

2020-1175

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

VETERANS4YOU, INC.,

Plaintiff – Appellant,

v.

UNITED STATES,

Defendant – Appellee.

On appeal from the United States Court of Federal Claims
Case No. 1:19-cv-00931-LKG, Judge Lydia K. Griggsby

**CORRECTED BRIEF FOR PLAINTIFF-APPELLANT
VETERANS4YOU, INC.**

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January 24, 2020

CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellant certifies the following:

1. The full name of every party or *amicus* represented by me is:

Veterans4You, Inc.

2. The names of the real party in interest represented by me is:

None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by me are:

None

4. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

None

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

None.

Dated: January 24 2020

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INTRODUCTION

Veterans4You, Inc. appeals from the final judgment entered on September 25, 2019 by Judge Lydia Kay Griggsby of the United States Court of Federal Claims (“CFC” or “Court”) in *Veterans4You, Inc. v. United States*, 1:19-cv-00931-LKG. The case arose as a bid protest action challenging the invocation of the “printing mandate” in 44 U.S.C. § 501 to route a Department of Veterans Affairs (“VA”) procurement for imprinted suicide-prevention cable (gun) locks, to include two keys and printed wallet cards (the “Solicitation”), through the Government Publishing Office (“GPO”). The VA sent this requisition through the GPO without either agency analyzing whether the printing mandate was in fact triggered or providing adequate documentation for this decision. The VA’s procurement of the cable locks through the GPO also meant that neither agency followed the “Rule of Two” in 38 U.S.C. §§ 8127, 8128, which creates a statutory preference for veteran-owned small businesses (“VOSBs”) or service-disabled veteran-owned small businesses (“SDVOSBs”) in VA acquisitions.

The CFC decision allowing the VA and GPO to circumvent the Rule of Two should be reversed. If upheld, the CFC’s decision would enable the VA (and other agencies) when acquiring products with a minor printing component to funnel these requisitions through the GPO, evading important mandatory procurement policies and regulations and resulting in a violation of the constitutional separation of

powers between the executive and legislative branches. It would also render the Rule of Two meaningless in instances where the VA conducts procurements through other agencies with no mechanisms to adhere to the Rule of Two.

STATEMENT OF RELATED CASES

There is no other appeal from the same proceeding in the lower court that was previously before this or any other appellate court. There are no cases that could directly affect or be directly affected by this Court's decision in this appeal.

JURISDICTION

The CFC possessed jurisdiction over the bid protest action under 28 U.S.C. § 1491(b). The CFC entered its final judgment on September 25, 2018. Appx23 (ECF No. 23). Appellant filed a timely notice of appeal on November 21, 2019 Appx23 (ECF No. 26). The Court possesses jurisdiction over this Appeal under 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUES

The issues on appeal center on the interplay of the Rule of Two mandate in 38 U.S.C. §§ 8127, 8128 and the printing mandate in 44 U.S.C. § 501 requiring the GPO to conduct printing solicitations for federal agencies. The issues are as follows:

1. Whether the printing mandate of 44 U.S.C. § 501 applies to the imprinted gun locks, keys and wallet cards required by the Solicitation.
2. Whether the VA adequately explained and documented its reasons for using

the GPO to conduct the Solicitation.

3. Whether the CFC erroneously concluded that because the Solicitation was conducted by the GPO and not the VA, the VA was not required to conduct a Rule of Two analysis under 38 U.S.C. § 8127(d) and instead 38 U.S.C. § 8127(i) merely required the VA to request the GPO to comply with the Rule of Two “to the maximum extent feasible.”
4. Whether the CFC properly concluded that the Rule of Two and printing mandate are not in conflict despite the invocation of the printing mandate resulting in complete non-adherence to the Rule of Two.
5. Whether the CFC properly concluded that the GPO had reasonably complied with its own regulations and the VA’s request to adhere to the Rule of Two “to the maximum extent feasible.”

STATEMENT OF THE CASE

A. Preliminary Statement

This bid protest appeal arises from the CFC’s decision denying Plaintiff’s Motion for Judgment on the Administrative Record (“MJAR”) while granting the MJAR for the VA. Appx1-19. Veterans4You brought the protest to challenge the legality of the VA’s decision to invoke the printing mandate of 44 U.S.C. § 501 to conduct a procurement for the acquisition of imprinted suicide prevention cable (gun) locks and printed wallet cards (the “Solicitation”) through the GPO without

having conducted a Rule of Two analysis under 38 U.S.C. § 8127(d).

The CFC found that the VA had properly invoked the printing mandate of 44 U.S.C. § 501 in conducting the Solicitation through the GPO; and that the VA had complied with the requirements of the VBA with regards to the Solicitation.

Appx12-17. The CFC reasoned that because the procurement was conducted by the GPO and not the VA, the “Rule of Two” did not apply. Appx15. As such, the CFC denied Appellant’s request for injunctive relief and dismissed its Complaint.

B. Procedural History

Appellant filed a bid protest with the CFC on June 26, 2019, along with an Application for Injunctive Relief and Supporting Memorandum. Appx20-21 (ECF Nos. 1 and 4). On July 9, 2019, the Government filed the Administrative Record. Appx21 (ECF No. 9).¹ The parties then filed cross-motions for judgment on the administrative record. Appx21 (ECF No. 11 and 12). The Court held oral argument on August 30, 2019, which was initially sealed to the public due to the sealing of Tab 26 in the administrative record. Appx22.² Following argument, Judge

¹ The Administrative Record was initially not filed under seal; however, upon the Government’s realization that Tab 26 contained proprietary information to prospective bidders, it filed an Unopposed Motion for Protective Order to seal this tab only. Appx22 (ECF No. 14).

² On January 21, 2020, Appellant filed an unopposed motion to unseal the sealed transcript, as it contains no information that requires protection and does not include any mention of the contents of the sealed Tab 26. This motion was granted on January 22, 2020; as such, the transcript is now unsealed. Appx28.

Griggbsy issued an oral ruling: denying Appellant’s Motion for Judgement Upon the Administrative Record; granting the Government’s Cross Motion for Judgment Upon the Administrative Record; denying Veterans4You’s Motion for Preliminary Injunction; and dismissing the Complaint. A subsequent Sealed Memorandum and Order was issued on September 20, 2019. Appx22 (ECF No. 22). A reported Memorandum Opinion and Order followed on September 27, 2019. Appx1-19 (ECF No. 25).

On September 25, 2019, Final Judgment was entered, pursuant to Rule 58, in favor of the Government. Appx23 (ECF No. 23). Appellant timely appealed on November 21, 2019. Appx23 (ECF No. 26).

C. Factual Background

The GPO is an agency of the legislative branch of the federal government, responsible for producing and distributing informational products and services. Section 501 of Title 44 of the U.S.C. requires executive branch agencies, including the VA, to conduct their printing procurement through the GPO. Section 501 provides: “All printing, binding, and blank-book work for Congress, the Executive Office, the Judiciary, other than the Supreme Court of the United States, and every executive department, independent office and establishment of the Government, shall be done at the Government Publishing Office....” This is also referred to as the “printing mandate.”

The Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403-3468 (codified, in relevant part, as amended at 38 U.S.C. §§ 8127-8128) (the “Veterans Benefits Act” or “VBA”), establishes the Veterans First Contracting Program. It mandates that the VA “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 will submit offers and that the award can be made at a fair and reasonable price that offers the best value to the government” when certain conditions are met. 38 U.S.C. § 8127(d). This statutory requirement is known as the “Rule of Two.” The VBA also requires the VA “to give priority to a small business concern owned and controlled by veterans” when “procuring goods and services pursuant to a contracting preference under [Title 38] or any other provision of law.” *Id.* § 8128(a). On June 16, 2016, the U.S. Supreme Court ruled that this set-aside requirement “is mandatory, not discretionary,” requiring “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*, 136 S. Ct. 1969, 1976 (2016).

On February 14, 2019, the VA through the GPO issued an Invitation for

Bids. Appx85-95. Conducted under unrestricted competition, this opportunity called for a fixed price/indefinite quantity of cable gunlocks with a maximum price of \$360,000, to be used by the VA's Veterans Crisis Line. Appx86. The gunlocks were to comprise a cable and key-activated padlock mechanism that could be used on virtually any handgun, rifle, or shotgun. Appx87. In addition, the padlock portion of the device was to have a vinyl coating imprinted with the Veterans Crisis Line logo and contact information; a wrap-around sticker to be affixed to the cable portion of the device with the Veterans Crisis Line logo and contact information; a wallet card with the Veterans Crisis Line logo and contact information; and information identifying signs of suicide risk. *See* Appx87. Even though the cable locks and keys (rather than the printing component) accounted for the vast majority of the contract price, the GPO classified the procurement under North Atlantic Industry Classification System ("NAICS") Code 32311 (Commercial Printing (Except Screen and Books)).

On June 3, 2019, the Government Accountability Office ("GAO") sustained a bid protest that had been lodged by Appellant. Appx427-433. The GAO concluded that the acquisition contravened the VA's requirement under the VBA to set aside opportunities for VOSBs and SDVOSBs, as the VA was the agency acquiring the supplies at issue. Appx429. The GAO found the VBA applicable, stating: "[A]ny time the VA is acquiring goods or services—*without limitation*—it

is required to determine whether there are at least two SDVOSBs [service-disabled veteran-owned small businesses] or VOSBs [veteran-owned small businesses] capable of meeting the agency’s requirements at a fair and reasonable price.” Appx431 (emphasis added). The GAO further noted that under 38 U.S.C. 8127(i), the VA is required to include in contracts with other agencies whereby it acquires goods or services “a requirement that the entity will comply, to the maximum extent feasible, with the provisions of this section in acquiring such goods or services.” Appx431-432. In this instance, when transmitting its requisition to the GPO, the VA had made no attempt to do so. *See* Appx98-101 (SF-1, “Printing and Binding Requisition to the Public Printer of the United States”). Because the GAO found that Veterans4You prevailed on the *Kingdomware* issue it raised, it did not find it necessary to rule on the issue of whether the printing mandate was being properly utilized. *See* Appx428 n.2.

On June 13, 2019, ten days after the GAO sustained Veterans4You’s protest, the GPO issued another Invitation for Bids for the same gunlocks. Appx599-600 (IFB No. 647-365, VA19-00234/012911) (the “Solicitation”). The Solicitation was substantively identical to the initial Invitation for Bids, although this opportunity characterized the supplies sought as “cable locks” rather than “gunlocks.” Appx603. As its predecessor, the Solicitation was also issued under NAICS Code 323111 (Commercial Printing (except Screens and Books)) and with

unrestricted competition. Appx599; Appx603.

Upon its protest to the CFC, Veterans4You learned via the production of the Administrative Record that the VA had made the following request via the SF-1 on the “Additional Information” Box:

Important - In accordance with 38 U.S.C. § 8127(i), VA requests that GPO, to that [sic] maximum extent feasible, set-side any procurement action resulting from this requisition to verified service-disabled veteran-owned small businesses (SDVOSBs) or verified veteran-owned small businesses (VOSBs). VA maintains a database of all verified SDVOSB and VOSB firms that is publicly available at <https://www.vip.vetbiz.gov>.

Appx435.

The GPO, however, was unable to accommodate this request. Its Printing Procurement Regulations (“PPR”), which are unique to GPO procurements, specifically require the GPO to ensure “competition to the maximum extent practicable in the acquisition process.” Appx235 (PPR § VIII-3.1). The PPR defines “competition to the maximum extent practicable” to mean that “all responsible sources are permitted to compete.” Appx236 (PPR § VIII-3.3). The PPR provides that GPO contracting officers “shall promote and provide for competition to the maximum extent practicable when soliciting bids and offers and awarding Government contracts.” Appx236 (PPR § VIII-3.4). As such, in its Determination and Findings, the GPO concluded that it could not set aside the acquisition for VOSBs or SDVOSBs. Appx437-439. To accommodate the “spirit” of the request, it would search the VA’s VetBiz Vendor Information Pages (“VIP”)

database of eligible VOSBs and SDVOSBs to identify bidders who could be added to its bid list (Invitation for Bids). Appx439. However, of the 34 firms included on the GPO's bid list, only six of these were included in the VIP database as of the date of Appellant's Complaint. *See* Appx445-447. Accordingly, with respect to this procurement, neither the GPO nor the VA applied the "Rule of Two" as set forth at 38 U.S.C. § 8127(d).

Throughout the litigation before both the GAO and the CFC, the Government argued that because the GPO had conducted the procurement, the VA-specific requirements of the VBA no longer applied even though the supplies sought were acquired for the VA. This presents a classic chicken-before-the-egg scenario, as it was the VA that chose to place the requisition through the GPO by submitting the request via form SF-1. In the case of this acquisition via the GPO, requiring it as the procuring agency to comply with VBA to the "maximum extent feasible" translated to non-compliance, as the GPO has no set-aside procedures nor any means to provide evaluation credit for VOSB or SDVOSB status. This therefore begs the question of whether the VA is permitted to route an acquisition through another agency when the result is complete avoidance of the VBA's requirements or policy considerations.

SUMMARY OF ARGUMENT

The CFC found that the VA was *required* to procure the cable locks sought by the Solicitation due to the printing mandate of 44 U.S.C. § 501, which requires that all printing for executive agencies such as the VA to be acquired via the GPO. A further statute restricts an agency's legal authority to spend appropriated funds to acquire printing from any source other than the GPO. That provision defines printing as including: "the processes of composition, platemaking, presswork, duplicating, silk screen processes, binding, microform, and the end items of such process." Legislative Appropriations Act of 1993, Pub. L. 102-392, title II, §207(a)(i), 106 Stat. 1719 (1992), as amended in relevant part by Legislative Appropriations Act of 1995, Pub. L. 103-283, title II, §207, 108 Stat. 1440 (1994).

The CFC found that because the supplies sought included a printing component, the VA as the executive agency seeking to acquire them was required by statutory mandate to procure them through the GPO. It also noted that to the extent that part of the supplies sought (the cable locks and the keys) did not constitute "printing," it was reasonable for the VA to acquire both the non-printing and the printing components of the requirement through the GPO. This was due to alleged previous difficulty cited in procuring the components separately. Appx58. Not only is this cited only in the Contracting Officer's Statement prepared following Veterans4You's initial protest, but there is no documentation in the

Administrative Record that support this difficulty. Nor is there any analysis from either agency contemporaneous with either procurement discussing the permissibility of, or requirement for, it the GPO to obtain the cable locks for the VA at the same time it acquired the printing component.

Furthermore, the CFC decision ignores Veterans4You's argument that by the GPO conducting this acquisition, the robust set of rules and principles that apply to executive agency procurements as set forth in the Federal Acquisition Regulation ("FAR"), will not apply. The FAR is inapplicable to the GPO as a legislative agency, which is subject to its own rules and procedures via its PPR. Appx438. The CFC's overbroad reading of the definition of "printing" also exacerbates an issue with the printing mandate's violation of the Constitutional separation of powers by causing the GPO as a legislative branch to encroach upon the procurement duties of executive agencies.

Last, the CFC improperly held that the VA was not required to perform a Rule of Two analysis for this particular solicitation because it ultimately was not a VA solicitation, distinguishing it from prior case law interpreting the VBA. Because the VA is responsible for implementing the VBA, such obligation would be evaded if the VA sought goods or supplies through another agency while knowing that the requirements of the VBA would not be met. The CFC also erred in holding that the VBA and the printing mandate of 44 U.S.C. § 501 are not in

conflict, as the invocation of the printing mandate to route a VA procurement through the GPO effectively results in complete non-adherence to the VBA due to the GPO's limitations in its procurement procedures.

Last, the Court improperly held that the GPO had followed its own procurement procedures and adhered to the VA's request "to the maximum extent feasible." The GPO failed to complete its regulatory steps in addressing a set-aside request, and it also contacted only six of the 91 veteran-owned firms available in the VA's VetBiz registry.

Veterans4You understands that the supplies sought by the Solicitation have now been procured; however, this situation raises a host of issues capable of repetition in future procurements. Such issues include identifying when the printing mandate is triggered, and also when executive agencies are permitted to place requisitions through the GPO when such requisitions involve non-printing components. It also presents the repeatable issue of whether the VA may place a requisition via another agency when it is aware that the requirements of the VBA will not be adhered to because the agency has no set-aside procedures or other means to accommodate its purpose.

STANDARD OF REVIEW

This Court "reviews the Claims Court's findings of fact for clear error" and "the Claim's Court's determination on the legal issue of the Government's

conduct, in a grant of judgment upon the administrative record, without deference.” *Guardian Moving & Storage Co., Inc. v. United States*, 657 F. App’x 1018, 1023 (Fed. Cir. 2016) (citations, alterations, and quotations omitted). “This means that [the Court] appl[ies] the arbitrary and capricious standard set forth in 706 of the Administrative Procedure Act (‘APA’) anew, conducting the same analysis as the [CFC].” *Id.* (citation and alterations omitted). “Under this standard, [the Court] determine[s] whether the agency’s actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” *Id.* (citation omitted).

ARGUMENT

I. THE COURT ERRONEOUSLY FOUND THAT THE GPO HAD PROPERLY CONDUCTED THE SOLICITATION, BECAUSE THE PRINTING MANDATE WAS IMPROPERLY AND ILLEGALLY INVOKED

In holding that the supplies sought by the Solicitation fall under the printing mandate, the Court notes that “[t]he administrative record makes clear that the Solicitation is for suicide prevention cable gun locks that include printed labeling and printed wallet cards.” Appx12. Citing the definition of “printing” as set forth at 44 U.S.C. § 501 and the Legislative Branch Appropriations Act of 1995, which includes “the processes of composition, platemaking, presswork, duplicating, silk screen processes, binding, microform, and the end items of such processes,” the Court found that “the imprinted gun locks and wallet cards requested under the Solicitation are goods that fall within the printing mandate set forth in Section

501.” Appx13. Particularly considering the adverse implications of this holding on other procurements involving a minor element of printing, as well as the constitutional encroachment caused by its broad sweep, this holding is in error.

A. The Imprinted Cable Locks with Accompanying Wallet Cards Required by the Solicitation Do Not Fall Within the Printing Mandate of 44 U.S.C. § 501

Suicide-prevention cable locks for veterans with printing as a minor component do not reasonably fall under the plain meaning of the “printing mandate” of 44 U.S.C. § 501. Congress has defined “printing” as “the processes of composition, platemaking, presswork, duplicating, silk screen processes, binding, microform, and the end item of such processes.” The CFC’s decision cites this “broadly defined” provision—and nothing else—in concluding that “the imprinted gun locks and wallet cards required under the Solicitation are goods that fall within the printing mandate set forth at Section 501.” Appx13. This conclusory statement provides no analysis for why the supplies sought by this Solicitation fall under the mandate.

Furthermore, the CFC improperly ignores the predominance of the cable lock and keys in the procurement. The supply sought here should be looked at as a whole to determine whether the printing mandate is triggered, as it encompasses all elements to be obtained. These include the cable lock, two keys, and laminated wallet cards. As a whole, that end item is not “printing,” and it does not trigger the

printing mandate because it does not qualify as “platemaking,” “presswork,” “duplicating,” “silk screen processes,” “binding,” or “microform;” or as the “end item of such processes.” *See* Legislative Appropriations Act of 1993, 207(a), 106 Stat. 1719 (1992), as amended in relevant part by Legislative Appropriations Act of 1995, Pub. L. 103–283, title II, §207, 108 Stat. 1440 (1994). A cable lock, by definition, is a mechanism used to prevent the discharging of a gun; here, the cable lock is accompanied by a set of keys made with steel and including nickel plating. Appx589. The mere fact that the cable lock is imprinted and comes with laminated wallet cards and other printed information does not qualify this requisition as “printing.” In fact, any federal agency would be hard-pressed to find a supply sought that does not come with some printing, as virtually all products include printed instructions, information, and/or warnings. It is also not uncommon for products to include stamped logos or lettering. Such products have not been found to trigger the “printing mandate;” nor is there any evidence of comparable items in the Administrative Record.

Also, the cable locks as requisitioned are not the “end item” of such processes, as these processes did not create the cable locks as the VA requires them. The finished product merely includes printing as one minor element which constitutes a very small percentage of the total cost of the supply to be acquired. The supply sought as a whole is a cable lock, with accompanying

elements to assist with its use. The existence of these elements and their importance to the function of the item does not change its character. For example, if an agency was acquiring an expensive item with the batteries required to function, the fact that these batteries were essential for operation would not render this an acquisition for “batteries.” As such, the CFC incorrectly dismissed Veterans4You’s argument that the GPO is not properly conducting the Solicitation because only a small percentage of the cost of the contract will involve printing services. The CFC observed that the purpose of the Solicitation is to help prevent suicides among veterans. Due to this purpose, the CFC characterized the information printed on the gunlocks and wallet cards an “essential element” of the Contract. Appx13 n.4. Even if this information is important to the mission of the project as a whole, this has no bearing on the price of the contract or the need to protect the quality or integrity of its various physical components.

The improper characterization of this procurement as “printing” is further illustrated by referring to NAICS codes, which an agency assigns to each procurement to classify the supplies or services sought. Such designation is made to all contracts, with the applied NAICS code determining the size standard that applies to a socioeconomic set-aside contract. A procuring agency representative will select the single NAICS code that describes the principal

purpose of the product or supply being acquired. 13 C.F.R. § 121.402(b).

In the assignment of such NAICS code, the relevant Small Business Administration provision states:

(1) Primary consideration is given to the industry descriptions in the U.S. NAICS Manual, the product or service description in the solicitation and any attachments to it, the *relative value and importance of the components* of the procurement making up the end item being procured, and the function of the goods or services being purchased. (1).

(2) A procurement is usually classified according to the component which accounts for the greatest percentage of contract value.

13 C.F.R. § 121.402(b) (emphases added).

Here, the gun locks contain the vast percentage of the cost of the supplies sought. However, rather than appropriately categorize the procurement and assign the proper NAICS code, the VA assigned the requisition to the GPO, which then assigned one of the few NAICS codes applicable to the printing agency to the resulting solicitation.³ Then, because the GPO is not subject to the Small Business Act, once the procurement was passed from the VA to the GPO, there was no longer the possibility of review of the NAICS code as assigned by the GPO by a higher authority. *See NAICS Appeal of Veterans4You, Inc.*, SBA No. NAICS-6021, 2019 WL 3887178 (Aug. 13, 2019) (SBA Office of Hearings and Appeals lacks jurisdiction over NAICS appeal of GPO solicitation issued on

³ Subsection 323 (Printing and Related Activities) of the NAICS code table only includes four options for printing services or supplies.

behalf of VA because the GPO is a legislative branch agency not subject to SBA requirement).

Accordingly, the imprinted cable locks with accompanying wallet cards required by the Solicitation do not fall within the printing mandate of 44 U.S.C. § 501.

B. The Imprinted Gunlock Is Not a “Substrate” Under the Meaning of the GPO’s Printing Procurement Regulations

The imprinting on the cable lock itself does not qualify the acquisition as printing. The cable lock is not a “substrate” whereby the act of imprinting it invokes the printing mandate.

The PPR defines a “substrate” in Chapter VIII (Preliminary Procurement Procedures) at Section Six (Assignment of Jacket Numbers). This states:

Requisitions shall be reviewed to identify an agency’s individual requirements that may be ideally grouped together (strapped). Examples of requirements with strapping potential include: Same trim size, paper, binding, etc., similar substrates such as metals or plastics, or GFP (Government Furnished Property) common to multiple jobs. . .

Appx233 (PPR § VIII-6(a)).

A cable lock is not a “substrate” of “printing” by the mere fact that it is imprinted with information for the Veterans Crisis line. If this qualifies, any item, such as a curtain with a label, a desk with the manufacturer’s name and help line stamped on it, or a printer bearing a printed logo, would also be subject to the printing mandate. During the oral hearing, the CFC cited to Veteran4You’s

example of embroidered curtains, seemingly disagreeing that this would not fall under the printing mandate. Judge Griggsby noted that she was not aware of any decision that says that an embroidered curtain is not within the scope of the printing mandate, as “printing” is defined “pretty broadly.” Appx644. This is an overbroad interpretation of the printing mandate that, if applied going forward, would result in numerous other acquisitions being improperly found to be subject to the printing mandate. Alternatively, it could be used as justification by the VA to route an acquisition through the GPO, thereby evading its obligations under the VBA.

It is also worth noting that the Administrative Record includes no such similar acquisitions that were previously *determined to be* subject to the printing mandate. It includes only two examples of prior requisitions for an executive agency made through the GPO. This includes one requisition for printed binders (Appx379-388) and another for imprinted tote bags (Appx389-397). These requisitions, however, do not establish that the GPO correctly conducted this particular procurement. The Administrative Record evidences only that these acquisitions occurred, as it includes only the Invitation for Bids list and the solicitations themselves. There is absolutely no analysis or evidence whereby the GPO determined that the printing mandate had applied to the acquisitions or that it was properly acquiring the supplies for the executive agency. In fact, the

Administrative Record does not even include a Determination and Findings with respect to these procurements or the completed SF-1s. Nor were these acquisitions as conducted for an agency via the GPO challenged by a prospective bidder.⁴

Further, this interpretation misconstrues the definition of “substrates” in both the PPR and as applied by the GPO to this particular procurement. The PPR provision cited above refers to those instances where the GPO may group together requisitions for an agency for convenience purposes, not to acquire an underlying item because it happens to have a printing element. As specifically enumerated in the provision, this provides guidance to the GPO in grouping together printing requisitions when they have similar requirements, such as the same trim size of paper *or the same substrates*. Indeed, this is consistent with the contracting officer’s characterization of this acquisition as set forth in the Administrative Record. At Paragraph Two of her statement, she clearly sees the gunlocks as being non-printing items acquired at the same time as printing items, not as a substrate. Appx58 (“The Contracting Officer considered the VA request to include the printed labels as well as the printed wallet cards (on a plastic substrate) for this

⁴ This may be because these prior acquisitions are much more likely to “fly under the radar” than the VA’s acquisition of suicide gunlocks for veterans through another agency without arranging to set aside that opportunity for veteran small businesses.

procurement in addition to the gunlock product.”). Accordingly, the CFC erred in holding that the cable lock qualified as a “substrate” under the PPR.

C. The Printing Mandate, and Particularly the CFC’s Broad-Sweeping Application, Violates Constitutional Separation of Powers by Causing the GPO as Part of the Legislative Branch to Encroach Upon the Procurement Duties of Executive Agencies

The doctrine of constitutional avoidance requires courts to construe statutes, “if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.” *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); *Jones v. United States*, 529 U.S. 848, 857 (2000). “[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The “elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *Id.* (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)); accord *Burns v. United States*, 501 U.S. 129, 138 (1991); *Gollust v. Mendell*, 501 U.S. 115, 126 (1991).

The invocation of the printing mandate, particularly the CFC’s broad-sweeping interpretation, violates constitutional provisions of separation of powers. As the Office of Legal Counsel in the United States Department of Justice has concluded, the constitutional doctrine of separation of powers forbids

Congress from vesting non-legislative functions—specifically, executive functions—in the GPO if Congress retains control over the GPO. *Involvement of the Government Printing Office in Executive Branch Printing and Duplicating*, 20 U.S. Op. Off. Legal Counsel 214, 1996 WL 1185161 (1996) (“OLC Opinion”). The GPO is part of the legislative branch. *See United States v. IBM Corp.*, 892 F.2d 1006, 1009 (Fed Cir. 1989); 44 U.S.C. § 103; Appx403; Appx438. The OLC Opinion explained that “the GPO is subject to the sort of control that Congress may not exercise over an actor that performs non-legislative functions.” 1996 WL 1185161, at *9. The GPO’s printing functions via the printing mandate encroach upon executive powers because they enable the GPO to “control[] the timing and the production of all printing work for the executive branch.” *See* 44 U.S.C. §§ 501 and 501 note. Accordingly, the OLC opinion concludes, “Because the GPO is subject to congressional control and because the GPO performs executive functions, we conclude that ***the language in 44 U.S.C. §§ 501 & 501 note requiring the executive branch to procure all of its printing by or through the GPO is unconstitutional and, therefore, inoperative.***” 1996 WL 1185161, at *10 (emphasis added).

While the OLC Opinion supports that the printing mandate is unconstitutional in general, the CFC’s broad interpretation of the printing mandate is particularly problematic. This holds that executive agencies are

foreclosed from conducting any procurements that contain minor elements of printing, and instead must invest these duties in the GPO, a legislative branch. It also forecloses these executive agencies from requiring the GPO to apply mandatory or beneficial regulatory provisions typically applicable to executive agency procurements, as the GPO is uniquely subject to the PPR and not the FAR. This is not only clearly a violation of separation of powers, but it fundamentally alters the nature of the procurement process.

The CFC's lack of criteria for application of the printing mandate creates additional confusion. This provides no guidance to determine whether a procurement qualifies as "printing" and therefore triggers the printing mandate. While the nature of a procurement would not render the printing mandate any less problematic with respect to the separation of powers issue, this ambiguity in the decision impacts the degree to which the encroachment impacts the executive agency and ultimately the integrity of the procurement process.

D. The Characterization of This Requisition as Subject to the Printing Mandate Would Have Adverse Policy Implications By Evading Important Regulatory and Statutory Provisions

As Veterans4You argued before the CFC, to classify the acquisition at issue as invoking the printing mandate would open the door for other dubious requirements to be routed through the GPO rather than via the executive agency acquiring them. So long as a procurement contains some element of printing,

such as an insignia on a military uniform or a label on a weapon, this decision holds that the printing mandate is triggered and the executive agency at issue must conduct its requisition through the GPO. Consequently, unless a prospective bidder such as Veterans4You invests the time and expense of challenging such acquisition, it would no longer be conducted under the auspices of the Federal Acquisition Regulation (“FAR”) as it applies to procurements conducted by all executive agencies.

As set forth at FAR 1.101, the Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. 48 C.F.R. § 1.101. These serve the purposes of: (1) satisfying the customer in terms of cost, quality, and timeliness of the delivered product or service by maximizing the use of commercial products and services, using contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform; and promoting competition; (2) minimizing administrative operating costs; (3) conducting business with integrity, fairness, and openness; and (4) fulfilling public policy objectives. *See* 48 C.F.R. § 1.102(b). This robust set of regulations includes numerous provisions necessary to protect the integrity of an acquisition.

For example, as relevant here, FAR § 25.1101 enumerates those provisions and clauses that apply to the acquisition of supplies, such as those addressing the

Buy American Act and trade agreements. 48 C.F.R. § 25.1101. In contrast, the PPR, to which the GPO as a legislative agency is uniquely subject, includes none of these provisions or requirements. All requisitions conducted by the GPO for executive agencies are subject only to the limited requirements of the PPR versus the FAR, which is problematic when such requisitions contain printing as only a minor component, and especially when the integrity or quality of the product is particularly important. Here, the CFC's decision enables the GPO to procure cable locks used to prevent veteran suicides via a set of regulations that omit important provisions that should by law (and for obvious public policy considerations) apply to the requisition at hand.

II. THE CFC IMPROPERLY DETERMINED THAT THE VA HAD ADEQUATELY EXPLAINED AND DOCUMENTED ITS REASONS FOR USING THE GPO TO CONDUCT THE SOLICITATION

It is well settled that “[u]nder Rule 52.1 of the Rules of the Court of Federal Claims, the parties are limited to the [Administrative Record], and the Court makes findings of fact as if it were conducting a trial on a paper record. Looking to the AR, the Court must determine whether a party has met its burden of proof based on the evidence in the record.” *Walden Sec. v. United States*, 136 Fed. Cl. 216, 228 (2018) (citing *Bannum, Inc. v. United States*, 404 F.3d 1346, 1354 (Fed. Cir. 2005)).

The CFC found that the VA had “adequately explained and documented the

reasons for its decision to employ the GPO to conduct the Solicitation.” Appx13 (citing Appx58-59). However, the VA conducted no analysis or documentation prior to its decision to issue the requisition through the GPO. Its only explanation for its reasoning was provided to Mr. Timothy Farrell, the owner of Veterans4You, upon Mr. Farrell’s inquiry *after* the initially-posted IFB. This explanation stated: “The VA customer did not want to attempt to order the labels/wallet cards via separate procurements, as the coordination through two different vendors (i.e., Label Printer and Plastic Printed Wallet Cards) to deliver them just in time to the supplier of the gunlocks caused them to ask GPO to purchase all (with no predominate function).” Appx58-59.

There is no support for this conclusory statement in the record. While the Administrative Record contains information with respect to a prior solicitation for cable locks, nothing within these documents justifies, whether from a legal or a practicality perspective, having cable locks with a separate printing element be acquired together. *See* Appx131-150. Nor does the fact that this prior acquisition took place support that it was properly conducted. No one questioned or contested it, and any bidder that desired to do so would have had to have raised the issue in a timely pre-award bid protest. The acquisition was not examined by a reviewing body or court. In fact, the Administrative Record contains no evidence of analysis with respect to the triggering of the printing mandate or the GPO’s authority or

requirement to conduct the previous acquisition.

Similarly, the Administrative Record is devoid of any analysis made by either the GPO or VA prior to, or contemporaneous with, the acquisition to support the conclusion that it was permissible for the VA to conduct this procurement via the GPO, despite the minor nature of the printing component. The sole relevant document is the GPO's Determination and Findings, which addressed its decision to issue the requisition under full and open competition to the maximum extent practicable, and its attempt to accommodate the VA's set-aside request. Appx437-439. The Determination and Findings does not analyze the triggering of the printing mandate other than to note that because the acquisition involved printing, the VA was required to acquire the cable locks via the GPO. The SF-1 completed by the VA merely requested the GPO to conduct the requisition, without offering an explanation as to reasoning. Appx434-435.

While the CFC states that "Plaintiff points to no law or regulation that would prohibit the GPO from procuring non-printing items on behalf of the VA (at the same time as the procurement of the printing items)" (Appx13), as set forth above and as was also argued in Veterans4You's brief, such procurement would result in the evasion of the FAR, which applies to all executive agency procurements. While the Government has argued that it was more convenient for the GPO to acquire the imprinted cable locks (with keys) at the same time as the wallet cards, the

Administrative Record is devoid of any support of this. Furthermore, convenience alone does not justify the other issues raised by having a legislative agency conduct a procurement for an executive agency, as this not only violates the Constitutional separation of powers but also results in the evasion of regulatory requirements typically applied to procurements of this nature.

For these reasons, the Court improperly determined that the imprinted gun locks and wallet cards do not fall under the printing mandate and that the VA properly conducted the requisition through the GPO. The decision should be reversed on this basis.

III. THE COURT IMPROPERLY DETERMINED THAT THE VA HAD COMPLIED WITH THE VBA

A. The CFC Improperly Concluded That Because the Solicitation Was Conducted by The GPO and Not the VA, the VA Was Not Required to Conduct a Rule of Two Analysis Under 38 U.S.C. § 8127(d) or Otherwise Ensure the Purpose of the VBA Would Be Met When Procuring Through the GPO

The Court erred in holding that the VA was not required to perform a Rule of Two analysis for this particular solicitation, as it ultimately was not a VA solicitation and thus distinguished from the prior cases of *Kingdomware* and *PDS Consultants*, which involved procurements conducted by the VA itself.

Kingdomware Technologies, Inc. v. United States, 136 S. Ct. 1969 (2016); *PDS Consultants, Inc. v. United States*, 907 F.3d 1345 (Fed. Cir. 2018), *cert. denied*, 2020 WL 129560 (Jan. 13, 2020). The CFC also stated that its holding was

consistent with the plain language of the VBA, which refers to the “VA” and “VA contracting officers.” It reasoned:

But, the text of the VBA also makes clear that this preference applies only when the VA Secretary and the VA Contracting Officer are conducting a procurement on behalf of the agency. *See generally* 38 U.S.C. § 8127. And so, the Court reads the VBA to mandate that the VA conduct a Rule of Two analysis only when the VA is conducting the procurement.

Appx15.

This reads the provision in isolation, which misconstrues its meaning. This point is illustrated by looking to the *Angelica Textile Services v. United States*, 95 Fed. Cl. 208 (2010). There, the CFC examined the interaction of the federal preferences afforded under the AbilityOne Program with the VBA. It noted that the VA] “is responsible for implementing the Veterans Benefits Act; indeed, it is the only federal department or agency to which the Act’s requirements apply.” *Id.* at 222. Because the VA is responsible for implementing the VBA, that obligation would be evaded if the VA sought goods or supplies through another agency while knowing that the requirements of the VBA would not be met. It is a basic canon of statutory construction that in interpreting a statute, courts should “look to the particular statutory language at issue, as well as the language and design of the statute as a whole” in order to ascertain a statute’s “plain meaning.” *K Mart Corp. v Cartier, Inc.*, 486 U.S. 281, 291 (1988). The VA is uniquely tasked with implementing the VBA, and it makes no sense to permit a VA contracting offer to

evade its purpose by placing a requisition with another agency while knowing the procuring agency cannot comply with the purpose of the VBA. Here, the GPO is not only not equipped to apply a veteran preference.⁵

The CFC further states that Congress elected not to require other federal agencies to comply with the Rule of Two when conducting procurements on behalf of the VA and required compliance “to the maximum extent feasible” as compromise language. Appx16. This interpretation is in error, as it renders 38 U.S.C. § 8127(i) meaningless in instances where the GPO or another agency has no set-aside authority or preference procedures (i.e., no means whatsoever to meet the spirit or purpose of the VBA). Thus, by assigning the procurement, *the VA passes on its mandatory obligations under the VBA while knowing they will not be fulfilled*. This could not have been what Congress intended, particularly as the crux of the VBA is compliance with the Rule of Two. “The maximum extent feasible” must have meaning, yet the CFC is permitting it to be read in a way to render it meaningless. It erred in determining that the VA was not required to conduct a Rule of Two analysis prior to conducting an acquisition via another agency, or to conduct a procurement itself upon the

⁵ As a legislative agency, the GPO isn’t even subject to the requirements of the Small Business Act regardless of whether it is conducting a procurement for an executive agency. *Colonial Press Int’l, Inc. v. United States*, 788 F.3d 1350, 1355-1358 (Fed. Cir. 2015).

determination that another agency is unable to protect the veteran preference.

Upon recognizing that that GPO would not set aside the opportunity for veteran-owned businesses, the VA was required to take further steps to meet its obligations under the VBA. In this case, upon the conducting of the Rule of Two analysis to determine whether set-aside obligations under the VBA were invoked, the VA should have conducted the acquisition itself.

This is particularly true considering that neither the VA nor the GPO confirmed that the VA was required to acquire the cable locks via the GPO. Neither agency conducted any analysis to confirm the triggering of the printing mandate or to address its interplay with the GPO. Accordingly, the VA did not satisfy its duty under the VBA by merely including the language set forth in 38 U.S.C. § 8127(i) on the SF-1 and taking no other steps to comply with the VBA. Given its unique duties, it was required to ensure that the purpose and spirit of the VBA was protected.

B. The CFC Erred in Holding That the VBA and the Printing Mandate Are Not in Conflict, as Invoking the Printing Mandate Effectively Results in Non-Adherence to the VBA

The CFC also found that the printing mandate and the VBA do not conflict. It interpreted the printing mandate as requiring the GPO to provide printing services for all federal agencies, including the printing services to be sought by the VA via the Solicitation. The CFC also read Section 8127(i) of the VBA to

specifically authorize the VA to employ the GPO to provide such printing services, without requiring that either the VA or the GPO conduct a Rule of Two analysis. 38 U.S.C. § 8127(i). As set forth above, however, this does represent a conflict considering that the GPO has no means to comply with the VBA. This includes the Rule of Two, as the GPO has no set-aside procedures. *See, e.g.*, Appx235-236 (PPR § VIII-3). Nor may the GPO provide evaluation preference or credit for those who fall within a particular socioeconomic category. *See, e.g.*, Appx217 (PPR § VIII-1) (describing contracting methods utilized by the GPO and enumerating the preference for sealed bidding procedures). The GPO is not even subject to the Small Business Act. *See Colonial Press Int'l*, 788 F.3d at 1355-1358.

As such, the printing mandate does in fact conflict with the VBA, because its invocation results in complete non-adherence to the VBA. At most, the GPO can only include veteran-owned small businesses on the bid list submitted to increase awareness and interest in a procurement. By the invocation of the printing mandate, even if the VA includes the language required at 38 U.S.C. § 8127(i), that language has no meaning, force, or effect.

C. The GPO Did Not Employ Sufficient Efforts to Comply with the VBA “To the Maximum Extent Feasible” As Requested By the VA

The CFC also found that the GPO had reasonably determined that it could not set aside the Solicitation as requested by the VA, citing both the GPO’s Determination and Findings and the PPR § VII-4(a) and (b) as justifying the GPO

contracting officer's determination that the GPO "is obligated under its [regulations] to [employ] competitive bidding" for the Solicitation." Appx17 (citing Appx439).

Although Veterans4You acknowledges that the GPO was obligated to employ competitive bidding, the GPO still failed to take those steps required by Chapter VIII, Section 1.7(f) of the PPR. *See* Appx234. In particular, there is no evidence in the record that the GPO encouraged the VA to recommend additional firms that could be furnished questionnaires. Further, while the Determination and Findings stated that the GPO would accommodate the "spirit" of the VA's request by including veteran firms on its bid list (Invitation for Bids), it only included six such firms. This is despite the VA providing the GPO with instructions for accessing its VetBiz registry, which includes those veteran firms "verified" by the VA as eligible for set-aside opportunities as part of the Veterans First Contracting Program. While the VA's VetBiz registry includes 91 firms under the NAICS code applied to the Solicitation, the GPO only contacted six in its Invitation for Bids even though others could have responded. *See* Appx445-447. This is despite the fact that a search in the VetBiz registry under this NAICS code is simple to perform. Upon entering the NAICS code, the search results will display all firms verified under this NAICS code, including contact information.

This not only fails to adhere to the GPO's own regulations in addressing a set-aside request, but it clearly does not meet the definition of complying with the VBA and the Rule of Two "to the maximum extent feasible." "To the maximum extent feasible" would at least include the GPO reaching out to those firms listed in the VA's VetBiz registry under the NAICS code used for the Solicitation.

Nor is there evidence that the GPO considered whether it was appropriately conducting this acquisition in the first place. Even if the GPO is in general required to conduct full and open competition, there is nothing in the record showing that the GPO considered the invocation of the printing mandate or the application of the VBA and the implication of the GPO's inability to establish a preference for veteran-owned small businesses. At most, the GPO refers only to having complied with the "spirit" of the request in its Determination & Findings by its inclusion of a mere six veteran-owned small businesses on its bid list.

Accordingly, the CFC unreasonably determined that the requirements of the VBA were adhered to in this instance, as the VA's act of routing the procurement at issue through the GPO effectively resulted in complete evasion of the VBA.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant's Motion for Judgment on the Administrative Record should have been granted and the Judgment of the U.S. Court of Federal Claims should be reversed.

Respectfully submitted,

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