

**ORIGINAL**

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

**BID PROTEST**

**FILED**

AUG 25 2016  
U.S. COURT OF  
FEDERAL CLAIMS

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<b>PDS Consultants, Inc.</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	No. <u>16-1063 C</u>
	)	
<b>THE UNITED STATES</b>	)	
	)	
<b>Defendant.</b>	)	
_____	)	

**COMPLAINT**

**FOR DECLARATORY AND INJUNCTIVE RELIEF**

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

**PARTIES**

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

2. Plaintiff is one of at least two small businesses concerns that are owned and controlled by veterans and that compete in the vision-related product market. At least two of

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

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

#### **NATURE OF THE ACTION**

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

5. On June 16, 2016, the U.S. Supreme Court ruled that this set-aside requirement "is mandatory, not discretionary ... [with the statutory] text requir[ing] the Department to apply the Rule of Two to all contracting determinations and to award contracts to veteran-owned small businesses." *Kingdomware Technologies, Inc. v. United States*, 579 U.S. \_\_\_\_ (2016) (Slip. Op. at 8). The "Rule of Two" refers to the statutory requirement under the VBA to set aside a contracting action "if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be

made at a fair and reasonable price that offers best value to the United States.” 38 U.S.C. § 8127(d); *Kingdomware*, Slip Op. at 2-3. For purposes of the VBA, a “contract” award includes the issuance of an order by the VA under existing contracts or ordering agreements. *See Kingdomware*, Slip Op. at 11-12.

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

7. The VA and the Committee’s actions with respect to the foregoing issues are arbitrary and capricious, without a rational basis, and contrary to applicable law. The Government’s unreasonable actions directly harm Plaintiff, a prospective veteran-owned bidder that would submit a quotation if given the opportunity to compete for the procurements in any of the foregoing VISNs.

8. Plaintiff seeks a preliminary injunction and ultimately seeks permanent injunctive relief ordering the VA not to conduct any “contracting determination” (including award of a contract or issuance of an order) without first conducting a Rule of Two analysis, including a

prohibition on awarding any contracts to or issuing orders to IFB before such analysis is completed. Plaintiff also seeks a declaratory judgment that VA procurements must be conducted in accordance with the plain language of the VBA, and that the VBA holds priority over purported “mandatory” purchasing requirements under the Javits-Wagner-O’Day Act, 41 U.S.C. §§ 8501-8506, via the AbilityOne Procurement List (“the Procurement List”).

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

#### **JURISDICTION AND STANDING**

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

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

services, and the associated requirement to conduct the necessary market research required under the VBA.

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

### **FACTUAL BACKGROUND**

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

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

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

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

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

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

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

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

20. JWOD provides that the Committee “may prescribe regulations regarding specifications for products and services on the procurement list, the time of their delivery, and other matters as necessary to carry out this chapter.” 41 U.S.C. § 8503(d). In addition, the Committee “shall prescribe regulations providing that when the federal government purchases products produced and offered for sale by qualified nonprofit agencies for the blind or qualified nonprofit agencies for other severely disabled, priority shall be given to products produced and

offered for sale by qualified nonprofit agencies for the blind.” *Id.* The Committee publishes regulations that prescribe the processes that it should follow in adding items to the Committee’s Procurement List. *See* 41 C.F.R. Chapter 51.

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

21. In December 2006, Congress passed the Veterans Benefit Act, providing that the VA must give procurement priority to qualified veteran-owned small businesses. 38 U.S.C. §§ 8127-8128. The VBA requires the VA to establish goals for the use of veteran-owned small businesses. 38 U.S.C. § 8127(a). Moreover, subject to only two exceptions that allow for non-competitive procedures for contract actions valued at no more than \$5 million (38 U.S.C. § 8127(b) and (c)), contracting officers must award contracts to veteran-owned small businesses if the Rule of Two is satisfied. 38 U.S.C. § 8127(d). The “Rule of Two” mandates that if the contracting officer has a reasonable expectation that two or more veteran-owned small businesses will submit offers and that award can be made at a fair and reasonable price that offers the best value to the government, then the VA must restrict that procurement to veteran-owned small businesses. 38 U.S.C. § 8127(d). The VBA provides that the priority for veteran-owned small businesses applies when procuring goods pursuant to Title 38 “or any other provision of law.” 38 U.S.C. § 8128(a).

22. Implementing the VBA, the VA Acquisition Regulations (“VAAR”) (found at 48 C.F.R. Chapter 8) require that the contracting officer, in determining an acquisition strategy, must consider contracting preferences for service-disabled veteran-owned small businesses (“SDVOSBs”) and veteran-owned small businesses (“VOSBs”), first and second, respectively. VAAR 819.7004. Further, echoing the provisions of 38 U.S.C. § 8128(a), the VAAR notes that

“[v]arious sections of title 38 U.S.C. authorize the Secretary to enter into certain contracts and certain types of contracts without regard to any other provisions of law.” VAAR 806.302-5(b).

23. Additionally, on April 28, 2010, the VA Office of Acquisition and Logistics issued an Information Letter, “New Guidelines for Placing Items and Services on the AbilityOne Procurement List.” IL 001AL-10-06 (the “Information Letter”), further implementing the VBA and discussing the interplay between the VBA and JWOD. According to the Information Letter, SDVOSBs and VOSBs are given first and second priority in satisfying the VA’s acquisition requirements. For all procurements conducted after April 28, 2010, the Information Letter indicates that the procurements are subject to the Veterans First Contracting Program’s requirements under the VBA **before** being considered for the AbilityOne Program. But the VA also indicated that items that were already on the Procurement List (which includes VISN 2 and VISN 7, discussed below) prior to the passage of the VBA would continue to have priority. The Information Letter provides a seven-step procedure that must be followed for an item to be excluded from the VBA’s Veterans First Contracting Program and added to the Procurement List, which includes conducting market research and obtaining written approval from the VA’s Chief Acquisition Officer. The Information Letter advises that the VA should not engage in discussions with AbilityOne or its nonprofit agencies before receiving such written approval.<sup>1</sup>

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

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<sup>1</sup> Each VISN is a discrete requirement for the VA that must be separately assessed for purposes of market research and VBA compliance.

the more specific Veterans Benefits Act would control.” *Id.* at 222. Specifically, the Court held that services newly added to the Procurement List in that particular case needed to follow the procedures set forth in the Information Letter, and failure to follow the Information Letter invalidated the additions.

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

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

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

27. The Policy Memorandum does **not** direct VA contracting officers to give priority to veteran-owned businesses over AbilityOne products and services. Specifically, the Policy Memorandum states, “When a contracting officer is required by law to obtain goods and services from a specific source, the contracting officer shall carry out that mandate. These include supplies and services listed on the Procurement List issued by the Committee for Purchase from

People Who Are Blind or Severely Disabled.” Policy Memorandum, at 11. The Decision Tree expressly states that the first question that should be considered by a contracting officer is whether “Mandatory Sources” (such as AbilityOne) are available, and if they are, then “38 U.S.C. 8127 does not apply” and the VA should “proceed” with purchasing from the “mandatory source” (without first conducting a VBA Rule of Two analysis). This is contrary to the main holding in *Kingdomware* and the plain language of the VBA.

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

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

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

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

30. On April 4, 2014, the Committee unilaterally issued a Notice in the Federal Register adding eyeglasses, lenses, and related vision products to the AbilityOne Procurement List. 79 Fed. Reg. 18892. The Notice made IFB the mandatory source of supply and for such products to be a mandatory purchase for the Bay Pines Healthcare System in Bay Pines, FL and

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

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

**F. Addition of VISN 6 to the Procurement List**

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

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

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<sup>2</sup> On August 11, 2016, the VA issued pre-solicitation notice VA248-16-R-0815, informing potential offerors of a pending opportunity for vision-related products and services in the other VISN 8 locations not covered by the foregoing AbilityOne notices. The procurement will be "100% Set-Aside for Service-Disabled Veteran-Owned Small Business ... firms." Plainly, if SDVOSBs are able to satisfy the VA's requirements under this new opportunity, then SDVOSBs would also be able to satisfy the other VISN 8 opportunities that AbilityOne has unilaterally claimed since 2014 and 2015.

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

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

### COUNT I

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

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

37. The VA's failure to implement the VBA and the mandatory application of the Rule of Two in all VA contracting determinations, as clearly spelled-out by the Supreme Court in *Kingdomware*, is arbitrary, capricious, without a rational basis, and otherwise contrary to law. As the VA's recent Policy Memorandum, Class Deviation, and Decision Tree make clear, the VA continues to prioritize items on the Procurement List before applying the Rule of Two and before considering whether VA contracting actions (including the issuance of orders) should be set aside for veteran-owned small businesses. This violates the VBA's requirement that the VA

must set-aside contracts for veteran-owned small businesses if the Rule of Two is satisfied. 38 U.S.C. § 8127(d). As the Supreme Court stated in *Kingdomware*, the requirements of § 8127(d) are “mandatory, not discretionary” in VA procurements. Slip Op. at 8. As a result, the VA’s position that it should purchase items on the Procurement List without first completing a Rule of Two analysis is irrational and contrary to law.

38. Moreover, the VA’s new Policy Memorandum setting forth the process by which the VA will comply with the new *Kingdomware* decision, was not issued consistent with existing requirements of law. Specifically, the VA did not provide advance notice to the public, and the public did not have an opportunity to comment, on these new rules.

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

40. The addition of VISN 6 to the Procurement List is in violation of the VBA for multiple reasons. First, listing these vision-related products attempts to elevate the JWOD obligations over the VBA preferences, which is inconsistent with the plain language of § 8128(a). Second, the VA and the Committee appear to have already violated the VBA by making a “contracting determination” (*Kingdomware*, Slip. Op. at 8) without having first conducted a Rule of Two analysis on the VISN 6 opportunities. This violates both *Kingdomware* and the plain language of the VBA. Third, listing items on the Procurement List will ostensibly require the VA to issue orders for these vision-related products, despite having not first conducted a Rule of Two analysis, which is contrary to *Kingdomware* and the plain language of

the VBA. Finally, the addition of these new VISN 6 products did not comply with the procedures set out in the VA's April 2010 Information Letter. For all of the foregoing reasons, the addition of VISN 6 to the Procurement List is arbitrary, capricious, without a rational basis, and otherwise contrary to law.

## COUNT II

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

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

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

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

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

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

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

### COUNT III

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

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

47. As this Court held in October 2010 in *Angelica Textile*, the VBA takes priority over JWOD. *See Angelica Textile*, 95 Fed. Cl. at 222. Furthermore, the Information Letter issued by the VA in April 2010 set forth the procedures that should be followed before adding new VA products or services to the Procurement List in accordance with the VBA. With regard to opportunities in VISN 6 and certain locations in VISN 8 (both of which were added to the Procurement List after the passage of the VBA), the Committee did not allow VOSBs to have the

priority that Congress originally intended under the VBA and did not follow the Information Letter, which affirms such priority.

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

#### COUNT IV

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

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

50. By failing to follow the VBA and the Information Letter, the Committee has improperly denied Plaintiff and other VOSBs the opportunity to compete for vision-related products.

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

52. The Court should enjoin the Committee from violating the VBA and the Information Letter by adding vision-related products to VISN 6, or any other VISN, and making

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

**REQUEST FOR RELIEF**

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

- a. Entry of judgment in favor of Plaintiff and against the United States, declaring that the VA procurements must be conducted in accordance with the plain language of the VBA and consistent with the U.S. Supreme Court's decision in *Kingdomware*, providing priority for veteran-owned small businesses over purported "mandatory" purchasing requirements under the Javits-Wagner-O'Day Act by applying the Rule of Two to all VA contracting determinations;
- b. Entry of a Preliminary Injunction ordering the VA to conduct procurements for VISN 2, VISN 6, VISN 7, and certain locations in VISN 8, as well as all other VISNs, in compliance with the VBA's requirement to conduct the necessary market research for all contracting determinations, regardless of whether the items are on the Procurement List, and to

cease issuing orders for vision-related products to IFB, until such time as the Court has the opportunity to hear argument and rule on Plaintiff's request for permanent injunctive relief;

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

d. Entry of judgment in favor of Plaintiff and against the United States, declaring that the AbilityOne Committee must follow the VBA, the U.S. Supreme Court in *Kingdomware*, the direction from the U.S. Court of Federal Claims in *Angelica Textile*, and the VA's April 2010 Information Letter before adding any new VA products or services to the AbilityOne Procurement List;

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

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

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

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

Respectfully submitted,

Dated: August 25, 2016

SHEPPARD MULLIN RICHTER & HAMPTON LLP

s/ David S. Gallacher

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*Counsel for Plaintiff PDS Consultants, Inc.*

**CERTIFICATE OF SERVICE**

I certify that I caused a copy of the foregoing Plaintiff's Complaint for Declaratory and Injunctive Relief to be served by electronic mail this 25 day of August 2016 to:

U.S. Department of Justice  
Commercial Litigation Branch  
1100 L Street NW, 8<sup>th</sup> Floor  
Washington DC 20530  
nationalcourts.bidprotest@usdoj.gov

I further certify that I caused a copy of the foregoing Plaintiff's Complaint for Declaratory and Injunctive Relief to be served by overnight delivery and electronic mail this 25 day of August 2016 to:

Winston-Salem Industries for the Blind  
c/o David Horton  
President and CEO  
7730 North Point Boulevard  
Winston-Salem, NC 27106  
dhorton@wsifb.com

s/ David S. Gallacher \_\_\_\_\_  
David S. Gallacher