2020-1175

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

VETERANS4YOU, INC,
Appellant,

v.

UNITED STATES,
Appellee.

Appeal from the United States Court of Federal Claims Case No. 19-931, Judge Lydia K. Griggsby

CORRECTED BRIEF FOR APPELLEE

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May 4, 2020

STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, appellee's counsel states that she is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title.

To counsel's knowledge, no other cases pending before this or any other court or agency will directly affect or be directly affected by the Court's decision in this appeal.

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CORRECTED BRIEF FOR APPELLEE

STATEMENT OF THE ISSUES

1. Whether the trial court correctly held that the Veterans Benefits Act, 38 U.S.C. § 8127, did not preclude the Department of Veterans Affairs (VA) from acquiring goods and services through a procurement conducted by the Government Publishing Office (GPO).

2. Whether the trial court correctly concluded that the VA did not otherwise violate any law or regulation and was not irrational in acquiring imprinted cable gunlocks with printed labels and printed wallet cards, all conveying a message about the VA's Veterans Crisis Line, in light of the GPO's authority to procure "all printing, binding, and blank-book work" for Federal

agencies and where the GPO also determined that it was reasonable to procure the non-printing aspects of the VA's requirement.

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

Veterans4You appeals a Court of Federal Claims' decision denying Veterans4You's challenge to the GPO's procurement of imprinted and labeled suicide prevention cable gunlocks (cable locks) and printed wallet cards for the VA. *Veterans4You, Inc. v. United States*, 145 Fed. Cl. 181 (2019); Appx1. Veterans4You complained that in submitting a requisition for the GPO to acquire the imprinted cable locks and printed wallet cards, the VA had failed to conduct a Rule of Two analysis under the VBA — that is, conducts an analysis of whether there was a reasonable expectation that two or more veteran owned small businesses or serviced disabled veteran owned small businesses (SD/VOSBs) will submit offers and the award can be made at a fair and reasonable price that offers best value to the United States. *See* 38 U.S.C. § 8127(d). Appx2, Appx12. The trial court rejected this argument, reasoning that the VBA contains a separate provision specifically governing the situation where, as here, another entity is conducting the procurement, and that provision — section 8127(i) — does not does not require the VA to conduct a Rule of Two analysis. Appx14–17.

Veterans4You also complained that there was no basis for the VA to requisition the cable locks and wallet cards through the GPO, and so the VA itself

should have procured these aspects of the VA's requirement. Appx2–12. The trial court also rejected this argument, finding that it was neither illegal, nor irrational for the VA to submit the requisition to the GPO, given the GPO's printing statute and record evidence that the GPO reasonably determined it would also procure the non-printing aspects of the VA's requirement. Appx12–13.

I. Statutory And Regulatory Background

For context, we provide a brief description of the two statutes primarily at issue here.

A. The Veterans Benefits Act

To meet congressionally-imposed annual goals for the award of contracts to veteran-owned and service-disabled veteran-owned small businesses (SD/VOSBs), the VBA imposes certain obligations on the VA, depending on the nature of the VA's acquisition activities. 38 U.S.C. § 8127. Specifically, under section 8127(d), when a "contracting officer of the Department" of Veterans of Affairs is awarding contracts, the VA contracting officer must conduct a "Rule of Two analysis," that is, consider whether she has a reasonable expectation that two or more SD/VOSBs will submit offers and the award can be made at a fair and reasonable price that offers best value to the United States. If the Rule of Two is met, the VA contracting officer must "restrict the competition to veteran-owned small businesses." 38 U.S.C. § 8127(d).

On the other hand, in addressing the situation when another Government entity will be acquiring goods for the VA, Congress established a different obligation for the VA in a separate section of the VBA. Namely, in section 8127(i), instead of requiring the VA to conduct a Rule of Two analysis, Congress provided that:

> 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*.

38 U.S.C. § 8127(i) (emphasis added).

B. The Government Publishing Office[1]

Section 501 of Title 44 of the United States Code requires that all printing and binding for the government "shall be done" through the GPO, absent a waiver from the Joint Committee on Printing:

> 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

[1] The Government Publishing Office was previously called the Government Printing Office. On December 16, 2014, Congress redesignated it as the Government Publishing Office. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 1301, 128 Stat. 2130, 2537 (2014).

> Government, shall be done at the Government Publishing Office . . . .

See 44 U.S.C. § 501. Congress also has broadly defined "printing" to mean "the processes of composition, platemaking, presswork, duplicating, silk screen processes, binding, microform, and the end items of such processes." *See* Legislative Branch Appropriations Act of 1993, Pub. L. No. 102-392, 207(a), 106 Stat. 1703, 1720 (1992), *as amended*, Legislative Branch Appropriations Act of 1995, Pub. L. No. 103-283, 207, 108 Stat. 1423, 1440 (1994).

Further, Congress prohibits agencies from obligating or expending appropriated funds on the "procurement of any printing related to the production of Government publications (including printed forms), unless such procurement is by or through the Government Publishing Office." *See* 44 U.S.C. § 501 note. Congress authorized the GPO to procure printing "under contracts made by [the GPO Director] with the approval of the Joint Committee on Printing." 44 U.S.C. § 502.

Additionally, the Federal Acquisition Regulation (FAR) 8.802(a)[2] directs agencies that "Government printing must be done by or through the Government Publishing Office (GPO) (44 U.S.C. 501)." *See* FAR 8.802(a). In turn, the GPO's

[2] The FAR is promulgated by a council of representatives from various Executive agencies. The FAR is codified at Title 48 of the Code of Federal Regulations.

Printing Procurement Regulation (PPR) directs agencies to submit a request for the GPO to requisition printing by completing a Standard Form 1 (SF-1). Appx3, Appx233 (Printing Procurement Regulation, GPO Publication 305.3 (rev. 4-14) at VIII-1.4).

II. The Procurement

A. The VA's Initial Requisition For Imprinted Cable Gunlocks With Labels And Wallet Cards, And Veterans4You's GAO Protest

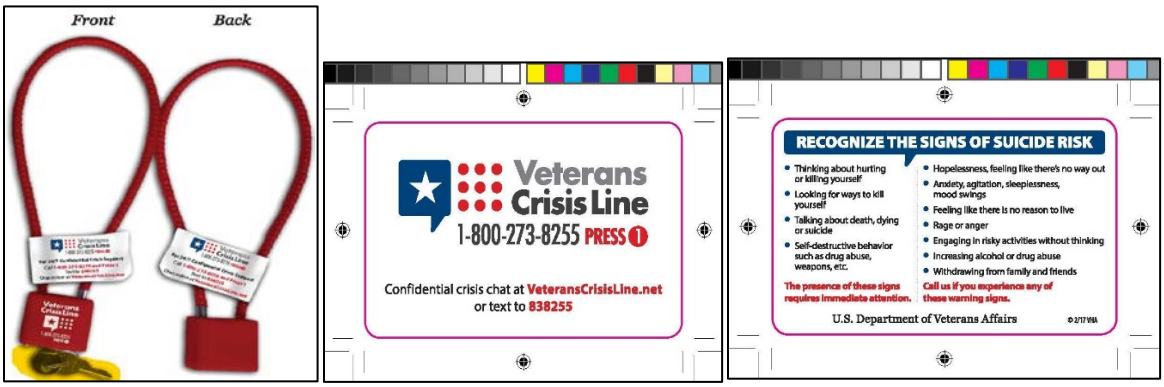
Suicide is a national health concern that affects all Americans, and as part of VA's mission to provide health care to veterans, the VA has a specific program to prevent suicides among veterans.[3] This includes a Veterans Crisis Line with specially trained responders who are available around the clock to "connect[] Service members and Veterans in crisis, as well as their family members and friends, with qualified, caring VA responders through a confidential toll–free hotline, online chat, or text–messaging service."[4] The Crisis Line is useful only to the extent that veterans and their families are aware of it, and raising awareness about this resource is one of the VA's key goals.[5]

[3] https://www.mentalhealth.va.gov/suicide_prevention/index.asp (last visited May 1, 2020).

[4] https://www.mentalhealth.va.gov/suicide_prevention/veterans-crisis-line.asp (last visited May 1, 2020).

[5] https://www.mentalhealth.va.gov/suicide_prevention/strategy.asp (last visited May 1, 2020).

As relevant here, VA sought to promote awareness of its Crisis Line program by distributing packages of imprinted and labeled cable locks and printed wallet cards, all conveying detailed information about the Crisis Line and signs of suicide risk:



See Appx595, Appx597.

In accordance with FAR 8.802(a), on January 31, 2019, the VA submitted a SF-1 requisition form for the GPO to procure the imprinted and labeled cable locks along with the printed wallet cards. Appx4, Appx100–101. This was the same process the VA had used in the past. Appx131–152. In response, on February 14, 2019, the GPO issued an invitation for bids for the VA's requirements, with unrestricted competition, and detailed printing requirements, including ink type, colors, print resolution, printing method, and requirement to deliver proof samples. Appx5, Appx85, Appx87–90.

A week later, Veterans4You filed a bid protest with the Government Accountability Office (GAO). Appx6. Veterans4You challenged the GPO's

solicitation because the solicitation did not give a preference to SD/VOSBs. *Id.* In June 2019, GAO issued a decision recommending corrective action, finding that the record failed to demonstrate the VA gave any consideration or effect to the VBA; either by performing the Rule of Two as required under 8127(d) or by requesting the GPO's compliance with the VBA to the maximum extent feasible under 8127(i). Appx429–432. The GAO recommended corrective action, but expressly left it up to the agencies to determine how to implement its recommendation. Appx433.

B. The VA's Revised SF-1, The GPO's Reissued Solicitation, And Veterans4You's Protest To The Court Of Federal Claims

The VA responded to the GAO's recommendation by submitting a new SF-1 to the GPO and included the following specific requirement in the SF-1:

> In accordance with 38 U.S.C. 8127(i), VA requests that GPO, to the maximum extent feasible, set-aside 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.va.gov/

Appx6, Appx434–435. The GPO's contracting officer reviewed that request and issued a written Determination and Finding that the GPO's PPR requires the GPO to use competitive bidding and that the GPO has no authority to set-aside a procurement for SD/VOSBs. Appx6, Appx437–439.

That said, the GPO's contracting officer committed to "accommodate the spirit of VA's request . . . by including known/verified SDVOSBs and VOSBs to its Bid List to ensure they receive an opportunity to bid on this IFB." Appx6, Appx439. The GPO explained that it could "leverage the VA database[6] of all verified SDVOSB and VOSB firms that is publicly available . . . to include verified firms[] on its Bid List." Appx6, Appx438. The GPO thus searched for vendors in the VIP database, across all 50 states, using relevant key words. Appx6, Appx440. Ultimately, the bidders list included vendors who were both verified in the VIP database and registered with the GPO, as well as other GPO vendors who had veteran affiliations. Appx6, Appx445–446. On June 13, 2019, the GPO issued a new invitation for bids, again with unrestricted competition and detailed printing requirements. Appx7, Appx587–598.

C. The Trial Court Proceedings

On June 26, 2019, prior to the opening of bids, Veterans4You filed a pre-award protest at the Court of Federal Claims, arguing that: (1) the printing mandate, 44 U.S.C. § 501, was not applicable; (2) the record did not explain why the GPO was procuring the VA's requirement; (3) the VA had violated the VBA by not conducting a rule of two analysis either before submitting the requisition to

[6] The database is called VA's Vendor Information Page or VIP. *See* www.vip.vetbiz.gov/.

the GPO or when GPO determined that is could not set-aside the procurement for SD/VOSBs; and, (4) the GPO irrationally concluded that the GPO's PPR did not permit set-aside procurements. Appx14–18.

On August 30, 2019, the trial court held oral argument and issued an oral ruling from the bench denying Veterans4You's protest. *See* Appx605, Appx684–701. On September 20, 2019, the trial court issued a written decision consistent with its oral ruling. Appx1–20.

The trial court held that here, the VA properly complied with section 8127(i), which expressly governs the VA's obligations when another Government entity is acquiring goods or services for the VA, and not section 8127(d), which governs acquisitions where the VA was conducting the procurement. Appx14–17. The trial court found that the GPO rationally complied with its procurement procedures and met the "spirit" of the VA's request to comply with the VBA to the maximum extent feasible. Appx17–18.

Regarding Veterans4You's complaint that the VA, and not the GPO, should procure the VA's requirements, the trial court concluded that (1) the procurement did not violate any law and was rational given that the VA's requirement included printing aspects that the GPO, by statute, was required to procure; and (2) GPO was also reasonably procuring the non-printing aspects of the VA's requirement to assist with the acquisition. Appx13. Moreover, the court found the record

adequately explained why the GPO, and not the VA, was conducting the procurement. App13.

SUMMARY OF THE ARGUMENT

The trial court correctly interpreted the VBA to mean that the Rule of Two analysis is not part of the VA's obligations under the VBA when the VA is acquiring goods and services through a procurement conducted by another Government entity. The trial court also correctly held that the GPO was appropriately procuring the imprinted cable locks and printed wallet cards for the VA. Veterans4You's appeal does not demonstrate any error in these conclusion. This Court should affirm.

First, with respect to the VBA, Veterans4You argues that the trial court's decision reads the VBA in isolation and does not take into account the VA's overarching responsibility to implement the VBA — which Veterans4You equates narrowly to an obligation to conduct a Rule of Two analysis. The trial court did no such thing. The trial court expressly acknowledged that the VA must implement the VBA — but here, that only begs the question of *which* provision in the VBA applies. That is because the VBA contains one provision — section 8127(d) — pertaining to when the VA conducts procurement, and yet another provision — section 8127(i) — pertaining to when another Government entity is acquiring goods for the VA.

Reviewing the plain language of the VBA, the trial court recognized this difference in the provisions and correctly determined that section 8127(i) applies here. Section 8127(i), unlike section 8127(d), does not require the VA to conduct a Rule of Two analysis when the VA has entered into an agreement with another Government entity to acquire goods or services. Instead, it requires the VA to include a particular term in its agreement with the other entity — namely, that the entity will comply to the maximum extent feasible with the VBA's provisions for acquiring goods and services.

Veterans4You proposes a completely different process whereby, if the acquiring entity is unable to do the Rule of Two analysis to set aside the procurement, then the VA must take on the procurement itself and conduct the Rule of Two analysis. This process, however, is not grounded in the terms of the VBA, is inconsistent with Congress's intent, and would read the "maximum extent feasible" standard out of section 8127(i). Veterans4You hinges its theory only on a general policy argument that the VA is responsible for implementing the VBA. That general responsibility, however, is no basis to ignore the plain language of the VBA.

Second, with respect to the GPO's procurement of the VA's requirement generally, Veterans4You argues that despite the GPO's printing authority and FAR § 8.802(a), which requires Executive agencies to use the GPO for their printing

requirements, the trial court erred in finding that the GPO was properly conducting the procurement. Again, the trial court committed no error.

The VA's requirement here was a message — one imprinted on cable locks and printed on accompanying wallet cards. The trial court examined the GPO's printing statute and concluded that the printing and imprinting services that VA required fell within that authority. The trial court also considered GPO's procurement of the non-printing aspects of the VA's requirement, concluding that no law prohibited the GPO from conducting the procurement and that it was reasonable for the GPO to do so given the VA's history of difficulties when procuring the imprinted cable locks and wallet cards. Given the overall nature of the VA's requirement, the trial court's reasoning is unassailable.

Veterans4You makes no serious effort to challenge the trial court's factual conclusion that the printing and imprinting here constitute "printing" or "the processes of composition, platemaking, [or] presswork," as Congress defined "printing" in the context of the GPO's printing authority. Instead, Veterans4You argues that the printing here was too "minor" to be within the GPO's authority and likens the VA's suicide prevention message to mere pre-printed user instructions on a commercial good. But the trial court found to the contrary, concluding that the VA's messaging was an "essential" part of the VA's requirement — and it was. That factual conclusion is without error. Plain cable locks simply would not have

met the VA's needs, and this messaging was nothing like a manufacturer's user manual.

Veterans4You now also tries to attack the trial court's decision on an entirely new ground that it did not present to the trial court. Namely, Veterans4You argues that the procurement is flawed because the GPO's statutory printing authority violates the constitutional mandate of separation of powers, citing a 1996 Office of Legal Counsel (OLC) opinion. Veterans4You's argument is waived. In any event, Veterans4You's argument fails on the merits because FAR 8.802(a), promulgated by the FAR Council, which is not part of the legislative branch, requires agencies to procure printing through the GPO, and thus no separation of powers issues exist here. Moreover, Congress has prohibited agencies from using appropriated funds for printing except through the GPO. 44 U.S.C. § 501 note. In light of FAR 8.802(a) and Congress's prohibition against agencies using appropriated funds for printing, the VA's requisition to the GPO was rational, and the only legal way the VA believes that it could pay for the printing.

Third, and finally, Veterans4You argues that the record does not adequately explain why the GPO was conducting the procurement. The trial court found no merit to this argument, and rightly so. As documented in the record, prior to either Veterans4You's GAO protest or protest at the Court of Federal Claims, the GPO

explained to Veterans4You the basis for the GPO's procurement, pointing out the VA's printing policy, the GPO's statutory authority, and the GPO's conclusion that the VA was reasonably requesting the GPO to procure all aspects of the VA's requirement, to include the non-printing aspects. Contrary to Veterans4You's argument, the explanation is not conclusory and no further documentation is required.

This Court should affirm.

ARGUMENT

I. Standard Of Review

This Court reviews the trial court's grant of judgment on the administrative record "without deference." *Bannum, Inc. v. United States*, 404 F.3d 1346, 1351 (Fed. Cir. 2005). As such, in this bid protest appeal, this Court applies the "arbitrary and capricious" standard in 5 U.S.C. § 706 "anew, conducting the same analysis as the Court of Federal Claims." *Centech v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009) (citation omitted). The court reviews the trial court's findings of fact for clear error. *Bannum*, 404 F.3d at 1354.

In turn, in a bid protest, the question is whether the agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 28 U.S.C. § 1491(b)(4); 5 U.S.C. § 706(2)(A); *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001).

This standard requires a protestor to demonstrate: (1) that the procurement decision "lacked a rational basis;" or (2) "a clear and prejudicial violation of applicable statutes or regulations." *Garufi*, 238 F.3d at 1332–33 (citation omitted).

An agency's decision lacks a rational basis and, therefore, is arbitrary and capricious, when the agency "'entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [the decision] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Alabama Aircraft Indus., Inc.–Birmingham v. United States*, 586 F.3d 1372, 1375 (Fed. Cir. 2009) (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Furthermore, even if a protestor shows errors in the procurement process, to prevail, the protestor must additionally show that it was "significantly prejudiced" by those errors. *Bannum*, 404 F.3d at 1353.

Finally, this Court has explained that when procuring goods or services "federal procurement entities . . . ha[ve] broad discretion to determine what particular method of procurement will be in the best interests of the United States in a particular situation." *Tyler Const. Grp. v. United* States, 579 F.3d 1329, 1334 (Fed. Cir. 2009). This is because, "'[e]ffective contracting demands broad discretion.'" *Id.* (quoting *Lockheed Missiles & Space Co. v. Bentsen,* 4 F.3d 955, 958 (Fed. Cir. 1993)).

II. The Trial Court Correctly Held That The VA Complied With The Veterans Benefits Act

Veterans4You challenges the trial court's holding that the VA was not required to conduct a Rule of Two where another Government entity is procuring goods and services for the VA, arguing that the trial court ignored VA's responsibility to implement the VBA. Br. at 29-32. Veterans4You's argument, however, misconstrues the plain language of the VBA — which imposes different obligations on the VA depending on whether VA itself is conducting the procurement — and also overlooks Congress's intent. The Court should affirm the trial court's ruling.

A. As The Trial Court Concluded, Section 8127(i), Not Section 8127(d), Of The VBA Applies Here

The trial court examined both section 8127(d) and section 8127(i) of the VBA and concluded that section 8127(d) "makes clear that Congress has established a mandatory preference for VOSBs and SDVOSBs when the VA conducts a procurement." Appx15. Nonetheless, the trial court further reasoned, "[T]he 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." Appx15. Thus, the trial court recognized that section 8127(d) and section 8127(i) impose different obligations on the VA depending on whether the VA is conducting the procurement. Appx15–16. The trial court found

that its conclusion was supported by "the legislative history of section 8127(i), which the court explained shows that Congress elected not to require other federal agencies to comply with the Rule of two when conducting procurements on behalf of the VA." Appx16. Based on this plain language and the history, the trial court concluded that the VA's obligations here arose under section 8127(i), not section 8127(d), and that the VA complied with section 8127(i). Appx16.

The trial court also considered whether its reading of the VBA was consistent with *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016), and *PDS Consultants, Inc. v. United States*, 907 F.3d 1345, 1356 (Fed. Cir. 2018), *cert. denied sub nom. Winston-Salem Indus. for the Blind v. PDS Consultants, Inc.*, 140 S. Ct. 909 (2020). In particular, in *Kingdomware*, the Supreme Court held, "the Department must use the Rule of Two when awarding contracts, even when the Department will otherwise meet its annual minimum contracting goals." *Kingdomware*, 136 S. Ct. at 1973. In *PDS Consultants*, this Court held that before the VA could enter into non-competitive contracts with an AbilityOne contractor under the Javits-Wagner-O'Day Act (JWOD), 41 U.S.C. § 8501, the VA must first apply the Rule of Two. 907 F.3d at 1348. In concluding that its reasoning was consistent with those decisions, the trial court recognized the significant difference between those cases and this procurement — namely, *Kingdomware* and *PDS Consultants* considered section 8127(d) in the context of

procurements conducted by the VA where the VA would be awarding a contract. Appx15.[7]

On appeal, Veterans4You argues that the trial court read the VBA "in isolation," thus allowing the VA to "evade" its obligation to implement the VBA when "the VA [seeks] goods or supplies through another agency while knowing that the requirements of the VBA would not be met." Br. at 30 (citing *Angelica Textile Services v. United States*, 95 Fed. Cl. 208, 222 (2010), for the proposition that the VA is responsible for implementing the VBA).[8] *Id*. at 29–30. According to Veterans4You, Congress could not have intended that result.

There is no dispute that the VA has a responsibility to implement the VBA. The question here is *which* responsibility under the VA is implicated when another Government entity, not the VA, is conducting a procurement to acquire goods and services for the VA. Here, the VA discharged its responsibility to implement the

[7] The GAO failed to acknowledge this key distinction between this case and *PDS* and *Kingdomware*. Subsequently, GAO has recognized that "the plain language of the [VBA] . . . limits the application of the mandatory preference in subsection 8127(d) to when the VA conducts the procurement." *Cross & Co.*, B-417971, 2019 WL 7019035, *4 (Comp. Gen. 2019) (citing favorably *Veterans4You*, 145 Fed. Cl. at 192).

[8] On appeal, Veterans4You does not address the trial court's analysis of *PDS* and *Kingdomware*. *See* Br. at 29–33. Veterans4You thus waives any challenge to that analysis. *See Beckton Dickinson & Co. v. C.R. Bard, Inc*., 922 F.2d 792, 800 (Fed. Cir. 1990) ("[A]n issue not raised by an appellant in its opening brief . . . is waived.").

VBA by following section 8127(i) because that is the only section of the VBA that applies when the VA enters into an agreement or arrangement for another Government entity to acquire its goods or services.

The Court should reject Veterans4You's argument that the VA must conduct a Rule of Two analysis even when section 8127(i) applies. That argument is not only unmoored to the plain language of the VBA, it is directly contrary to the legislative history.

First, the starting point for the analysis of the VA's obligations under the VBA is the plain language of the statute. *Kingdomware*, 136 S. Ct. at 1976. When the language is unambiguous and "the statutory scheme is coherent and consistent . . . [t]he inquiry ceases." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S. Ct. 941 (2002).

As the trial court correctly recognized, in section 8127(d) of the VBA, Congress requires the VA to apply the Rule of Two when the "Department" of Veterans Affairs is conducting a procurement. Section 8127(i) of the VBA, however, has no similar requirement. Appx14–16. Only section 8127(d) mentions the Rule of Two, and moreover, it does so only in the context of a "contracting officer of the Department [of Veterans Affairs]" awarding contracts. 38 U.S.C. § 8127(d). Thus, Veterans4You incorrectly attempts to equate the VA's "mandatory obligations under the VBA" with the Rule of Two alone. Br. at 30-31. Giving

section 8127(d) and 8127(i) their plain meaning leads to the conclusion that the VA's obligations under the VBA vary depending on the circumstances, and that the VA's obligation to conduct a Rule of Two analysis arises only when the VA is conducting the procurement, which is not the circumstances here.

Second, Congress intended these different approaches. As originally enacted in 2006, the VBA did not contain the provision that is now in section 8127(i). In 2008, Congress considered different ways to close what Congress called a "loophole" in the VBA and to "clarify our intent by extending disabled veterans' small business contracting provisions to the maximum extent possible to cover agents purchasing goods and services on behalf of the VA." *See* 154 Cong. Rec. H9387-01, H9401 (Sept. 24, 2008). This shows that Congress did not consider section 8127(d) to cover "agents purchasing goods and services on behalf of the VA."

In closing that loophole, Congress considered requiring other agencies to comply fully with the VA's Rule of Two obligations if they are acquiring goods and services for the VA. *See* H.R. 6221, 110th Congress, 2d Session § 2 (June 10, 2008) (proposed bill that acquiring agencies "will comply" with the 2006 Veterans Benefits Act). Ultimately, however, Congress opted to require only that the other entities comply with the VBA "to the maximum extent feasible." *See* 154 Cong. Rec. S10444-01, S10456 (Oct. 2, 2008) (explaining that the House and Senate

compromise language required compliance "to the maximum extent feasible"). This legislative history demonstrates that although Congress could have amended section 8127(d) to apply even when another Government entity conducts procurements for the VA, Congress chose not do so, and instead elected to enact a different section, with a different obligation.

Accordingly, there is no merit to Veterans4You's argument that "[u]pon recognizing that [the] 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." Br. at 32. By this, Veterans4You appears to mean that if the GPO determined that it could not set-aside the procurement, then the VA would be required to take back the procurement to perform a Rule of Two analysis, and if the Rule of Two was satisfied, VA must conduct the procurement, setting it aside for SD/VOSBs. *Id*.

Neither section 8127(d), section 8127(i), nor the legislative history envision such a procedure. To the contrary, as we have shown, the plain language of sections 8127(d) and 8127(i), coupled with the legislative history, demonstrate that:

(1) section 8127(d) does not apply when another Government entity is acquiring goods and services for the VA because the absence of such a

requirement in the VBA (as originally enacted) is what prompted Congress to enact section 8127(i);

(2) Congress recognized that section 8127(d) does not preclude the VA from acquiring obtain goods and services from other Government entities;

(3) by enacting section 8127(i), Congress confirmed that it did not intend the VBA to foreclose the VA's ability to acquire goods and services through a procurement conducted by another Government entity; and

(4) when the VA does indeed acquire goods and services through another Government entity, the VA's only obligation is to include a requirement that the entity must apply the VBA "to the maximum extent feasible."

Veterans4You offers no textual support for the process it proposes, *i.e.*, where the VA would take back a procurement. Instead, for support, Veterans4You relies on only policy arguments and VA's duty generally to implement the VBA. Br. at 31-32. But this argument is one for Congress to resolve. *PDS Consultants*, 907 F.3d at 1360 ("While we are mindful of Appellants' policy arguments, we must give effect to the policy choices made by Congress."); *Smith v. Principi*, 281 F.3d 1384, 1388 (Fed. Cir. 2002) (Court's role is not to reform the law based on policy arguments); *Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1470 (Fed. Cir. 1998) (explaining that regardless of the strength of the Government's

policy arguments, the Court could not rewrite law to implement that policy as it "call[ed] for a result different from that which the statute seems to dictate.").

Third, Veterans4You's interpretation would mean that unless the acquiring agency can comply *fully* with the VBA in the same manner as the VA, the VA must take over the procurement. This would read the "to the maximum extent feasible" standard out of section 8127(i), which, of course, is an impermissible construction of the statute. *Bennett v. Merit Sys. Prot. Bd.*, 635 F.3d 1215, 1218 (Fed. Cir. 2011) (reciting the "basic rule of statutory construction that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant'") (*quoting Corley v. United States*, 556 U.S. 303 (2009)).

Curiously, Veterans4You argues that the *trial court* rendered section 8127(i) meaningless because the trial court's interpretation would allow for the possibility that there would be no compliance with the VBA at all. Br. at 31. That result, however, is encompassed by section 8127(i) because the standard "to the maximum extent feasible" requires no specific actions and allows the acquiring agency to proceed with the procurement according to its own ability to apply the Rule of Two.

The trial court correctly held that under the VBA, the VA was not required to conduct a Rule of Two analysis here because section 8127(i) applies, and that provision contains no such obligation.

B. The Trial Court Correctly Rejected Veterans4You's Argument That The VBA And The Printing Mandate Conflict

Veterans4You argues that the trial court erred in concluding that the VBA and the printing statute, 44 U.S.C. § 501, do not conflict. Br. at 32. Although Veterans4You's argument is not explained, Veterans4You is presumably referring to the principles of statutory construction that requires the Court to determine if there "is a conflict between the applicable federal laws, and if so, to resolve it." *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1347 (Fed. Cir. 1999). Here, the two statutes do not conflict.

According to Veterans4You, there is a conflict because "invoking the printing mandate effectively results in non-adherence to the VBA." Br. at 32. Veterans4You's position again presumes incorrectly that here, the VA must conduct a Rule of Two analysis. As explained above, the VBA does not consist of just section 8127(d) and the VA Rule of Two; it also includes section 8127(i). Thus, as the trial court held, the VA is able to give full effect to the VBA by complying with the only applicable provision here — section 8127(i). Appx16–17.

C. The Trial Court Correctly Concluded That The GPO Reasonably Met The Spirit Of The VA's Request Within The Parameters Of The GPO's Printing Procurement Regulations

Veterans4You challenges the trial court's conclusion that the GPO took reasonable efforts to fulfill the VA's request that the GPO comply, to the maximum extent feasible, with the VBA. Br. at 33. Veterans4You fails to identify any error in the trial court's conclusion.

The trial court concluded that the GPO was obligated to employ competitive bidding under its rules, a point that Veterans4You concedes. Br. at 34; Appx17; *see also* Appx437–439 (GPO's determination and findings explaining its obligation to conduct a full and open competition in response to VA's SF-1). The trial court detailed the efforts that the GPO took to comply with the spirit of the VA's request, Appx17–18, and concluded that these efforts "increased the number of SDVOSBs and VOSBs that may submit bids for the Solicitation." Appx18. Veterans4You does not dispute that conclusion. Br. at 34–35.

Nonetheless, Veterans4You complains that the GPO: (1) did not encourage the VA to recommend additional firms who could be included on the GPO's bidders list; and (2) did not do more to comply with the "spirit" of the VBA. According to Veterans4You, this means that the GPO's efforts "clearly do[] not meet the definition of complying with the VBA and the Rule of Two 'to the maximum extent feasible.'" Br. at 35.

Veterans4You's argument runs far afield of the standard of review in this case. The question here is not how Veterans4You would have conducted the procurement, but whether the GPO's procurement was arbitrary or in violation of any applicable law or regulation, and it was neither.

It is well-established that agencies are "'entitled to exercise discretion upon a broad range of issues confronting them' in the procurement process.'" *Savantage Financial Services, Inc. v. United States*, 595 F.3d 1282, 1286 (2010) (quoting *Garufi*, 238 F.3d at 1332). Here, as the trial court detailed, the GPO was well aware of the VA's VIP database (which includes the universe of verified SD/VOSB firms) and took reasonable efforts to meet the spirit of the VA's request. Appx15–16. The GPO compiled a bidders list that included firms who were both in the VIP database and registered with the GPO, as well as other veteran-affiliated firms that were also registered with the GPO. Appx445–447. This was consistent with the GPO's procurement regulations and was reasonable.

In complaining that the GPO should have added other vendors to the list based on an approach that Veterans4You prefers, Br. at 34, Veterans4You falls well short of its obligation to show that the GPO acted irrationally. Nothing required that approach. It was within the GPO's "broad discretion" to choose how best to meet the Government's needs in these circumstances. *Tyler Const.*, 579 F.3d at 1334. At most, Veterans4You merely disagrees with the GPO's approach,

which is not enough to demonstrate that the GPO's procurement was irrational. *Honeywell, Inc. v. United States*, 870 F.2d 644, 648 (Fed. Cir. 1989) (explaining that it is not enough for the protestor to demonstrate that the record could have supported a different outcome).

III. The Trial Court Correctly Concluded That The GPO Was Appropriately Conducting The Procurement

The trial court examined the entirety of the VA's requirement, both the printing and non-printing aspects, and concluded that GPO was reasonably procuring the requirement. Appx12–13. The trial court reasoned that the GPO's procurement of the printing was directly authorized by the GPO printing statute, 44 U.S.C. § 501, and, additionally, that the GPO's procurement of the non-printing aspect (the cable locks) violated no statute or regulation, and was otherwise reasonable give the overall nature of the VA's requirements. *Id.*

There was no error in the trial court's conclusions. The question here, as in any bid protest, is whether the challenged agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law? 28 U.S.C. § 1491(b)(1), (4); 5 U.S.C. §§ 702, 706(2)(A); *Garufi*, 238 F.3d at 1332. The answer turns not on whether there is some positive law authorizing an agency's procurement action, but on "whether there is any statutory or regulatory provision that precludes" the action. *Tyler Const.*, 570 F.3d at 1334. Given the broad discretion this Court affords to an agency's decision about the "particular method

of procurement [that] will be in the best interests of the United States in a particular situation," *id*., the procurement here was rational.

A. No Law Prohibited The GPO From Conducting This Procurement, And It Was Reasonable for The GPO To Do So

As we demonstrate below, GPO's procurement of the VA's requirement did not violate any statute or regulation. Moreover, it was reasonable for the GPO to conduct this procurement.

As the trial court recognized, there are significant printing aspects in the VA's requirement. Appx13 at n4. The trial court described the printing aspects:

> the specifications for the Solicitation provide that the suicide prevention cable lock body is to have a 'white imprint of the Veterans Crisis Line Logo' and the label will also contain 24/7 confidential crisis support information. The specifications for the wallets cards also require that these cards have printing on the 'face and back.'

Appx12; *see also* Appx595–598 (illustrations of cable locks and wallet card printing and text), Appx589–593 (solicitation terms describing details of the required printing, including ink type, colors, print resolution, printing method, and requirement to deliver proof samples).

The trial court considered these printing requirements against the GPO printing statute, which implicates "*printing*, binding, and blank books." Appx12–13 (emphasis added). As the trial court also explained, Congress further defined

printing to include "the processes of composition, platemaking, presswork, duplicating, silk screen processes, binding, microform, and the end items of such processes." Appx13 (quoting 44 U.S.C. § 501 note; Pub. L. 103-283, title II, § 207, 108 Stat. 1440).

The trial court concluded that the VA's requirement for imprinting on the cable locks and printed labels and wallet cards was "printing" within the scope of the GPO's printing statute. Appx13. In light of how broadly Congress defined "printing," and given the obvious printing aspect of the VA's requirement, the trial court did not clearly err in finding that the printing and imprinting here is "printing" for the purposes of the GPO's printing statute. *Bannum*, 404 F.3d at 1354.

Next, the trial court examined whether it was rational for the GPO to procure the non-printing aspects of the VA's requirement and concluded that it was. Specifically, the record explained that the GPO will procure nonprinting products "as an assisted acquisition if requested to do so." Appx58. The trial court reviewed the record evidence, which indicated that "VA ha[d] encountered difficulty in the past procuring the printed gunlocks and wallet cards." Appx13 (citing AR Tab 5 at 35, now Appx58). For that reason, the VA requested that the GPO procure both the printing and non-printing elements of the requirement. Appx13 (citing AR Tab 5 at 30, now Appx53). The trial court concluded that the

VA's request was reasonable. Appx13. The record indicates the GPO contracting officer also "concluded that the VA's request to order all items under this single procurement was reasonable." Appx58. This was an eminently reasonable and efficient approach to the procurement of the VA's requirement. In contrast, Veterans4You proposes a circuitous approach — one prone to problems — in which the cable locks would be procured separately by the VA only to have the VA send them to the GPO for the imprinting.

Veterans4You fails its burden in this case to demonstrate that by GPO conducting this procurement, the procurement violated any statute or regulation or was irrational.

B. Veterans4You's Argument That The Procurement Includes Only Minor Printing Is Flawed

Veterans4You does demonstrate any error in the trial court's conclusion that the GPO was appropriately conducting this procurement for the VA's requirement. At the trial court, although Veterans4You argued that the cable locks did not fall within the GPO printing statute, it nonetheless acknowledged that the statute "can apply to the wallet cards and the labeling and the printing elements." Appx621–622 (Oral argument tr. 17:20–18:3). Thus, not surprisingly, Veterans4You avoids expressly arguing that the printing and imprinting services that the VA requires are *not* the same "printing" services contemplated in GPO's printing statute and Congress's "printing" definition in section 207.

Instead, Veterans4You argues that the GPO should not have procured the VA's requirement because the printing is too minor or, at least, is not the predominate feature of the VA's requirement. Br. at 15–19. None of Veterans4You explanations for this theory have merit.

First, as a factual matter, the trial court correctly rejected the notion that the printing here was only a minor aspect of the VA's requirement. The trial court astutely understood that printing here was "an essential element of the contract." Appx13 n.4. This conclusion is borne out by the detailed printing specifications in the solicitation governing the required colors, final print output, permissible printers, the minimal printing resolution, print production files and illustrations, and the delivery of proof samples for the GPO's evaluation. Appx588–593. Simply put, unadorned cable locks would not have met the VA's requirement, and that is not what the VA sought to have the GPO procure. The VA was using the imprinted cable locks with the wallet cards and labels as a medium to convey an important message about, and bring awareness to, the VA's Crisis Line.

To be clear, there was nothing unusual about this procurement where GPO is procuring printing of an agency-related message on a non-paper item for another agency — GPO procures myriad similar products. *See*, *e.g.*, Appx379–392 (GPO procurements of binders for Navy and foldable tote bags for the VA); *see also Tribute Contracting, LLC*, GAOCAB No. 2014-03, 2015 WL 11252471 (Comp.

July 22, 2015) (challenge to termination for default under contract for "3,000 reusable, blue polypropylene tote bags, with a Marine Corps logo printed in white on each side"); *Appeal Of V.N. Products, Inc.*, GPOBCA No. 10-00, 2002 WL 1420008 (April 25, 2002) (appeal of GPO contracting officer's rejection of mouse pads where contractor was required to print "Government-furnished design on the pad's top polyester cloth laminate using a sublimation printing process"); *Appeal Of Badger Screen Print*, GPOBCA No. 13-98, 1999 WL 33134410, May 13, 1999 (appeal of the GPO's denial of additional costs under contract with GPO for acquisition of T-shirts with required screen print artwork for the United States Air Force); *Appeal of Ascot Tag & Label Co., Inc*., GPOBCA No. 14-85, 1987 WL 228974 (Aug. 7, 1987) (challenge to GPO's termination of contract for colored and imprinted bag tags for United States Postal Service).

Second, given the nature of the printing here, Veterans4You's attempt to diminish the VA's messaging requirement by comparing mission-related, suicide prevention information to mere "printed instructions, information, and/or warnings" falls flat. Br. at 16; *id*. at 19 (arguing that if this procurement falls under the statute, then "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"). *Id.* at 19.[9] These arguments misconstrue the VA's requirement. The VA is not purchasing commercial goods that happen to have pre-printed instructions about how to use a product. The VA is acquiring a custom, carefully worded, mission-related message about suicide prevention, to be conveyed on cable locks and wallet cards. Veterans4You similarly sets up a strawman when it argues that products with printed instructions, information, or warnings have not been found to fall in the GPO's printing statute. Br. at 16. This case does not involve such commercial goods with manufacturer pre-printed instructions.

Relatedly, the amicus's theory misses the mark when it argues that the printing statute only applies to "written materials in a traditional sense" that are "formal government publications" because, otherwise, the Court would not be able to print Westlaw cases, hearing lists, or case file labels. Amicus Br. at 6–7. This case is not about printing Westlaw cases, and the VA did not approach GPO for that purpose. Instead, the VA approached the GPO for assistance with publicizing

[9] *See also* Br. at 16-17 (describing VA's requirement as a "cable lock, with *accompanying elements to assist with its use*") (emphasis added); *id*. at 17 (arguing that "[e]ven if [the printed] 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 integrity of its various physical components*") (emphasis added); *id*. at 17 (comparing the printing requirements to batteries needed for an "an expensive item" to "*function*") (emphasis added).

its suicide prevention efforts — virtually every element of which had a printing component.

In any event, the regulations published by the Joint Committee on Printing, which Congress vested with authority to oversee the GPO,[10] demonstrate the flaw in the amicus's argument. The Joint Committee's regulations define printing to include a wide range of activities, to include "the processes of composition, platemaking, presswork, binding, and microform," as well as the purchase of certain printing equipment, such as molding machines (for rubber or plastic) and *printing presses* for engraving, *imprinting*, letterpress, silk screen, or embossing. JCP Regulations, ¶¶ 8-1, 8-2 and Table II (emphasis added).[11] As the "imprinting," "letterpress," and "embossing" categories of printing in the JCP regulations illustrate, the VA's requirement here for imprinting and printing falls under the printing statute.

Moreover, the question with the GPO printing statute is not whether the printing is "formal" as the amicus argues, but whether the printing is "for" the Government. 44 U.S.C. § 501; *accord* Matter of: Bureau of Land Management: Payment of Printing Costs by the Milwaukee Field Office, B-290900, 2003 WL 1453963, at *4 (Comp. Gen. March 18, 2003) (printing mandate did not apply to

[10] S. Pub. 101–9, 101st Cong., 2d Sess., § 1-1 (1990).

[11] The regulations are available at https://www.gpo.gov/docs/default-source/forms-standards-pdf-files/jcpregs.pdf.

brochure resulting from a cost-sharing cooperative arrangement with nonprofit, state, and federal entities because printing was not done "for the government"). There is simply no question that the VA's messaging and corresponding printing requirement was "for" the Government — it included the VA's Crisis Line logo and substantively related directly to the VA's mission. Indeed, when the VA submitted its SF-1, the VA certified that "this work is authorized by law and necessary to the conduct of the business of the above-mentioned Government establishment." Appx435.

Third, Veterans4You's reliance on the regulatory standards for the North Atlantic Industry Classification System (NAICS) to support its argument that the determination of which agency should conduct this procurement turns on the predominant feature or principal purpose of the VA's requirement, Br. at 15, 18, is factually and legally flawed. As demonstrated above, as a factual matter, the "essential element" of the requirement was the printing of a suicide prevention message. Appx13 n.4. And as a substantive matter, the NAICS code rules are inapposite. Agencies and the Small Business Administration (SBA) use NAICS codes "to establish size standards governing which entities qualify as small businesses for preferences or eligibility under government programs and procurements." *Rotech Healthcare Inc. v. United States*, 71 Fed. Cl. 393, 397 (2006). The NAICS codes standards have nothing to do with the printing statute,

and Veterans4You identifies no reason or authority for why the standards for NAICS codes would guide the analysis here.

Finally, Veterans4You misunderstands the trial court's opinion when it argues that the trial court "erred in holding that the cable lock qualified as a 'substrate'" under the GPO's procurement regulations. Br. at 22. The trial court reached no such conclusion — it concluded that the GPO was rationally procuring the cable locks as part of the acquisition in light of the printing aspects of the requirement, which including imprinting on the cable locks themselves. Appx13. That said, the PPR does show that the GPO contemplates that there will be instances — as here — when the GPO will procure printing services for printing not just on paper, but on other kinds of materials. Appx233 (PPR VIII-I.6(a), providing that GPO may "strap" requisitions if they can be grouped together if, for example, they involve the same trim size, paper, binding, or "similar substrates such as metals or plastics").

C. The Trial Court's Decision Does Not Have Any Adverse Policy Implications

Veterans4You argues that the GPO should not be permitted to conduct this procurement because it would open the door for other agencies to route their requirements through the GPO, Br. at 24, and then the procurement would no longer be governed by the FAR, Br. at 25. This is a red herring.

First, the FAR itself expects this result. FAR 8.802(a) directs agencies that "Government printing must be done by or through the Government Publishing Office (GPO) (44 U.S.C. 501)." At that same time, the FAR expressly applies only to executive agencies. *See* FAR 1.101. Thus, the FAR accepts that GPO procurements will not be governed by the FAR. Veterans4You may not invoke the FAR to force the VA to conduct this procurement where the FAR expressly requires the VA to use the GPO for its printing requirements.

Second, it is disingenuous for Veterans4You to argue that unless this procurement falls under the FAR, the procurement will not meet the FAR's goals of satisfying customers "in terms of cost, quality, and timeliness;" "promoting competition;" and "integrity." Br. at 25-26. Veterans4You's protest seeks *less* competition, not more. Further, the record here shows the GPO determined that the most efficient way to meet the customer's need and to avoid the problems that the VA previously experienced was for the GPO to procure the non-printing and printing aspects together. Appx58–59. In contrast, Veterans4You proposes a *less* efficient, multi-faceted procurement process in which the VA's requirement would be parsed into separate procurements: GPO would procure the printing of the labels and wallet cards by GPO, and the VA would procure stand-alone gunlocks only to then turn around and have them transmitted to the GPO for imprinting. As for the FAR's goal of promoting the integrity of the procurement process,

Veterans4You cites nothing in this procurement or the GPO's PPR to suggest that GPO procurements have any less integrity than an acquisition under the FAR.

Veterans4You is merely disagreeing with the GPO's approach, and that disagreement alone fails to demonstrate any flaw in the procurement because it is not enough for the protestor to demonstrate that the record could have supported a different outcome. *Honeywell*, 870 F.2d at 648. Veterans4You's policy arguments must be resolved by Congress or the FAR Council. Where, as here there is no statutory or regulatory error, the Court must stay its hand. *PDS*, 907 F.3d at 1360; *Smith*, 281 F.3d at 1388; *Clarendon Mktg.*, 144 F.3d at 1470.

IV. The Trial Court Correctly Determined That The Record Adequately Documented The Basis For The GPO's Procurement

Veterans4You challenges the trial court's conclusion the "'[t]he record evidence also shows that the VA has adequately explained and documented the reasons for its decision to employ the GPO to conduct the Solicitation.'" Br. at 26 (quoting Appx13). Veterans4You offers no basis to disturb the trial court's finding.

The trial court discussed the evidence in the record that "the VA had encountered difficulty in the past procuring printed gunlocks and wallet cards," and that this difficulty is what prompted the VA to submit the requisition to the GPO to procure the printing and non-printing aspects of the VA's requirement. Appx13 (citing AR Tab 5 at 30, 35, now Appx53, Appx58). Further, the trial court

concluded that the "the record evidence shows that the VA reasonably determined the GPO should also procure [the cable locks] to assist with this acquisition." *Id.* (citing AR Tab 5 at 35-36, now Appx58–59).

The trial court's conclusions are well-supported by the record. The record contains an email between Veterans4You and the GPO about why the GPO was conducting the procurement. Appx43. The GPO pointed Veterans4You to the VA's handbook (now VHA Directive 1118) setting out the VA's printing policy that required the VA to use the GPO as the source for its printing services. *Id*. Next, the record includes a statement of the GPO's contracting officer further explaining that in the past, the VA had difficulties separately procuring the different aspects of its requirement. *Id.* The statement also explains GPO's rationale for concluding that it was reasonable for the GPO to order all the items in one procurement — namely, because of the GPO's requirement to procure printing aspects of the requirement coupled with the problems the VA had with trying to procure items separately. Appx58–59.

Veterans4You argues that the Court should disregard this evidence because it is post-hoc and conclusory. *See* Br. at 27 (complaining that the VA's rationale was explained to the plaintiff "*after* the initially-posted IFB"); *id.* (complaining that there is no support for the "conclusory statement in the record"). Veterans4You is wrong.

First, the documentation of the decision for the GPO to conduct this procurement is not after-the-fact. The communications reflecting the explanation for the procurement all took place before both Veterans4You's February 21, 2019 GAO protest and its June 26, 2019 Court of Federal Claims protest. Thus, this is not a post-hoc explanation and is fully consistent with principle that the "focal point for judicial review should be the administrative record already in existence." *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1379 (Fed. Cir. 2009).

Second, the explanation is not conclusory just because the record does not contain more details about the VA's prior difficulties. No particular documentation is required here because the Administrative Procedure Act does not require agencies to document their procurement decisions. "[D]ecisions by contracting officers are not adjudicatory decisions to be made on the record after a hearing" and they are not formal rulemakings. *Garufi*, 238 F.3d at 1337; *see also Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43 (court should uphold agency action so long as court is able to reasonably discern the agency's decision making path).

Moreover, Veterans4You is mistaken to suggest that the Court may not take at face value the statements in the record about the VA's prior difficulties procuring the imprinted gunlocks and wallet cards. "The presumption that government officials act in good faith is enshrined in [this Court's] jurisprudence." *Croman Corp. v. United States*, 724 F.3d 1357, 1364 (Fed. Cir. 2013) (citing *Am–*

Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239 (Fed. Cir. 2002)). Thus, the Court presumes that Government officials act "conscientiously" in carrying out their duties. *Id.* No further explanation or evidence is needed here. The Court should reject Veterans4You's challenge to the record.

V. Veterans4You's Constitutional Challenge To The Printing Mandate Is Waived And, In Any Event, Misplaced

On appeal, Veterans4You argues for the first time that "the invocation of the printing mandate . . . violates constitutional provisions of separation of powers," citing a 1996 Office of Legal Counsel Opinion, *Involvement of the Government Printing Office in Executive Branch Printing and Duplicating*, 20 U.S. Op. Off. Legal Counsel 214, 1996 WL 1185161 (1996). Br. at 22–23. There is no merit to this argument.

As a threshold matter, Veterans4You waived this argument. Veterans4You did not raise this issue in any way, shape, or form at the trial court. Veterans4You "misunderstand[s] . . . the role of this court." *Sage Prod., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1426 (Fed. Cir. 1997). This Court's role is to "review judicial decisions . . . reached by trial courts. No matter how independent an appellate court's review of an issue may be, it is still no more than that — a review." *Id.*

As such, the courts of appeals "do not consider a party's new theories, lodged first on appeal." *Id.*; *see also Golden Bridge Tech., Inc. v. Nokia, Inc.*, 527 F.3d 1318, 1322 (Fed. Cir. 2008) (explaining the "'general rule . . . that a federal

appellate court does not consider an issue not passed upon below'") (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). Moreover, there is no reason why Veterans4You could not have asserted its constitutional challenge at the trial court. The argument "in no way depends upon or derives from the decision proffered below." *Golden Bridge Tech*, 527 F.3d at 1323. Accordingly, Veterans4You waived this argument, and the Court should decline to entertain it.

Moreover, on the merits, neither this procurement, nor the trial court's opinion implicates any constitutional separation of powers concerns. Veterans4You relies on an OLC opinion that concluded, "[b]ecause the GPO is subject to congressional control and because the GPO performs executive functions . . . the language in 44 U.S.C. § 501 and 501 note requiring the executive branch to procure all its printing by or through the GPO is unconstitutional and, therefore, inoperative." OLC opinion, 1996 WL 1185161, at *10.

Even putting 44 U.S.C. § 501 aside, however, the FAR itself directs agencies that "Government printing must be done by or through the Government Publishing Office (GPO) (44 U.S.C. 501)." FAR 8.802(a). The FAR, in turn, is promulgated by the FAR Council, comprising members of the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration, *see* 41 U.S.C. § 421, none of which are part of the legislative branch. Thus, as the trial court recognized, Appx2, through FAR 8.802(a),

Government printing is required to be done by or through the GPO. The FAR is not a legislative directive. As such, this procurement raises no constitutional separation of powers issues or concerns.[12]

Additionally, the FAR Council was aware of the OLC opinion, as well as a 2002 OLC memorandum reaffirming the 1996 opinion. *See* Federal Acquisition Regulation; Procurement of Printing and Duplicating Through the Government Printing Office, 67 Fed. Reg. 68,914 (Nov. 13, 2002). In response to those opinions, in 2002, the FAR Council published a proposed modification "[r]emoving restrictions in FAR 8.8 that mandated exclusive use of GPO for printing and related supplies." *Id.* Ultimately, the FAR Council left the FAR 8.802(a) directive unchanged, as the proposed modification was withdrawn two years later. *See* Unified Agenda of Federal Regulatory and Deregulatory Actions-Fall 2004, Department of Defense/General Services Administration/National Aeronautics and Space Administration (FAR), 69 Fed. Reg. 74088-01, 2004 WL 3113547 (Dec. 13, 2004). So, again, there is no separation of powers concern here.

Further, the procurement was rational because in addition to FAR 8.802(a), Congress also prohibits agencies from using funds "appropriated for any fiscal year" for printing (with some exceptions not applicable here). 44 U.S.C. § 501, note; Pub. L. No. 102–392, § 207, 106 Stat. 1703, 1719–20 (1992). In 2002, the

[12] Veterans4You does not challenge the FAR provision.

GAO examined the OLC opinions and 44 U.S.C. § 501 and note. *See* Letter to Hon. Robert Byrd, B-300192, 2002 WL 31521399 (Comp. Gen. Nov. 13, 2002). GAO explained that, if Congress has specifically prohibited the use of appropriated funds, and an agency nonetheless uses those funds for the prohibited purpose, the agency would violate the Antideficiency Act, 31 U.S.C. § 1341. *Id.* at 5. GAO identified the possible repercussions for violating that Act: "Officers and employees who violate the Act are subject to adverse personnel actions, and, possibly, criminal penalties." *Id.*

To be sure, the OLC opinion stated "we perceive little or no risk of liability or sanction to contracting officers who act consistently with this opinion." OLC opinion, 1996 WL 1885161, at *14. GAO, however, explained that agencies nonetheless are obligated to report Antideficiency Act violations to Congress and that if GAO becomes aware of an unreported violation, GAO itself will report it to Congress and make referrals to the Department of Justice. *See* Letter, 2002 WL 31521399, at *5. This uncertainty surrounding the repercussions for violating Congress's appropriations prohibition, coupled with the fact that the OLC opinion does not *forbid* agencies from acquiring printing through the GPO, demonstrates that the VA's action in submitting its requisition to the GPO does not raise any separation of powers concerns.

This is reinforced by VA's own printing directive, VHA Directive 1118,[13] which explained that the Joint Committee on Printing "may use any measure it considers necessary to remedy neglect, delay, duplication, or waste in public printing." VHA Directive 1118 at 1 (Background). The policy warns contracting personnel that "GPO has employed this provision and seized VA property under this authority in the past. VA ceased operations at its federal printing plant in 1984 at the direction of the GPO and the JCP. Failure to comply with 44 U.S.C. [§501 note] is a violation of Federal law and is punishable by fines, imprisonment, and/or removal from Federal Service." VHA Directive 1118 at 1 (Background).

Given FAR 8.802(a) and the ambiguity about the repercussions for an Antideficiency Act violation, Veterans4You fails to demonstrate that the VA's requisition to the GPO for the procurement of the imprinted cable locks and printed wallet cards is an unconstitutional violation of separation of powers.

CONCLUSION

Veterans4You has failed to demonstrate any error in the trial court's decision, and the Court should affirm the decision below.

Respectfully submitted,

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[13] *Available at:* https://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=4315.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Circuit Rule 32(a), appellee's counsel certifies that this brief complies with the Court's type-volume limitation rules. According to the word count calculated by the word processing system with which this brief was prepared, the brief contains a total of 10,346 words.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 6th day of May, 2020, a copy of the foregoing "CORRECTED BRIEF FOR APPELLEE":

_X_ was filed electronically.

_X_ This filing was served electronically to all parties by operation of the Court's electronic filing system.

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