purchases. 41 U.S.C. § 8504(b).

19. In 2007, the JWOD program was branded "AbilityOne." The Program is administered by the U.S. AbilityOne Commission (also referred to as the Committee for the Purchase From People Who Are Blind or Severely Disabled) ("the Committee" or "AbilityOne"). The Committee is an independent federal commission made up of fifteen Presidential appointees, eleven of whom represent various government agencies, including the VA. 41 U.S.C. § 8502(b).

20. JWOD provides that the Committee "may prescribe regulations regarding specifications for products and services on the procurement list, the time of their delivery, and other matters as necessary to carry out this chapter." 41 U.S.C. § 8503(d). In addition, the Committee "shall prescribe regulations providing that when the federal government purchases products produced and offered for sale by qualified nonprofit agencies for the blind or qualified nonprofit agencies for other severely disabled, priority shall be given to products produced and offered for sale by qualified nonprofit agencies for the blind." *Id.* The Committee publishes regulations that prescribe the processes that it should follow in adding items to the Committee's Procurement List. *See* 41 C.F.R. Chapter 51.

B. The Veterans Benefits Act of 2006 and Priority for Veteran-Owned Businesses

21. In December 2006, Congress passed the Veterans Benefit Act, providing that the VA must give procurement priority to qualified veteran-owned small businesses. 38 U.S.C. §§ 8127-8128. The VBA requires the VA to establish goals for the use of veteran-owned small businesses. 38 U.S.C. § 8127(a). Moreover,

subject to only two exceptions that allow for non-competitive procedures for contract actions valued at no more than $5 million (38 U.S.C. § 8127(b) and (c)), contracting officers must award contracts to veteran-owned small businesses if the Rule of Two is satisfied. 38 U.S.C. § 8127(d). The "Rule of Two" mandates that if the contracting officer has a reasonable expectation that two or more veteran-owned small businesses will submit offers and that award can be made at a fair and reasonable price that offers the best value to the government, then the VA must restrict that procurement to veteran-owned small businesses. 38 U.S.C. § 8127(d). The VBA provides that the priority for veteran-owned small businesses applies when procuring goods pursuant to Title 38 "or any other provision of law." 38 U.S.C. § 8128(a).

22. Implementing the VBA, the VA Acquisition Regulations ("VAAR") (found at 48 C.F.R. Chapter 8) require that the contracting officer, in determining an acquisition strategy, must consider contracting preferences for service-disabled veteran-owned small businesses ("SDVOSBs") and veteran-owned small businesses ("VOSBs"), first and second, respectively. VAAR 819.7004. Further, echoing the provisions of 38 U.S.C. § 8128(a), the VAAR notes that "[v]arious sections of title 38 U.S.C. authorize the Secretary to enter into certain contracts and certain types of contracts without regard to any other provisions of law." VAAR 806.302-5(b).

23. Additionally, on April 28, 2010, the VA Office of Acquisition and Logistics issued an Information Letter, "New Guidelines for Placing Items and Services on the AbilityOne Procurement List." IL 001AL-10-06 (the "Information Letter"), further implementing the VBA and discussing the interplay between the VBA

and JWOD. According to the Information Letter, SDVOSBs and VOSBs are given first and second priority in satisfying the VA's acquisition requirements. For all procurements conducted after April 28, 2010, the Information Letter indicates that the procurements are subject to the Veterans First Contracting Program's requirements under the VBA before being considered for the AbilityOne Program. But the VA also indicated that items that were already on the Procurement List (which includes VISN 2 and VISN 7, discussed below) prior to the passage of the VBA would continue to have priority. The Information Letter provides a seven-step procedure that must be followed for an item to be excluded from the VBA's Veterans First Contracting Program and added to the Procurement List, which includes conducting market research and obtaining written approval from the VA's Chief Acquisition Officer. The Information Letter advises that the VA should not engage in discussions with AbilityOne or its nonprofit agencies before receiving such written approval.[1]

24. In October 2010, the U.S. Court of Federal Claims confirmed in *Angelica Textile Services, Inc. v. United States*, 95 Fed. Cl. 208 (2010), that the VBA takes priority over JWOD. "The Veterans Benefits Act is a specific mandate to the Department . . . to grant first priority to SDVOSBs and VOSBs in the awarding of contracts. On the other hand, the Javits-Wagner-O'Day Act is a more general procurement statute. Were there a conflict between the two statutes, the more specific Veterans Benefits Act would control." *Id.* at 222. Specifically, the Court held that services newly

[1] Each VISN is a discrete requirement for the VA that must be separately assessed for purposes of market research and VBA compliance.

added to the Procurement List in that particular case needed to follow the procedures set forth in the Information Letter, and failure to follow the Information Letter invalidated the additions.

C. *Kingdomware* and the VA's July 25, 2016 Policy Memorandum

25. On June 16, 2016, the U.S. Supreme Court emphasized the principles discussed above, ruling that the VBA's set-aside requirement "is mandatory, not discretionary . . . [with the statutory] text requir[ing] the Department to apply the Rule of Two to all contracting determinations and to award contracts to veteran-owned small businesses." *Kingdomware*, Slip. Op. at 8. Central to its holding, the Court expressly ruled that, for purposes of the VBA, a "contract" award includes the issuance of an order under an existing contract or other ordering agreement. *See Kingdomware*, Slip Op. at 11-12.

26. On July 25, 2016, the VA issued "VA Procurement Policy Memorandum (2016-05) – Implementation of the Veterans First Contracting Program as a Result of the U.S. Supreme Court Decision" ("the Policy Memorandum"). Attached to the Policy Memorandum were a Class Deviation, outlining numerous changes to the VAAR in order to implement the *Kingdomware* decision, and a Decision Tree, providing a visual flow chart of steps the VA must take upon receiving an actionable procurement opportunity for supplies or services.

27. The Policy Memorandum does not direct VA contracting officers to give priority to veteran-owned businesses over AbilityOne products and services. Specifically, the Policy Memorandum states, "When a contracting officer is required by law to obtain goods

and services from a specific source, the contracting officer shall carry out that mandate. These include supplies and services listed on the Procurement List issued by the Committee for Purchase from People Who Are Blind or Severely Disabled." Policy Memorandum, at 11. The Decision Tree expressly states that the first question that should be considered by a contracting officer is whether "Mandatory Sources" (such as AbilityOne) are available, and if they are, then "38 U.S.C. 8127 does not apply" and the VA should "proceed" with purchasing from the "mandatory source" (without first conducting a VBA Rule of Two analysis). This is contrary to the main holding in *Kingdomware* and the plain language of the VBA.

D. Issuance of Orders to an AbilityOne Nonprofit Under VISN 2 and VISN 7

28. Prior to the passage of the VBA in 2006, the Committee added certain visonrelated products to the Procurement List for VISN 2 and VISN 7. This resulted in the VA entering into framework agreements, firm fixed price contracts with economic price adjustments, Blanket Purchase Agreements, and/or Basic Ordering Agreements with IFB to meet the VA's needs for vision-related products in these regions. But even after passage of the VBA in 2006, the VA continued to form contracts with and issue orders to IFB without conducting a Rule of Two analysis.

29. Upon information and belief, IFB and the VA are currently negotiating extended framework agreements for VISN 2 and VISN 7, with IFB and the VA entering into a series of 90-day "extensions," and the VA continues to issue orders to IFB for vision-related products. In so doing, the VA is not applying the Rule of Two as required under the VBA for the VISN 2 and VISN 7 orders.

E. Addition of Certain Locations in VISN 8 to the Procurement List

30. On April 4, 2014, the Committee unilaterally issued a Notice in the Federal Register adding eyeglasses, lenses, and related vision products to the AbilityOne Procurement List. 79 Fed. Reg. 18892. The Notice made IFB the mandatory source of supply and for such products to be a mandatory purchase for the Bay Pines Healthcare System in Bay Pines, FL and the James A. Haley Veterans Hospital in Tampa, FL. *Id.* And on August 14, 2015, the Committee issued another Notice in the Federal Register adding additional vision-related products to the AbilityOne Procurement List. 80 Fed. Reg. 48830. The Notice made IFB the mandatory source of supply and for such products to be a mandatory purchase for the VA Medical Center in Orlando, FL, the Viera, FL outpatient clinic, and the William V. Chappell, Jr. outpatient clinic in Daytona, FL. *Id.* These facilities are all located in VISN 8.

31. The VA is not applying the VBA-required Rule of Two for orders issued by these specific facilities located in VISN 8. Upon information and belief, neither the VA nor the Committee followed the VBA or the Information Letter implementing the VBA, as required by *Angelica Textile*, in adding these vision-related products to the Procurement List for VISN 8.[2]

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[2] On August 11, 2016, the VA issued pre-solicitation notice VA248-16-R-0815, informing potential offerors of a pending opportunity for vision-related products and services in the other VISN 8 locations not covered by the foregoing AbilityOne notices. The procurement will be "100% Set-Aside for Service-Disabled Veteran-Owned Small Business . . . firms." Plainly, if SDVOSBs are able to satisfy the VA's requirements under this new opportunity, then SDVOSBs would also be able to satisfy the other

F. Addition of VISN 6 to the Procurement List

32. On August 5, 2016, the Committee issued a notice in the Federal Register adding vision-related products to the AbilityOne Procurement List for VISN 6. *See* 81 Fed. Reg. 51863. The Notice makes IFB the mandatory source of supply and for such products to be a mandatory purchase for the VA VISN 6 medical centers, community based outpatient clinics, and health care centers that provide vision-related services as of September 4, 2016.

33. The addition of these vision-related products was done under the Committee's purported authority to add products to the Procurement List. *See* 41 C.F.R. § 51-2.3.

34. The addition of VISN 6 to the Procurement List disregarded this Court's decision in *Angelica Textile*, which held that the VBA takes priority over JWOD, and also ignored the Information Letter, which set forth the procedures for adding products to the Procurement List under the VBA.

35. Upon information and belief, the VA has not researched whether the Rule of Two can be satisfied for these facilities located in VISN 6 per the VBA, nor has the VA or the Committee satisfied the other requirements set forth in the Information Letter, which should be satisfied prior to the addition of products to the Procurement List. Moreover, the VA's present ordering actions in VISN 2, 7, and 8, as well as the VA's recent Policy Memorandum, indicate that the VA will not apply the Rule of Two as required under the VBA for contracts and orders for vision-related products in VISN 6.

VISN 8 opportunities that AbilityOne has unilaterally claimed since 2014 and 2015.

COUNT I

REQUEST FOR DECLARATORY JUDGMENT THAT THE VA'S FAILURE TO IMPLEMENT THE VETERANS BENEFITS ACT AND APPLY THE RULE OF TWO IN EVERY PROCUREMENT, AS AFFIRMED BY THE SUPREME COURT IN *KINGDOMWARE*, IS ARBITRARY AND CAPRICIOUS, WITHOUT A RATIONAL BASIS, AND OTHERWISE CONTRARY TO LAW

36. Plaintiff repeats and incorporates by reference paragraphs 1-35 above as if fully set forth herein.

37. The VA's failure to implement the VBA and the mandatory application of the Rule of Two in all VA contracting determinations, as clearly spelled-out by the Supreme Court in *Kingdomware*, is arbitrary, capricious, without a rational basis, and otherwise contrary to law. As the VA's recent Policy Memorandum, Class Deviation, and Decision Tree make clear, the VA continues to prioritize items on the Procurement List before applying the Rule of Two and before considering whether VA contracting actions (including the issuance of orders) should be set aside for veteran-owned small businesses. This violates the VBA's requirement that the VA must set-aside contracts for veteran-owned small businesses if the Rule of Two is satisfied. 38 U.S.C. § 8127(d). As the Supreme Court stated in *Kingdomware*, the requirements of § 8127(d) are "mandatory, not discretionary" in VA procurements. Slip Op. at 8. As a result, the VA's position that it should purchase items on the Procurement List without first completing a Rule of Two analysis is irrational and contrary to law.

38. Moreover, the VA's new Policy Memorandum setting forth the process by which the VA will comply

with the new *Kingdomware* decision, was not issued consistent with existing requirements of law. Specifically, the VA did not provide advance notice to the public, and the public did not have an opportunity to comment, on these new rules.

39. Since December 2006, the VA has continued to violate the VBA by awarding contracts and issuing orders for vision-related products in VISN 2, VISN 7, and certain locations in VISN 8 for items on the Procurement List without first conducting the necessary market research. This is contrary to the *Kingdomware* decision and the plain language of the VBA, and is thus irrational and contrary to law.

40. The addition of VISN 6 to the Procurement List is in violation of the VBA for multiple reasons. First, listing these vision-related products attempts to elevate the JWOD obligations over the VBA preferences, which is inconsistent with the plain language of § 8128(a). Second, the VA and the Committee appear to have already violated the VBA by making a "contracting determination" (Kingdomware, Slip. Op. at 8) without having first conducted a Rule of Two analysis on the VISN 6 opportunities. This violates both *Kingdomware* and the plain language of the VBA. Third, listing items on the Procurement List will ostensibly require the VA to issue orders for these vision-related products, despite having not first conducted a Rule of Two analysis, which is contrary to *Kingdomware* and the plain language of the VBA. Finally, the addition of these new VISN 6 products did not comply with the procedures set out in the VA's April 2010 Information Letter. For all of the foregoing reasons, the addition of VISN 6 to the Procurement List is arbitrary, capricious, without a rational basis, and otherwise contrary to law.

COUNT II

REQUEST FOR A PRELIMINARY AND PERMANENT INJUNCTION TO STOP THE VA FROM VIOLATING THE VETERANS BENEFITS ACT BY ISSUING ORDERS AND AWARDING CONTRACTS TO ABILITYONE SOURCES WITHOUT FIRST CONDUCTING RULE OF TWO ANALYSES

41. Plaintiff repeats and incorporates by reference paragraphs 1-35 above as if fully set forth herein.

42. By failing to follow the VBA, the VA has improperly denied Plaintiff and other veteran-owned small businesses the opportunity to compete for vison-related products and services.

43. Moreover, but for the "mandatory" requirement to issue orders to IFB for VISN 2, VISN 7 and certain locations in VISN 8, Plaintiff and at least two other veteran-owned small businesses would have submitted bids or offers for vision-related products in VISN 2, VISN 7 and certain locations in VISN 8. Plaintiff would have offered such products at a fair and reasonable price that offered the best value to the government, as demonstrated by the fact that Plaintiff supplies such products to the VA in nine other VISNs.

44. Similarly, but for the "mandatory" requirement to issue orders to IFB for VISN 6 effective September 4, 2016, given the opportunity, Plaintiff and at least one other veteran-owned small business would submit bids or offers for vision-related products in VISN 6.

45. The Court should enjoin the VA from violating the VBA by issuing orders and awarding contracts to AbilityOne sources without first conducting the market research required under the VBA and affirmed

by *Kingdomware*. Given the plain language of the *Kingdomware* decision and the VBA, Plaintiff will succeed on the merits of this matter. Plaintiff will suffer specific irreparable injury if the VA is not enjoined from continuing to ignore its statutory obligations and to allow IFB to continue to receive priority in violation of the VBA. Next, the balance of hardships in the instant case favors entry of an injunction. The VA will not be harmed by being required to follow the law. The slight potential harm that may result from a delay in procurement is insufficient, particularly when such delay would result from a mandate that the VA abide by a law designed to protect veterans. Finally, the public interest will be served by granting the injunction because the public's interest lies in ensuring the statutory requirements of the VBA are followed and that veteran-owned small businesses are given the priority that Congress originally intended. The VA's violations have the adverse effect of undermining the integrity of the federal procurement process.

COUNT III

REQUEST FOR DECLARATORY JUDGMENT THAT THE COMMITTEE'S ADDITION OF VISION-RELATED PRODUCTS TO THE PROCUREMENT LIST IS IN CONTRAVENTION OF THE VETERANS BENEFITS ACT AND DEPARTMENT GUIDELINES, AND IS ARBITRARY AND CAPRICIOUS, WITHOUT A RATIONAL BASIS, AND OTHERWISE CONTRARY TO LAW

46. Plaintiff repeats and incorporates by reference paragraphs 1-35 above as if fully set forth herein.

47. As this Court held in October 2010 in *Angelica Textile*, the VBA takes priority over JWOD. *See Angelica Textile*, 95 Fed. Cl. at 222. Furthermore, the Infor-

mation Letter issued by the VA in April 2010 set forth the procedures that should be followed before adding new VA products or services to the Procurement List in accordance with the VBA. With regard to opportunities in VISN 6 and certain locations in VISN 8 (both of which were added to the Procurement List after the passage of the VBA), the Committee did not allow VOSBs to have the priority that Congress originally intended under the VBA and did not follow the Information Letter, which affirms such priority.

48. While the Committee enjoys broad authority to add certain products or services to the Procurement List under 41 C.F.R. Chapter 51, that authority is not unlimited, particularly with regard to VA procurements. Before adding VA-related products to the Procurement List in VISN 6 and certain locations in VISN 8, the Committee should have been required to follow the VBA and the Information Letter issued by the VA. The Committee's failure to do so is arbitrary and capricious, without a rational basis, and otherwise contrary to law.

COUNT IV

REQUEST FOR A PRELIMINARY AND PERMANENT INJUNCTION TO STOP THE COMMITTEE FROM ADDING VISION-RELATED PRODUCTS TO THE ABILITYONE PROCUREMENT LIST IN CONTRAVENTION OF THE VETERANS BENEFITS ACT AND DEPARTMENT GUIDELINES

49. Plaintiff repeats and incorporates by reference paragraphs 1-35 above as if fully set forth herein.

50. By failing to follow the VBA and the Information Letter, the Committee has improperly denied Plaintiff

and other VOSBs the opportunity to compete for vison-related products.

51. Similarly, but for the so-called mandatory requirement to issue orders to IFB for VISN 6 effective September 4, 2016, given the opportunity, Plaintiff and at least one other veteran-owned small business would submit bids or offers for vision-related products in VISN 6. The addition of vision-related products to the Procurement List under VISN 6 will deprive PDS the opportunity to compete for those orders.

52. The Court should enjoin the Committee from violating the VBA and the Information Letter by adding vision-related products to VISN 6, or any other VISN, and making IFB the mandatory source of such products. Given the plain language of the *Kingdomware* decision, the VBA, and the *Angelica Textile* decision, Plaintiff will succeed on the merits of this matter. Plaintiff will suffer specific irreparable injury if the Committee is not enjoined from continuing to ignore the VBA's statutory obligations and attempting to require that IFB receive priority. Additionally, the balance of hardships in the instant case favor entry of an injunction. The Committee will not be harmed by being required to follow the law and the direction already issued by this Court in October 2010 under the *Angelica Textile* decision. Finally, the public interest will be served by granting the injunction because the public's interest lies in ensuring the statutory requirements of the VBA are followed and that VOSBs are given the priority that Congress originally intended. The Committee's violations have the adverse effect of undermining the integrity of the federal procurement process.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff, PDS Consultants, Inc., respectfully requests this Court grant judgment in its favor, and grant the following relief:

a. Entry of judgment in favor of Plaintiff and against the United States, declaring that the VA procurements must be conducted in accordance with the plain language of the VBA and consistent with the U.S. Supreme Court's decision in *Kingdomware*, providing priority for veteran-owned small businesses over purported "mandatory" purchasing requirements under the Javits-Wagner-O'Day Act by applying the Rule of Two to all VA contracting determinations;

b. Entry of a Preliminary Injunction ordering the VA to conduct procurements for VISN 2, VISN 6, VISN 7, and certain locations in VISN 8, as well as all other VISNs, in compliance with the VBA's requirement to conduct the necessary market research for all contracting determinations, regardless of whether the items are on the Procurement List, and to cease issuing orders for vision-related products to IFB, until such time as the Court has the opportunity to hear argument and rule on Plaintiff's request for permanent injunctive relief;

c. Entry of a Permanent Injunction ordering the VA to conduct procurements for VISN 2, VISN 6, VISN 7, and certain locations in VISN 8, as well as all other VISNs, in compliance with the VBA's requirement to apply the Rule of Two to all contracting determinations, regardless of whether the items are on the Procurement List;

d. Entry of judgment in favor of Plaintiff and against the United States, declaring that the AbilityOne Committee must follow the VBA, the U.S. Supreme

Court in *Kingdomware*, the direction from the U.S. Court of Federal Claims in *Angelica Textile*, and the VA's April 2010 Information Letter before adding any new VA products or services to the AbilityOne Procurement List;

e. Entry of a Preliminary Injunction enjoining the Committee from adding vision-related products from the Procurement List in VISN 6 or any other VISNs, in compliance with the VBA, the U.S. Supreme Court in *Kingdomware*, the direction from the U.S. Court of Federal Claims in *Angelica Textile*, and the VA's April 2010 Information Letter, until such time as the Court has the opportunity to hear argument and rule on Plaintiff's request for permanent injunctive relief;

f. Entry of a Permanent Injunction ordering the Committee to remove vision-related products from the Procurement List in VISN 6 and certain locations in VISN 8, for failure to comply with the VBA, the U.S. Supreme Court in *Kingdomware*, the direction from the U.S. Court of Federal Claims in *Angelica Textile*, and the VA's April 2010 Information Letter;

g. Entry of an order granting Plaintiff its costs in this action, including reasonable attorneys' fees; and

h. Granting such further relief as the Court may deem just and proper.

Dated: August 25, 2016

Respectfully submitted,

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