APPENDIX

APPENDIX

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APPENDIX A

SUPREME COURT OF VIRGINIA

Record No. 180667
Circuit Court No. CL16-3150

[Filed February 1, 2019]

Heard Construction, Inc., Appellant,	)
against	)
Waterfront Marine Construction, Inc., et al., Appellees.	)

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 8th day of November, 2018 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:
Douglas B. Robelen, Clerk

By: /s/
Deputy Clerk

APPENDIX B

SUPREME COURT OF VIRGINIA

Record No. 180667
Circuit Court No. CL16-3150

[Filed November 8, 2018]

Heard Construction, Inc., Appellant,	)
against	)
Waterfront Marine Construction, Inc., et al., Appellees.	)

From the Circuit Court of the City of Chesapeake

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,
Teste:
Patricia L. Harrington, Clerk

By: /s/
Deputy Clerk

SUPREME COURT OF VIRGINIA

Record No. 180666
Circuit Court No. CL16-3150

[Filed November 8, 2018]

Waterfront Marine Construction, Inc., et al., Appellants,	)
against	)
Heard Construction, Inc., Appellee.	)

From the Circuit Court of the City of Chesapeake

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,
Teste:
Patricia L. Harrington, Clerk

By: /s/
Deputy Clerk

APPENDIX C

VIRGINIA:
IN THE CIRCUIT COURT FOR THE CITY OF CHESAPEAKE

Case No. CL16-3150

[Filed February 20, 2018]

HEARD CONSTRUCTION, INC.,	)
	)
Plaintiff,	)
	)
v.	)
	)
WATERFRONT MARINE CONSTRUCTION, INC., *et al.,*	)
	)
Defendants.	)
	)

FINAL ORDER

THIS DAY came the parties, by counsel, on Defendants' motion to set aside the jury verdict. After considering the evidence at trial, the briefs filed by the parties and hearing oral arguments from counsel, the Court grants in part and denies in part Defendants' motion as stated in the Court's letter option dated January 10, 2018, attached hereto as Exhibit A.

Consistent with the Court's letter opinion, the Court **ORDERS** as follows:

The Court **DENIES** Defendants' motion to set aside the jury verdict regarding direct damages.

The Court **GRANTS** Defendants' motion to set aside the jury verdict regarding consequential damages.

The Court **DENIES** Defendants' motion to set aside the jury verdict regarding subject matter jurisdiction.

The Court **DENIES** Defendants' motion to set aside the jury verdict regarding evidence of a contract expectancy.

The Court previously entered a Consent Order on September 22, 2017 reducing the punitive damages to $350,000.00, without prejudice to Defendants' then pending motion to set aside the punitive damages in their entirety. The Court now **DENIES** Defendants' motion to set aside the jury verdict regarding punitive damages in their entirety.

The Court previously entered a Consent Order on September 22, 2017 cumulatively reducing direct and consequential damages (without particular consideration of either) to a total of $2,000,000.00 to conform to the *ad Damnum* of the Complaint.

The Court **GRANTS** Defendants' motion to set aside the jury verdict in its entirety against defendants Infrastructure Constructors, Inc., Infrastructure and Industrial Constructors USA, LLC and Infrastructure and Industrial Constructors USA Holdings, Inc.

JUDGMENT IS ENTERED in plaintiff Heard Construction Inc.'s favor against defendants

Waterfront Marine Construction, Inc., Warren Clem Sutton and John Randolph Sutton, jointly and severally, in the amounts of $887,158.00 representing direct damages and $350,000.00 representing punitive damages, for a total judgment of $1,237,158.00

This being the Court's Final Order, the Clerk is **DIRECTED** to remove this matter from the Court's active docket.

It is so ORDERED this 20 day of Feb, 2018

/s/Timothy S. Wright
Hon. Timothy S. Wright, Presiding Judge

CERTIFIED TO BE A TRUE COPY
OF THE RECORD IN MY CUSTODY
ALAN P. KRASNOFF, CLERK
CIRCUIT COURT, CHESAPEAKE, VA
BY: Amanda Wilson
DEPUTY CLERK

SEEN AND OBJECTED TO AS FOLLOWS: Heard objects to the Court setting aside the verdict of consequential damages because the evidence presented by Heard's expert witness, along with the testimony and evidence presented by other witnesses, was not speculative and contained sufficient particularity and basis to properly support the jury's verdict as to consequential damages. Heard further objects to the dismissal of defendants Infrastructure Constructors, Inc., Infrastructure and Industrial Constructors USA, LLC and Infrastructure and Industrial Constructors USA Holdings, Inc. because sufficient evidence was presented at trial to support each such defendants' individual liability.

/s/Christopher D. Davis
J. Andrew Baxter, Esq.
Merritt J. Green, Esq.
Christopher D. Davis, Esq.
GENERAL COUNSEL, P.C.
6849 Old Dominion Drive, Suite 220
McLean, VA 22101
(703) 556-0411 (tel)
(888) 222-6807 (fax)
Counsel for Plaintiff

SEEN AND OBJECTED TO FOR THE REASONS STATED IN DEFENDANTS' MOTION TO SET ASIDE THE VERDICT, REPLY, ORAL ARGUMENT, AND AS FOLLOWS: Defendants object to the Court's denial of setting aside the direct damages because the damages were unsupported, unreliable, and based on documents that the Plaintiff failed to produce. Defendants further object to the Court's denial of setting aside the verdict

in its entirety because this Court does not have jurisdiction to adjudicate the award and/or protest of a Federal government contract. Defendants further object to the Court's denial of setting aside the verdict in its entirety because the Defendants did timely raise Plaintiff's failure to protest award of the Project in a proper venue in its affirmative defenses. Defendants further object to the Court's denial of setting aside the verdict in its entirety because Plaintiff did not provide evidence of a contract expectancy or knowledge of a contract expectancy. Defendants further object to the Court's denial of setting aside the punitive damages in their entirety because there was no evidence of willful or wanton conduct.

/s/J Haire
Jessica Haire, Esq.
Ronni Two, Esq.
FOX ROTHCHILD LLP
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(202) 461-3109 (tel)
(202) 461-3102 (fax)
Counsel for Defendants

APPENDIX D

FIRST JUDICIAL CIRCUIT
OF VIRGINIA

TIMOTHY S. WRIGHT
JUDGE

307 ALBEMARLE DRIVE, SUITE 400A
CHESAPEAKE, VIRGINIA 23322-5580
757-382-3050 / FAX 757-382-3080

January 10, 2018

Christopher Davis, Esquire
General Counsel, P.C.
6849 Old Dominion Dr., Suite 220
McLean, VA 22101

Jessica Haire, Esquire
Fox Rothschild L.L.P.
The Executive Building.
1030 15th St., N.W., Suite 380 E.
Washington, DC 20005

Re: **Heard Construction, Inc. v. Waterfront Marine Construction Co., Infrastructure Constructors, Inc., Infrastructure and Industrial Constructors USA, L.L.C., Infrastructure and Industrial Constructors USA Holdings, Inc., Warren Clem Sutton a.k.a. Ken Sutton, John Randolph Sutton a.k.a. Randy Sutton, John Doe 1-10, and John Doe**

Entity 1-10
Civil No.: CL16-3150

Dear Counsel:

This matter is before the Court on the defendants' motion to set aside the jury verdict. The parties requested the opportunity to present oral argument on and brief the issues raised by that motion and were granted these requests. At the telephonic oral argument, the Court considered the plaintiff's motion to strike the exhibits accompanying the defendants' motion to set aside, and considered the extensive briefing submitted, as well as the trial record. The Court, having denied at argument the plaintiff's aforementioned motion to strike, for the reasons that follow, grants in part and denies in part the defendants' motion to set aside. Although the ensuing does not reproduce the parties' arguments in full, it summarizes and addresses the most substantial portions thereof.

In support of their motion to set aside, the defendants argue that: (1) the direct damages award is unsupported and speculative; (2) the consequential damages award is based on speculative and unreliable evidence; (3) this Court does not have subject matter jurisdiction to interpret the Federal regulations relevant to this litigation; (4) the plaintiff presented no evidence that the Navy would have awarded the contract but for the actions of Waterfront or that the defendants had knowledge of the plaintiff's contract expectancy; (5) the award of punitive damages was improper because there was no evidence of willful or wanton conduct; (6) the punitive damages award must

be reduced to the statutory cap of $350,000; (7) the compensatory damages award must be reduced to the ad damnum; and (8) the plaintiff presented no evidence against any of the defendants other than Waterfront. These issues are addressed in turn.

Direct Damages

The defendants contend that the only document produced by the plaintiff at trial showed an anticipated $391,103.97 profit from the subject project, yet the plaintiff claimed $887,150 in lost profits, and furthermore impermissibly considered overhead as profit. Virginia caselaw prohibits the recovery of damages based upon "completely speculative" lost profit evidence, the defendants argue.

The plaintiff replies that the jury's direct damages award was reasonably calculated and fully supported by the evidence; "reasonable," and not "absolute," certainty is all that is necessary, per the governing cases. Furthermore, the plaintiff maintains that a business owner may testify regarding his own profit expectations and such testimony is sufficient to sustain a damages award.

In *ADC Fairways v. Johnmark Constr., Inc.*, relied upon by the defendants, the Supreme Court of Virginia reversed an award of lost profits damages based upon the testimony of the plaintiff's president. 231 Va. 312, 316-18 (1986). The Court held:

> Lost profits should not have been awarded in this case. They were completely speculative. The $47,781.13 figure was nothing more than the profit Johnmark hoped to make at the time of

> the bid. There was no evidence to establish that this is the profit that would have been made had Johnmark completed the project. Indeed, there was evidence from Johnmark's president that on a similar rehabilitation project for the same developer no profit had been made whatever.

Id. at 318.

Because the relevant witness in *ADC* could not recall the cost estimates and produced no records regarding potential profits, that case is distinguished from the case at bar. *See id.* at 316-18. At minimum, the instant plaintiff was able to produce a bid spreadsheet and detailed testimony, through its president, in support of its claim. Tenuous though this evidence may be, the jury accepted it, and it is sufficient to support such award. *Cf. id.* The Court therefore denies the defendants' motion in this respect.

Consequential Damages

The defendants maintain that the consequential damages award is likewise speculative and unreliable because it is not based on facts specific to the plaintiff as required by *Vasquez v. Mabini*, 269 Va. 155 (2005). The plaintiff failed to present any evidence that it was prevented from bidding on other specific projects, and did not identify any specific lost opportunities, the defendants claim.

The plaintiff counters that statistical analysis may properly be used to calculate the plaintiff's future earning capacity when such analysis is grounded in facts particular to the plaintiff under *Clark v. Chapman*, 238 Va. 655 (1989). *Vasquez* is distinguished

because the plaintiff in that case never actually had any full-time employment upon which the statistical extrapolation could be based, the plaintiff contends.

In the case at bar, there was no testimony regarding the projects Heard was actually bidding on, whether the totality of Heard's bonding capacity was available,[1] and the plaintiff did not identify a single discrete lost business opportunity. Furthermore, in *Clark,* the Supreme Court seemingly allowed extrapolation due to the plaintiff's limited work history, which is not an issue in the instant case. *See id.* at 664-66. In fact, the plaintiff in the case at bar had years to track lost business opportunities, as well as years of financial history, but failed to present such evidence. The Court thus grants the motion to set aside the consequential damages award, as the testimony of the plaintiff's expert lacked sufficient particularity regarding the unique circumstances of the plaintiff and the alleged losses suffered.

Subject Matter Jurisdiction

The defendants now contend, for the first time, that this Court does not have subject matter jurisdiction to interpret the regulations at issue or to find a violation of a Federal statute or regulation in connection with a Federal procurement process. Exclusive jurisdiction regarding such questions is conferred to the Federal courts by the Tucker Act, 28 U.S.C. § 1491, as noted in

---

[1] Heard was awarded $4 million worth of projects in 2012, and $1-4 million during the following years (Tr. of 8/15/17 at 463-64), but plaintiff's expert did not account for these awards, even with respect to plaintiff's bonding capacity.

Distributed Solutions, Inc. v. United States, 539 F.3d 1340 (Fed. Cir. 2008), the defendants assert. The plaintiff's failure to allege the subject matter jurisdiction of this Court in the complaint is likewise fatal to any recovery, the defendants argue, without citing authority for the proposition.

The plaintiff responds that this Court and the Federal courts have concurrent jurisdiction over the questions presented in this case; nothing expressly divests this Court of jurisdiction or provides exclusive jurisdiction in the Federal courts. The Federal regulations simply provide the basis for any remedy, and 28 U.S.C. § 1491 only applies to claims against the Federal government, the plaintiff argues.

Having received no authority in support of the argument that the plaintiff's failure to allege subject matter jurisdiction is preclusive of recovery, and finding none, the Court denies the defendants' motion on this basis. With respect to the substance of the defendants' arguments, this Court begins with the well-recognized presumption of concurrent jurisdiction over Federal claims or claims involving the interpretation and application of Federal law. *See, e.g., Tafflin v. Levitt*, 493 U.S. 455, 459-60 (1990).

The statute upon which the defendants primarily rely for their exclusivity argument, 28 U.S.C. § 1491, provides in relevant part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon *any claim against the United States* founded either upon the Constitution, or any Act of Congress or

> any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (emphasis added). Therefore, the defendants' argument regarding lack of jurisdiction on this basis can summarily be dismissed, as the United States is not a party before the Court nor an indispensable party[2] to the instant litigation. *See GTSI Corp. v. Wildflower Int'l, Inc.*, 2009 U.S. Dist. LEXIS 61537, at *12 (E.D. Va. Jul. 17, 2009) ("[N]one of [the defendant's] counterclaims constitutes a 'bid protest' that can be adjudicated only by the relevant agency or the GAO. Bid protests generally challenge *government* action, such as the cancellation of a solicitation, the award of a contract, or the termination or cancellation of an awarded contract. Similarly, the Court of Federal Claims could not hear the counterclaims, because it 'does not have jurisdiction over suits against individuals; it only has jurisdiction over suits against the United States.'" (quoting *Cottrell v. United States*, 42 Fed. Cl. 144, 148 (Fed. Cl. 1998))) (internal citations omitted) (emphasis in original).

Although this Court does not have the power to order an award of the contract, etc., such relief is not sought; the plaintiff's action is not a bid protest, but contains state causes of action. The Court is intrigued by the defendants' argument that the plaintiff is barred from recovery because it failed to properly file a bid protest,

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[2] *See, e.g., Mendenhall v. Douglas L. Cooper, Inc.*, 239 Va. 71, 74-75 (1990).

as opposed to a size protest. However, the Court finds that this contention is in the nature of an affirmative defense, not properly raised as a jurisdictional challenge, and is therefore untimely in any event. *See New Dimensions, Inc. v. Tarquini*, 286 Va. 28, 35-36 (2013) (addressing the necessity of raising most affirmative defenses to prevent unfair surprise).

The Court, possessing concurrent jurisdiction over the state causes of action reliant to an extent upon Federal law, denies the motion to dismiss the action for lack of subject matter jurisdiction. *See, e.g., Integrity Mgmt. Int'l, Inc. v. Tombs & Sons, Inc.*, 836 F.2d 485, 486, 494-95 (10th Cir. 1987) ("[T]he second low bidder[] filed a protest claiming that [defendant] was not a small business within the meaning of the Small Business Act and its regulations. After the [SBA] determined that [defendant] did not meet its small business standards, [plaintiff] brought this diversity suit . . . , claiming unjust enrichment, intentional interference with its economic advantage in securing contract rights, and fraud and misrepresentation. The district court held that state common law actions to enforce the Small Business Act are preempted by federal law . . . . We agree with the other circuits that have considered the matter that state common law actions are not preempted here."); *Tectonics, Inc. of Florida v. Castle Constr. Co.*, 753 F.2d 957, 964 (11th Cir. 1985) ("Congress, by enacting the Small Business Act, did not preempt the field so as to preclude a state cause of action based upon the Act as a standard in determining whether the actions of fraud, unjust enrichment or interference with a business relationship are available to a second low bidder against a low successful bidder

of a federal contract when the latter has misrepresented itself as a small business.").

Loss of Contract Expectancy; Causation

The defendants argue that the plaintiff presented no evidence that the Navy would have awarded Heard the contract but for the actions of Waterfront. The plaintiff could not have a contract expectancy absent a "concrete move," and Calvin Jenkins only testified about what should have been done pursuant to an expired, mostly internal SBA guideline.

The plaintiff replies that the jury was presented with sufficient evidence that it would have received the contract but for the actions of the defendants. Furthermore, Jenkins was received as an expert without objection, and his testimony, coupled with ample evidence regarding the defendants' knowledge of plaintiff's expectancy, provides a sufficient basis for the jury award.

Because the Court finds that the jury was presented with sufficient evidence of the Waterfront's knowledge regarding the plaintiff's contract expectancy, and the testimony of Calvin Jenkins provides a sufficient basis to support the jury verdict award, the defendants' motion is denied on this ground. *See, e.g.,* Code § 8.01-430; *Quick Serve Concepts, L.L.C. v. Cedar Fair, L.P.*, 83 Va. Cir. 59, 62 (Hanover Cnty. 2011) ("A trial court's authority to set aside a jury verdict can only be exercised where the verdict is plainly wrong or without credible evidence to support it. If there is a conflict in the testimony on a material point, or if reasonable men may differ in their conclusions of fact to be drawn from

the evidence, or if the conclusion is dependent on the weight to be given the testimony, the trial judge cannot substitute his conclusion for that of the jury merely because he would have voted for a different verdict if he had been on the jury. The weight of a jury's verdict, when there is credible evidence upon which it can be based, is not overborne by the trial judge's disapproval. [I]n considering the evidence, the court gives the recipient of the verdict the benefit of all substantial conflicts in the evidence and all reasonable inferences that may be drawn from the evidence.") (internal citations and quotation marks omitted).

Punitive Damages

The parties agree that punitive damages cannot exceed the statutory cap of $350,000 pursuant to Code § 8.01-38.1.

The defendants additionally argue that there was no evidence of willful or wanton conduct supporting the imposition of punitive damages, and, despite the panoply of remedies available to the Federal authorities in this case, the defendants were never fined, referred for prosecution, or subject to any disciplinary measures by the SBA as a result of their conduct.

The plaintiff argues in response that the award of punitive damages is within the discretion of the jury, and the evidence clearly established that the defendants intentionally failed to notify the Navy of the change in ownership and pending mergers, and were well aware of the plaintiff's pending protest.

"'Punitive or exemplary damages are allowable only where there is misconduct or actual malice, or such recklessness or negligence as to evince a conscious disregard of the rights of others.'" *Condo. Servs. v. First Owners' Ass'n of Forty Six Hundred Condo., Inc.*, 281 Va. 561, 579 (2011) (quoting *Giant of Va., Inc. v. Pigg*, 207 Va. 679, 685 (1967)). In considering an award of punitive damages resulting from the conversion of $90,000, in the aforementioned case, the Supreme Court of Virginia found that defendants' actions (*e.g.,* opening a bank account and failing to provide signatory authority) evinced a conscious disregard of the plaintiff's rights so as to support the award. *Id.* at 579-80.

In the instant case, because the plaintiff presented evidence, accepted by the jury, that the defendants were well aware of their size change and persisted in their course of conduct (*e.g.,* the filing of Form 355 regarding pending mergers), exhibiting conscious disregard of the plaintiff's rights, the Court denies the motion to set aside the punitive damages award. *See id.* at 580 ("The evidence of [the defendant's] "conscious disregard of [the plaintiff's] rights' was before the jury. The trial court must accord the jury verdict the 'utmost deference.'" (quoting *Bussey v. E.S.C. Rests. Inc.*, 270 Va. 531, 534 (2005))).

Damages Reduced to Amount of ad Damnum

The parties agree that the direct damages assessed by the jury cannot exceed the $887,150 ad damnum of the complaint.

Evidence of the Other Defendants' Involvement

Lastly, the defendants argue that the plaintiff presented no evidence that defendants I+ICON, ICI, or IIC had any involvement in the bid, protest, or project. At most, the plaintiff presented evidence that I+ICON had the power to control Waterfront. However, testimony established that the bid at the heart of this litigation was not considered part of I+ICON's acquisition of Waterfront.

The plaintiff argues in response that the evidence demonstrated I+ICON's control of the other entities and involvement in the pending merger. I+ICON's control was such that defendant Sutton was no longer aware of his own authority within Waterfront following the merger, the plaintiff submits.

Considering the lack of evidence in the record regarding the legal culpability of the entities other than Waterfront, the Court grants the defendants' motion and dismisses said entities.

Counsel for the plaintiff is requested to prepare and circulate for endorsement an order consistent with this letter opinion.

Yours sincerely,

/s/ Timothy S. Wright
Timothy S. Wright
Judge

CC: Hon. Alan P. Krasnoff, Clerk of Court

APPENDIX E

STATUTES

28 U.S.C. § 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

> **(1)** Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;
>
> **(2)** Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the

Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)

(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

28 U.S.C. § 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)

(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either

upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting

officer has been issued under section 6 [1] of that Act.

(b)

(1) Both the Unites [2] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(5) If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A–76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A–76, then an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action.

(6) Jurisdiction over any action described in paragraph (1) arising out of a maritime contract, or a solicitation for a proposed maritime contract, shall be governed by this section and shall not be subject to the jurisdiction of the district courts of the United States under the Suits in Admiralty Act (chapter 309 of title 46) or the Public Vessels Act (chapter 311 of title 46).

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

110 STAT. 3870

Public Law 104-320
104th Congress

* * *

SEC. 12. JURISDICTION OF THE UNITED STATES COURT OF FEDERAL CLAIMS AND THE DISTRICT COURTS OF THE UNITED STATES: BID PROTESTS.

(a) BID PROTESTS.—Section 1491 of title 28, United States Code, is amended—

(1) by redesignating subsection (b) as subsection (c);

(2) in subsection (a) by striking out paragraph (3); and

(3) by inserting after subsection (a), the following new subsection:

"(b)(1) Both the Unites States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

"(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

"(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

"(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.".

[28 USC 1491 note.]

(b) EFFECTIVE DATE.—This section and the amendments made by this section shall take effect on December 31, 1996 and shall apply to all actions filed on or after that date.

(c) STUDY.—No earlier than 2 years after the effective date of this section, the United States General Accounting Office shall undertake a study regarding the concurrent jurisdiction of the district courts of the United States and the Court of Federal Claims over bid protests to determine whether concurrent jurisdiction is necessary. Such a study shall be completed no later than December 31, 1999, and shall specifically consider the effect of any proposed change on the ability of small businesses to challenge violations of Federal procurement law.

[28 USC 1491 note.]

(d) SUNSET.—The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code (as amended by subsection (a) of this section) shall terminate on January 1, 2001 unless extended by Congress. [Applicability.] The savings provisions in subsection (e) shall apply if the bid protest jurisdiction of the district courts of the United States terminates under this subsection.

[28 USC 1491 note.]

(e) SAVINGS PROVISIONS.—

(1) ORDERS.—A termination under subsection (d) shall not terminate the effectiveness of orders that have been issued by a court in connection with an action within the jurisdiction of that court on or before December 31, 2000. Such orders shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law.

(2) PROCEEDINGS AND APPLICATIONS.—(A) a termination under subsection (d) shall not affect the jurisdiction of a court of the United States to continue with any proceeding that is pending before the court on December 31, 2000.

(B) Orders may be issued in any such proceeding, appeals may be taken therefrom, and payments may be made pursuant to such orders, as if such termination had not occurred. An order issued in any such proceeding shall continue in effect until modified, terminated, superseded, set

aside, or revoked by a court of competent jurisdiction or by operation of law.

(C) Nothing in this paragraph prohibits the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that proceeding could have been discontinued or modified absent such termination.

(f) NONEXCLUSIVITY OF GAO REMEDIES.—In the event that the bid protest jurisdiction of the district courts of the United States is terminated pursuant to subsection (d), then section 3556 of title 31, United States Code, shall be amended by striking "a court of the United States or" in the first sentence.

Approved October 19, 1996.

4 C.F.R. § 21.1 - Filing a protest.

(a) An interested party may protest a solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services; the cancellation of such a solicitation or other request; an award or proposed award of such a contract; and a termination of such a contract, if the protest alleges that the termination was based on improprieties in the award of the contract.

(b) Protests must be filed through the EPDS.

(c) A protest filed with GAO shall:

(1) Include the name, street address, email address, and telephone and facsimile numbers of the protester,

(2) Be signed by the protester or its representative,

(3) Identify the agency and the solicitation and/or contract number,

(4) Set forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents,

(5) Set forth all information establishing that the protester is an interested party for the purpose of filing a protest,

(6) Set forth all information establishing the timeliness of the protest,

(7) Specifically request a ruling by the Comptroller General of the United States, and

(8) State the form of relief requested.

(d) In addition, a protest filed with GAO may:

(1) Request a protective order,

(2) Request specific documents, explaining the relevancy of the documents to the protest grounds, and

(3) Request a hearing, explaining the reasons that a hearing is needed to resolve the protest.

(e) The protester shall furnish a complete copy of the protest, including all attachments, to the individual or

location designated by the agency in the solicitation for receipt of protests, or if there is no designation, to the contracting officer. The designated individual or location (or, if applicable, the contracting officer) must receive a complete copy of the protest and all attachments not later than 1 day after the protest is filed with GAO. The protest document must indicate that a complete copy of the protest and all attachments are being furnished within 1 day to the appropriate individual or location.

(f) No formal briefs or other technical forms of pleading or motion are required. Protest submissions should be concise and logically arranged, and should clearly state legally sufficient grounds of protest. Protests of different procurements should be separately filed.

(g) Unless precluded by law, GAO will not withhold material submitted by a protester from any party outside the government after issuing a decision on the protest, in accordance with GAO's rules at 4 CFR part 81. If the protester believes that the protest contains information which should be withheld, a statement advising of this fact must be on the front page of the submission. This information must be identified wherever it appears, and within 1 day after the filing of its protest, the protester must file a final redacted copy of the protest which omits the information.

(h) Protests and other documents containing classified information shall not be filed through the EPDS. Parties who intend to file documents containing classified information should notify GAO in advance to obtain advice regarding procedures for filing and handling the information.

(i) A protest may be dismissed for failure to comply with any of the requirements of this section, except for the items in paragraph (d) of this section. In addition, a protest shall not be dismissed for failure to comply with paragraph (e) of this section where the contracting officer has actual knowledge of the basis of protest, or the agency, in the preparation of its report, was not prejudiced by the protester's noncompliance.

4 C.F.R. § 21.8 - Remedies.

(a) If GAO determines that a solicitation, cancellation of a solicitation, termination of a contract, proposed award, or award does not comply with statute or regulation, it shall recommend that the agency implement any combination of the following remedies:

(1) Refrain from exercising options under the contract;

(2) Terminate the contract;

(3) Recompete the contract;

(4) Issue a new solicitation;

(5) Award a contract consistent with statute and regulation; or

(6) Such other recommendation(s) as GAO determines necessary to promote compliance.

(b) In determining the appropriate recommendation(s), GAO shall, except as specified in paragraph (c) of this section, consider all circumstances surrounding the procurement or proposed procurement including the

seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation(s) on the agency's mission.

(c) If the head of the procuring activity determines that performance of the contract notwithstanding a pending protest is in the government's best interest, GAO shall make its recommendation(s) under paragraph (a) of this section without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.

(d) If GAO determines that a solicitation, proposed award, or award does not comply with statute or regulation, it may recommend that the agency pay the protester the costs of:

(1) Filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees; and

(2) Bid and proposal preparation.

(e) ***Recommendation for reimbursement of costs.*** If the agency decides to take corrective action in response to a protest, GAO may recommend that the agency pay the protester the reasonable costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees. The protester shall file any request that GAO recommend that costs be paid not later than 15 days after the date on which the protester learned (or should have learned, if that is

earlier) that GAO had closed the protest based on the agency's decision to take corrective action. The agency shall file a response within 15 days after the request is filed. The protester shall file comments on the agency response within 10 days of receipt of the response. GAO shall dismiss the request unless the protester files comments within the 10-day period, except where GAO has granted an extension or established a shorter period.

(f) ***Recommendation on the amount of costs.***

(1) If GAO recommends that the agency pay the protester the costs of filing and pursuing the protest and/or of bid or proposal preparation, the protester and the agency shall attempt to reach agreement on the amount of costs. The protester shall file its claim for costs, detailing and certifying the time expended and costs incurred, with the agency within 60 days after receipt of GAO's recommendation that the agency pay the protester its costs. Failure to file the claim within that time may result in forfeiture of the protester's right to recover its costs.

(2) The agency shall issue a decision on the claim for costs as soon as practicable after the claim is filed.

(3) If the protester and the agency cannot reach agreement regarding the amount of costs within a reasonable time, the protester may file a request that GAO recommend the amount of costs to be paid, but such request shall be filed within 10 days of when the agency advises the protester that the

agency will not participate in further discussions regarding the amount of costs.

(4) Within 15 days after receipt of the request that GAO recommend the amount of costs to be paid, the agency shall file a response. The protester shall file comments on the agency response within 10 days of receipt of the response. GAO shall dismiss the request unless the protester files comments within the 10-day period, except where GAO has granted an extension or established a shorter period.

(5) In accordance with 31 U.S.C. 3554(c), GAO may recommend the amount of costs the agency should pay. In such cases, GAO may also recommend that the agency pay the protester the costs of pursuing the claim for costs before GAO.

(6) Within 60 days after GAO recommends the amount of costs the agency should pay the protester, the agency shall file a notification of the action the agency took in response to the recommendation.

13 C.F.R. § 121.1009 - What are the procedures for making the size determination?

(a) ***Time frame for making size determination.***

(1) After receipt of a protest or a request for a formal size determination, the SBA Area Office will issue a formal size determination within 15 business days, if possible.

(2) The contracting officer may award a contract after receipt of a protest if the contracting officer

determines in writing that an award must be made to protect the public interest. Notwithstanding such a determination, the provisions of paragraph (g) of this section apply to the procurement in question.

(3) If SBA does not issue its determination within 15 business days (or request an extension that is granted), the contracting officer may award the contract if he or she determines in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government. Notwithstanding such a determination, the provisions of paragraph (g) of this section apply to the procurement in question.

(b) ***Basis for determination***. The size determination will be based primarily on the information supplied by the protestor or the entity requesting the size determination and that provided by the concern whose size status is at issue. The determination, however, may also be based on grounds not raised in the protest or request for size determination. SBA may use other information and may make requests for additional information to the protestor, the concern whose size status is at issue and any alleged affiliates, or other parties.

(c) ***Burden of persuasion.*** The concern whose size is under consideration has the burden of establishing its small business size.

(d) ***Weight of evidence.*** SBA will give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions. In the case of

refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure.

(e) ***Formal size determination.*** The SBA will base its formal size determination upon the record, including reasonable inferences from the record, and will state in writing the basis for its findings and conclusions.

(f) ***Notification of determination.*** SBA will promptly notify the contracting officer, the protester, and the protested concern. SBA will send the notification by verifiable means, which may include facsimile, electronic mail, or overnight delivery service.

(g) ***Results of an SBA Size Determination.***

(1) A contracting officer may award a contract to a protested concern after the SBA Area Office has determined either that the protested concern is an eligible small business or has dismissed all protests against it. If OHA subsequently overturns the Area Office's determination or dismissal, the contracting officer may apply the OHA decision to the procurement in question.

(2) A contracting officer shall not award a contract to a protested concern that the Area Office has determined is not an eligible small business for the procurement in question.

(i) If a contracting officer receives such a determination after contract award, and no OHA appeal has been filed, the contracting officer shall terminate the award.

(ii) If a timely OHA appeal is filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.

(iii) If OHA affirms the size determination finding the protested concern ineligible, the contracting officer shall either terminate the contract or not exercise the next option.

(3) The contracting officer must update the Federal Procurement Data System and other procurement reporting databases to reflect the final agency size decision (the formal size determination if no appeal is filed or the appellate decision).

(4) Once SBA has determined that a concern is other than small for purposes of a particular procurement, the concern cannot later become eligible for the procurement by reducing its size.

(5) A concern determined to be other than small under a particular size standard is ineligible for any procurement or any assistance authorized by the Small Business Act or the Small Business Investment Act of 1958 which requires the same or a lower size standard, unless SBA recertifies the concern to be small pursuant to § 121.1010 or OHA reverses the adverse size determination. After an adverse size determination, a concern cannot self-certify as small under the same or lower size standard unless it is first recertified as small by SBA. If a concern does so, it may be in violation of criminal laws, including section 16(d) of the Small Business Act, 15 U.S.C. 645(d). If the concern has

already certified itself as small on a pending procurement or on an application for SBA assistance, the concern must immediately inform the officials responsible for the pending procurement or requested assistance of the adverse size determination.

(h) ***Limited reopening of size determinations.*** SBA may, in its sole discretion, reopen a formal size determination to correct an error or mistake, provided it is within the appeal period and no appeal has been filed with OHA. Once the agency has issued a final decision (either a formal size determination that is not timely appealed or an appellate decision), SBA cannot re-open the size determination.

Federal Acquisition Regulation
1.602-1 Authority.

(a) Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings. Contracting officers may bind the Government only to the extent of the authority delegated to them. Contracting officers shall receive from the appointing authority (see 1.603-1) clear instructions in writing regarding the limits of their authority. Information on the limits of the contracting officers' authority shall be readily available to the public and agency personnel.

(b) No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable

procedures, including clearances and approvals, have been met.

Federal Acquisition Regulation
1.602-2 Responsibilities.

Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment. Contracting officers shall-

(a) Ensure that the requirements of 1.602-1(b) have been met, and that sufficient funds are available for obligation;

(b) Ensure that contractors receive impartial, fair, and equitable treatment;

(c) Request and consider the advice of specialists in audit, law, engineering, information security, transportation, and other fields, as appropriate; and

(d) Designate and authorize, in writing and in accordance with agency procedures, a contracting officer's representative (COR) on all contracts and orders other than those that are firm-fixed price, and for firm-fixed-price contracts and orders as appropriate, unless the contracting officer retains and executes the COR duties. See 7.104(e). ×COR-

(1) Shall be a Government employee, unless otherwise authorized in agency regulations;

(2) Shall be certified and maintain certification in accordance with the current Office of Management and Budget memorandum on the Federal Acquisition Certification for Contracting Officer Representatives (FAC-COR) guidance, or for DoD, in accordance with the current applicable DoD policy guidance;

(3) Shall be qualified by training and experience commensurate with the responsibilities to be delegated in accordance with agency procedures;

(4) May not be delegated responsibility to perform functions that have been delegated under 42.202 to a contract administration office, but may be assigned some duties at 42.302 by the contracting officer;

(5) Has no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract nor in any way direct the contractor or its subcontractors to operate in conflict with the contract terms and conditions;

(6) Shall be nominated either by the requiring activity or in accordance with agency procedures; and

(7) Shall be designated in writing, with copies furnished to the contractor and the contract administration office-

(i) Specifying the extent of the COR's authority to act on behalf of the contracting officer;

(ii) Identifying the limitations on the COR's authority;

(iii) Specifying the period covered by the designation;

(iv) Stating the authority is not redelegable; and

(v) Stating that the COR may be personally liable for unauthorized acts.

APPENDIX F

VIRGINIA:
IN THE CIRCUIT COURT FOR THE CITY OF CHESAPEAKE

Case No. CL16-3150

[Filed December 21, 2016]

HEARD CONSTRUCTION, INC.	)
	)
Plaintiff,	)
	)
v.	)
	)
WATERFRONT MARINE CONSTRUCTION, INC.,	)
	)
INFRASTRUCTURE CONSTRUCTORS, INC.,	)
	)
INFRASTRUCTURE AND INDUSTRIAL CONSTRUCTORS USA, LLC,	)
	)
INFRASTRUCTURE AND INDUSTRIAL CONSTRUCTORS USA HOLDINGS, INC.,	)
	)
WARREN CLEM SUTTON a/k/a "KEN SUTTON",	)

JOHN RANDOLPH SUTTON)
a/k/a "RANDY SUTTON",)
)
"John Doe, 1-10",)
)
and)
)
"John Doe Entity, 1-10")
)
Defendants.)
_____)

COMPLAINT

COMES NOW Plaintiff Heard Construction, Inc., by and through undersigned counsel, and in support of its causes against the above-named Defendants, pleads as follows:

PARTIES

1. Heard Construction, Inc. (hereinafter "HEARD") is a corporation organized and operating under the laws of Virginia, and maintaining its principle business offices in Chesapeake, Virginia.

2. Waterfront Marine Construction, Inc. (hereinafter "WATERFRONT") is a corporation organized and operating under the laws of Virginia, and maintaining its principle business offices in Virginia Beach, Virginia.

3. Upon information and belief, Infrastructure Constructors, Inc. (hereinafter "ICI") is a Delaware corporation maintaining its principle

business offices in Pittsburgh, Pennsylvania, and is the majority or sole owner of WATERFRONT.

4. Upon information and belief, Infrastructure and Industrial Constructors USA, LLC (hereinafter "TIC") is a Delaware company maintaining its principle business offices in Pittsburgh, Pennsylvania, and is the majority or sole owner of ICI.

5. Upon information and belief, Infrastructure and Industrial Constructors USA Holdings, Inc. (hereinafter "I+ICON") is a Delaware corporation maintaining its principle business offices in Pittsburgh, Pennsylvania, and is the majority or sole owner of IIC.

6. Upon information and belief, Warren Clem Sutton (hereinafter "K. Sutton"), also known as Ken Sutton, is a natural person residing and domiciled in Virginia Beach, Virginia; and is a former shareholder and officer of WATERFRONT.

7. Upon information and belief, John Randolph Sutton (hereinafter "R. Sutton"), also known as Randy Sutton, is a natural person residing and domiciled in Virginia Beach, Virginia; and is a former shareholder and officer of WATERFRONT.

8. "John Doe" and "John Doe Entity" designate natural persons, corporations, or other entities whose identities are as yet unknown, but are affiliated with WATERFRONT and/or integral to

the transactions that are the subject of the present action.

JURISDICTION AND VENUE

9. Jurisdiction of the present action by this Court is proper under Virginia Code § 8.01-328.1.

10. This Court is the proper venue for the present action in accordance with Virginia Code §§ 8.01-261 through 263.

FACTUAL SUMMARY AND PROCEDURAL STANCE

11. In 2012, the U.S. Department of the Navy requested bids for a civil engineering and construction project, Solicitation Number N40085-12-C-7005, with a contract value of at least $4.5 million (hereinafter "Contract").

12. Heard qualified as a small business with SBA HUBZone price advantage in the bidding process for the Contract.

13. In September of 2012, HEARD submitted a bid for the Contract.

14. WATERFRONT, ICI, IIC and I+ICON were aware of the opportunity to bid on the Contract.

15. At that time, WATERFRONT had made arrangements with ICI, IIC and I+ICON whereby WATERFRONT would be acquired by ICI.

16. On or about late August / early September 2012, WATERFRONT, ICI, IIC and I+ICON, along

with the principles and owners of each entity, met and acted together and in concert with the specific intent to conceal their acquisition plan from the SBA.

17. As seasoned government contractors, WATERFRONT, ICI, IIC and I+ICON knew that they would receive an advantage in bidding on the Contract if WATERFRONT was listed as a "small business" rather than a "large business."

18. WATERFRONT, ICI, IIC and I+ICON, along with the principles and owners of each entity, determined individually and collectively in one or more meetings and discussions prior to September 25, 2012, that WATERFRONT would submit a bid for the Contract and falsely identify Waterfront as a "small business."

19. It takes multiple days of preparation and research to make a bid on the kind of work contemplated in the Contract.

20. WATERFRONT began preparing it's bid for the Contract long before the closing of the acquisition of WATERFRONT by ICI.

21. WATERFRONT submitted its bid for the Contract and claimed that it qualified as a small business for the purpose of selection.

22. However, by the time WATERFRONT submitted it's bid, WATERFRONT had been acquired by ICI.

23. At the time of WATERFRONT's bid, ICI was a subsidiary of IIC, and IIC itself was a subsidiary of I+ICON.

24. Because of WATERFRONT's affiliation with I+ICON and other companies through subsidiaries, WATERFRONT did not qualify as a small business for the purpose of its bid on the contract.

25. After bids had been submitted by all interest parties, including WATERFRONT and HEARD, on September 28, 2012, the Contracting Officer sent an email to WATERFRONT that included an "Abstract of Offers" listing each offer that had been submitted to the Navy.

26. The Abstract of Offers specifically listed and included the offer made by HEARD and showed that HEARD was a SBA HUBZone business. *Exhibit A (September 28, 2012 email and letter from the Navy Contracting Officer to Randy Sutton).*

27. The Abstract of Offers listed the following bids as the lowest four offers:

C&D Construction	$3,995,958	(listed as a Small Business)
Waterfront Marine	$4,439,000	(incorrectly listed as a Small Business)

PreCon Marine	$4,649,340	(listed as a Small Business)
Heard Construction	$4,702,084	(listed as a HUBZone business)

28. Later in the day on September 28, 2012, WATERFRONT sent an email back to the Contracting Officer stating, among other things, that "[w]e confirm our bid." *Exhibit B (September 28, 2012 letter and email from Randy Sutton to the Navy Contracting Officer).*

29. At some point before September 30, 2012, C&D Construction withdrew its bid.

30. On September 30, 2012, the Contracting Officer awarded the Contract to WATERFRONT.

31. Had WATERFRONT not falsely claimed itself to be a small business concern in its bid for the contract, then the Contracting Officer would have evaluated HEARD' s bid with its HUBZone price advantage, and HEARD would have been awarded the contract.

32. On October 2, 2012 HEARD properly filed a protest concerning WATERFRONT's size with the Contracting Officer under 13 C.F.R. § 121.1001(7).

33. In its protest, HEARD alleged that WATERFRONT had been acquired by Joseph B. Fay Company, and was thus no longer a small concern for the purpose of selection.

34. Defendants, at one or more meetings subsequent to the bid protest, coordinated and acted together to hide the acquisition of WATERFRONT by ICI from U.S. Small Business Administration (hereinafter "SBA").

35. For example, on October 22, 2012, defendant Randolph Sutton filed a sworn statement with the SBA where he failed to identify the acquisition of WATERFRONT by ICI. *Exhibit* C *(October 22, 2012 "Information for Small Business Size Determination").*

36. On January 16, 2013, the SBA issued a formal size determination finding that WATERFRONT was entitled to small-business status; however, the SBA's findings were based on the false and misleading statements by WATERFRONT's officers that WATERFRONT had not been acquired by Joseph B. Fay Company.

37. HEARD appealed the SBA's decision and went on to prove to the SBA that WATERFRONT had in fact been acquired by and was affiliated with multiple larger concerns, and was thus not a small business for the purpose of the contract award.

38. The SBA determined that WATERFRONT had been acquired by ICI on September 25, 2012, the very same day that WATERFRONT submitted its bid for the contract.

39. Prior to WATERFRONT's sale to ICI, WATERFRONT was majority owned and controlled by K. Sutton and R. Sutton.

40. WATERFRONT's owners, officers, and management thus had full knowledge that WATERFRONT did not qualify as a small business at the time of its bid.

41. The SBA issued a revised size determination on or about May 23, 2014, finalizing the decision that WATERFRONT was too large to have been duly awarded the contract at the time it submitted its bid. *Exhibit D ("Size Determination").*

42. Before the SBA's final ruling in HEARD's favor, however, WATERFRONT had already been improperly awarded the contract, completed all work on the project, and collected all remuneration associated with the contract.

43. At the time of WATERFRONT's bid, all identified defendants to this action – WATERFRONT, I+ICON, IIC, ICI, K. Sutton, and R. Sutton (as well as any relevant party yet to be identified) – had actual knowledge that WATERFRONT did not qualify as a small business for purposes of its bid for the contract.

44. At the time of WATERFRONT's bid, or at least by the time of WATERFRONT's September 28, 2012 confirmation email to the Navy, all identified defendants to this action – WATERFRONT, I+ICON, IIC, ICI, K. Sutton, and R. Sutton (as well as any relevant party yet to be identified) – had actual knowledge of HEARD's competing bid for the contract.

45. Despite such knowledge, all identified defendants to this action – WATERFRONT, I+ICON, IIC, ICI, K. Sutton, and R Sutton (as well as any relevant party yet to be identified) – agreed and acted in concert to go forward with WATERFRONT's improper bid for the specific purpose of interfering with HEARD's prospective award of the contract.

46. HEARD would have been awarded the contract but for WATERFRONT's improper claim of small-business status in the bidding process.

47. HEARD would have been awarded the contract at issue but for the combination and collaboration of WATERFRONT and its owners – I+ICON, IIC, and ICI (as well as any relevant party yet to be identified) – to improperly claim small-business status in WATERFRONT's bid.

48. As a direct result of defendants' improper actions, HEARD lost approximately $500,000 in profits which would have been realized through its performance of general contracting services pursuant to the contract.

49. As a direct result of defendants' improper actions, HEARD lost approximately $300,000 in profits which would have been realized through its performance of concrete engineering and construction services pursuant to the contract.

50. As a direct result of defendants' improper actions, HEARD lost valuable technical experience and business reputation which it

would have gained through performance of the contract.

51. As a direct result of defendants' improper actions, HEARD has lost future opportunities to expand its business and qualify for future contract awards which would have been realized incident to its performance of the contract.

52. As a direct result of defendants' improper actions, HEARD has expended valuable resources in the form of employee time, costs, professional fees, legal fees, and lost opportunities both in appealing the size determination before SBA and in bringing the present action.

COUNT I - TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY

As to all Defendants

53. Plaintiff hereby incorporates by reference paragraphs 1 through 52 as if fully stated herein.

54. By all objective measures, and as supported by SBA's final decision, HEARD submitted the winning bid and should been duly awarded the contract.

55. HEARD had an expectancy to be awarded the contract and to realize the benefits of the contract award in the form of profits, technical experience, business reputation, and future contracting opportunities.

56. Defendants had knowledge of HEARD's bid submission for the contract.

57. Defendants had knowledge that HEARD qualified as a small business for purpose of the bid submission.

58. Defendants had knowledge, at the time of its own bid submission, that WATERFRONT did not qualify as a small business for the purpose of the bid submission.

59. WATERFRONT, aided and assisted by all other named defendants, intentionally submitted a bid that falsely claimed itself to be a small business for the purpose of thwarting HEARD's business expectancy.

60. WATERFRONT's claim of small-business status in the bidding process was patently false, and Defendants had full knowledge of the improper nature of WATERFRONT's bid at the time of submission.

61. Due entirely to WATERFRONT's false claim of small-business status, WATERFRONT was awarded the contract, performed the contract, and was fully compensated for its performance.

62. As a direct result of Defendants' improper actions, HEARD lost approximately $500,000 in profits which would have been realized through its performance of general contracting services pursuant to the contract.

63. As a direct result of Defendants' improper actions, HEARD lost approximately $300,000 in profits which would have been realized through its performance of concrete engineering and construction services pursuant to the contract.

64. As a direct result of Defendants' improper actions, HEARD lost valuable technical experience and business reputation which it would have realized through performance of the contract.

65. As a direct result of Defendants' improper actions, HEARD has lost future opportunities to expand its business and qualify for future contract awards, which would have been realized incident to its performance of the contract.

66. As a direct result of Defendants' improper actions, HEARD has expended valuable resources in the form of employee time, costs, professional fees, legal fees, and lost opportunities both in appealing the size determination before SBA and in bringing the present action.

COUNT II - COMMON LAW CONSPIRACY

As to Defendants I+ICON, IIC, ICI, and WATERFRONT

67. Plaintiff hereby incorporates by reference paragraphs 1 through 66 as if fully stated herein.

68. On or about late August / early September 2012, WATERFRONT, ICI, IIC and I+ICON, along with the principles and owners of each entity, met and acted together and in concert with the specific intent to conceal the proposed acquisition from the SBA.

69. WATERFRONT, ICI, IIC and I+ICON, along with the principles and owners of each entity, determined that WATERFRONT would submit a bid for the Contract and falsely identify Waterfront as a "small business."

70. After the acquisition, WATERFRONT followed through with the plan conjured by WATERFRONT, ICI, IIC and I+ICON prior to the acquisition, and filed its bid falsely representing itself as a "small business."

71. As a direct result of Defendants' improper actions, HEARD lost its expectancy of approximately $500,000 in profits which would have been realized through its performance of general contracting services pursuant to the contract.

72. As a direct result of Defendants I+ICON, IIC, ICI, and WATERFRONT's improper actions, HEARD lost its expectancy of approximately $300,000 in profits which would have been realized through its performance of concrete engineering and construction services pursuant to the contract.

73. As a direct result of Defendants I+ICON, IIC, ICI, and WATERFRONT's improper actions,

HEARD lost valuable technical experience and business reputation which it would have realized through performance of the contract.

74. As a direct result of Defendants I+ICON, IIC, ICI, and WATERFRONT's improper actions, HEARD has lost future opportunities to expand its business and qualify for future contract awards, which would have been realized incident to its performance of the contract.

75. As a direct result of Defendants I+ICON, IIC, ICI, and WATERFRONT's improper actions, HEARD has expended valuable resources in the form of employee time, costs, professional fees, legal fees, and lost opportunities both in appealing the size determination before SBA and in bringing the present action.

COUNT III - UNJUST ENRICHMENT

As to all Defendants

76. Plaintiff hereby incorporates by reference paragraphs 1 through 75 as if fully stated herein.

77. As a result of Defendants' actions in submitting a bid to the Navy that falsely listed WATERFRONT as a small business, WATERFRONT was awarded the bid, instead of HEARD.

78. HEARD had a right to the award of the Contract, based upon its status as a HUBZone

business and in consideration of the other bids that took place.

79. All Defendants had knowledge that WATERFRONT's bid was false, and that but for the false representation that WATERFRONT was a "small business," HEARD would have won the bid.

80. Nevertheless, WATERFRONT continued to make the false representations, even confirming the representations again to the Navy on September 28, 2012, and then repeatedly again before the SBA during the bid protest and subsequent appeal, and during this time WATERFRONT accepted the work from the Navy, completed the project.

81. WATERFRONT obtained and accepted the profit and goodwill associated with the project.

82. HEARD constructively conferred upon WATERFRON the benefits of HEARD's interest in the contract.

WHEREFORE, in consideration of the foregoing, HEARD respectfully prays that it be granted judgment against the Defendants as follows:

1. Joint and several damages, including both direct and consequential damages, in the amount of $2,000,000;

2. $4,000,000 in punitive damages based upon defendants' intentional and premeditated actions and conspiracy;

3. Treble damages as permitted by applicable law, including, but not limited to, Va. Code Ann. § 18.2-500;

4. Costs, attorneys' fees and incidental damages; and

5. Such other and further relief deemed just and appropriate by the Court.

Respectfully submitted,

/s/Christopher D. Davis
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* * *

[*Demand for Jury Trial and Exhibits Omitted in the Printing of this Appendix*]

APPENDIX G

VIRGINIA:
CIRCUIT COURT IN THE
CITY OF CHESAPEAKE

RECORD CL16-3150

[Dated August 14, 2017]

HEARD CONSTRUCTION, INC., Plaintiff,	)
v	)
WATERFRONT MARINE CONSTRUCTION, INC., *et al.,* Defendants.	)

Volume 1

Before Honorable Timothy S. Wright, judge

Chesapeake, Virginia

August 14, 2017

------oOo------

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I N D E X

WITNESSES: **PAGE:**

E X H I B I T S

PLAINTIFF'S EXHIBITS:

EXHIBIT		DESCRIPTION	ID	REC'D
No. 1	-	E-mail		109
No. 2	-	E-mail		109
No. 3	-	E-mail		109

No. 4	-	Letter dated October 22, 2012		109
No. 5	-	Information for Small Business Size Determination		109
No. 6	-	Letter dated January 16, 2013		109
No. 7	-	Size Appeal		109
No. 8	-	Size Appeal Decision		109
No. 9	-	E-mail		109
No. 10	-	Letter dated May 8, 2014		109
No. 11	-	Letter dated May 23, 2014		109
No. 12	-	Confidentiality and Non-Disclosure Agreement		109
No. 13	-	Pledge Agreement		109
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No. 15	-	Disclosure Schedule		109
No. 16	-	Organizational chart		109
No. 17	-	Stock Purchase Agreement	238	
No. 18	-	Joint Consent	238	
No. 19	-	Contract Status Report	238	

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I N D E X (Continued)

PLAINTIFF'S EXHIBITS:

EXHIBIT		DESCRIPTION	ID	REC'D
No. 20	-	Total Construction Spending Document	238	
No. 21	-	Total Construction Spending Document	238	
No. 22	-	Small Business Spike Document	238	
No. 23	-	State Comparison Document	238	
No. 24	-	i+iconSOUTHEAST Web Page	238	
No. 25	-	Bar Chart	238	
No. 26	-	Bid Submission Chart	238	
No. 27	-	SBA Procedural Notice	238	272
No. 28	-	E-mail	238	
No. 29	-	Lost Profits Damage Calculation Report	238	
No. 30	-	Plaintiff's Amended Expert Witness Identification	238	
No. 31	-	Deposition of Cory Lee Neider	238	
No. 32	-	Deposition of Guy Kendall Sutton	238	

No. 42	-	Letter dated July 15, 2016	238
No. 43	-	Letter dated August 25, 2016	238

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I N D E X (Continued)

PLAINTIFF'S EXHIBITS:

EXHIBIT		DESCRIPTION	ID	REC'D
No. 44	-	Responses to Plaintiff's First Interrogatories	238	
No. 45	-	Jason Heard Damages Worksheet	238	
No. 46	-	Total Project Value/Total Bond Document	238	
No. 47	-	Curriculum Vitae		238
No. 48	-	Solicitation, Offer, and Award		274

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* * *

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by Joseph B. Fay Company?

A They were correcting the information at hand.

Q Okay. All right. Let's go ahead and flip to Exhibit 11, that very last page, under conclusion. The conclusion says, Based on the evidence and analysis

above, Waterfront is found to be other than small -- other than a small business for the referenced size standard and for this solicitation. Do you see that?

A Yes.

Q Did the SBA make any other conclusions about Waterfront?

A No, none at all.

Q Did the SBA conclude that Waterfront had been fraudulent?

A Not at all.

Q Did the SBA conclude that Waterfront had misrepresented anything?

A No.

Q Did the SBA conclude that Heard should have been awarded the project?

A No.

Q Did the SBA conclude that Waterfront was ineligible for the contract?

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A No.

Q The only thing that the SBA determined was that you are a large business?

A Yes.

Q Okay. And for the record, do you agree or disagree with that statement based on the time of the bid?

A Disagree.

MS. HAIRE: Okay. Your Honor, I'll reserve the remainder of my questions for his direct examination when we call him.

THE COURT: All right. Thank you, counsel.

Any questions for Mr. Sutton as follow-up to those questions?

MR. BAXTER: Yes, briefly.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MR. BAXTER:

Q Very quickly. Oh, I need to switch it over again. The request for additional information -- drawing your attention to Exhibit 3, the second page. Ms. Haire just had a look at this where it said you

VIRGINIA:
CIRCUIT COURT IN THE
CITY OF CHESAPEAKE

RECORD CL16-3150

[Dated August 15, 2017]

HEARD CONSTRUCTION, INC., Plaintiff,	)
v	)
WATERFRONT MARINE CONSTRUCTION, INC., *et al.,* Defendants.	)

Volume 2

Before Honorable Timothy S. Wright, judge

Chesapeake, Virginia

August 15, 2017

------oOo------

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I N D E X

WITNESSES: **PAGE:**

E X H I B I T S

PLAINTIFF'S EXHIBITS:

EXHIBIT		DESCRIPTION	ID	REC'D
No. 29	-	Lost Profits Damage Calculation Report	238	474
No. 245	-	Jason Heard Damages Worksheet	238	436
No. 46	-	Total Project Value/Total Bond Document	238	417

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(The court reporter was duly sworn.)

THE COURT: Are we ready?

MR. DAVIS: We are.

(The jury panel entered the jury box.)

THE COURT: All right. You can all have a seat. Good morning. I hope everyone had a good evening. I don't remember the question being asked yesterday, if anyone had previously sat on a jury, but if you haven't in the past then yesterday being your first time, today you are no longer a rookie. That's the good news. The bad news is there is no escalation of pay for not being a rookie anymore.

I hope that some of you guys stayed up to see the Orioles beat the Mariners on the coast last night. I recorded it and watched it this morning.

We are not actually doing too badly today. I know it's a little bit after 10, but I mentioned yesterday we had some issues, some personal family matters with one of the judges. At any rate, we are ready to proceed. And unless there is something to take up beforehand, counsel, we can go to Mr. Jenkins and his cross-examination.

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MS. HAIRE: Yes, sir, Your Honor.

THE COURT: Mr. Jenkins, you were sworn yesterday.

MR. JENKINS: Yes, sir.

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CALVIN JENKINS, recalled as a witness, and having been previously duly sworn, resumed the stand and testified as follows:

CROSS-EXAMINATION

BY MS. HAIRE:

Q Good morning, Mr. Jenkins. Thank you for coming back today. Couple of questions. You were hired by the plaintiff in this case, right?

A Yes.

Q So you are being paid to be here today?

A Yes.

Q And you are being paid for your testimony specifically?

A Yes.

Q How much are you being paid?

A $250 an hour.

* * *

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deposition in this case. I'm here on Page 89.

Question, is there any regulation that says a contracting officer has to reevaluate a HUBZone price preference five days after the bid?

Answer, I don't think -- no. I don't think it says that. But they probably have to reevaluate who is in line for award.

So you have no regulation to --

A I'm not sure which document you have.

Q I'm reading from your deposition transcript. It's not a document you have in front of you. I'm just reading your testimony to you.

A Okay.

Q So, again, you have no document that says five days after the bid after the low bidder drops out the contracting officer should reevaluate anyone?

A There is no regulation, but it's part of the process because they have to determine who the low bidder is. So the contracting officer has to reevaluate the prices to determine who is the low bidder. So it's common sense that they would reevaluate their prices to

determine who is the low bidder. All of these other items related to that situation apply.

Q Let me ask a different question. If there

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is no regulation that says that, there is no document where it is written down, how on earth is Waterfront Marine Construction supposed to know that this whole reevaluation should occur?

A It's not for them to know. It's for the contracting officer to decide who is in line for the award and what proper preferences should be applied.

Q So you agree that Waterfront Marine may not know that this preference reevaluation should apply?

A He may not have known it from the beginning. I don't know if he even knew it was in the award.

Q Okay. In fact, you agree a company who does not participate in the HUBZone program might not be aware of the HUBZone regulations in the general matter?

A Except in this particular solicitation it provides a section that deals with the HUBZone preference and how the HUBZone preference would be applied and it makes reference to where it's found in regulation.

Q Okay. That wasn't quite my question. You agree that a contractor that doesn't participate in the HUBZone program might not necessarily be aware of

* * *

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around here a little bit, you are basing that on few assumptions that they knew they were small -- I'm sorry, that they knew they were other than small?

A Yes.

Q Okay. And then you agree that the SBA never actually concluded that Waterfront knew that they were other than small?

A That's not part of SBA to review. What SBA or side of determination will do is strictly look at whether or not the firm was other than small or small.

Q But don't you agree that the SBA never made that determination it was outside of their purpose?

A That was not their purpose.

Q And you agree that if the SBA did feel there was any sort of misrepresentation, they could have referred it to the inspector general or the office of general counsel, right?

A That's correct.

Q And you're not aware of any referral by SBA in this case?

A No, I'm not.

Q And this was a little bit yesterday. I just want to touch on this. You further see in your

* * *

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contracting officer's notations -- you can tell me your understanding if it's not -- but it looks to me like the contracting officer evaluated the bid and evaluated the HUBZone price preference at the time -- at the time that this bid abstract was made.

A There is no way to determine when they made those notations on there.

Q Okay. And you agree that it's the Navy's job to evaluate price preference?

MR. DAVIS: Your Honor, I'm just going to object. I don't believe that was brought out on direct. We can go here, I suppose, but Mr. Heard is going to come back and testify and also I would object on relevance. She didn't ask the witness who wrote it and why he wrote it and I don't think that is relevant and it's already been discussed what the rules should be.

THE COURT: What's the relevance, Ms. Haire?

MS. HAIRE: All right. This is the last question on this line of questioning, but my question was is it's the Navy's job to do the evaluation not --

THE COURT: I'll overrule the objection. Mr. Heard can answer that.

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THE WITNESS: The contracting officer is responsible for performing the evaluation, but if any member of any of the bidders that were bidding on

the project feel like they did not do it properly. There is always a pathway to a protest.

BY MS. HAIRE:

Q That's a good point actually. So no matter who gets the award they can protest afterwards?

A That's correct.

Q Okay. And, in fact, there is an option where all the bids can get thrown out and rebid, right?

A That can happen.

Q And when you perform a job, there is no guarantee that it will be profitable, right?

A That's a fair assumption.

Q Okay. In fact, I believe -- well, let's go to your bid estimates that you were looking at. I believe it's Plaintiff 46. Just a couple of things here. I think I heard you testify earlier, but correct me if I'm wrong, at the time of the bid you had already covered your overhead for the year?

A No. Not at the time of this bid.

APPENDIX H

VIRGINIA
IN THE CIRCUIT COURT FOR THE CITY OF CHESAPEAKE

Case No. CL16-3150

[Filed September 7, 2017]

HEARD CONSTRUCTION, INC.,	)
	)
Plaintiff,	)
	)
v.	)
	)
WATERFRONT MARINE CONSTRUCTION, INC., *et al.,*	)
	)
Defendants.	)
	)

DEFENDANTS' MOTION
TO SET ASIDE JURY VERDICT

NOW COMES Defendants Waterfront Marine Construction, Inc., Infrastructure Constructors, Inc. (ICI), Infrastructure and Industrial Constructors USA, LLC, (IIC), Infrastructure and Industrial Constructors USA Holdings, Inc. (i+icon), Ken Sutton, and Randy Sutton (collectively referred to as Defendants), through undersigned counsel, and move this Court to set aside the jury verdict against all defendants because:

(1) Heard's claimed direct lost profits are unsupported, remote, and speculative; (2) the consequential damages are speculative and unreliable; (3) this Court does not have subject matter jurisdiction to interpret the federal HUBZone regulations; (4) there is no evidence that the Navy would have awarded Heard the Project but for Waterfront's actions or that Defendants knew of Heard's alleged contract expectancy; (5) there is no evidence of willful or wanton conduct to support an award of punitive damages; (6) the punitive damages are in excess of the statutory cap; and (7) the awarded damages are in excess of the ad damnum clause in the Complaint.

Additionally, the Defendants move this Court to set aside the jury verdict as against i+icon, ICI, and IIC because there is no evidence that they were involved in the bid, the protest, or the Project at all. For all of these reasons, the jury verdict should be set aside. Each issue is discussed in detail below.

MATERIAL FACTS

Defendants have already ordered a copy of the complete transcript from the trial in this case and the transcript will be filed with the Court as soon as it is ready from the Court reporter. Defendants have highlighted a few dispositive facts below, but will rely on the transcript for support as well when it has been filed.

1. Plaintiff did not call Ms. Tina Rule, the contracting officer responsible for awarding the contract at issue, to testify.

2. Plaintiff did not call any witness from the Navy to testify.

3. Plaintiff relies on Mr. Calvin Jenkins's unwritten interpretation of the federal HUBZone regulations as the basis for Heard Construction's alleged contract expectancy.

4. Plaintiff did not present historical profit information as evidence in this case.

5. Plaintiff did not present any contemporaneous documentation related to its anticipated concrete profit in this project.

6. The only evidence presented of any direct lost profits in this case was Mr. Heard's testimony of his anticipated profit at bid time, and the bid spreadsheet showing $391,103.97 of profit in the Project.

LEGAL STANDARD

A trial court may enter judgment notwithstanding the verdict. Va. Code §8.01-430. A trial court may set aside a verdict that is plainly wrong or without credible evidence to support it. *Id.* However, where the evidence fairly supports multiple inferences, a trial judge ruling on a motion to strike must adopt those inferences most favorable to the party whose evidence is challenged, even though he may believe different inferences are probable. *R.F. & P. Railroad v. Sutton*, 218 Va. 636, 643 (1977).

1. The Direct Damages In The Jury Verdict Should Be Set Aside Because They Are Unsupported And Speculative.

The jury verdict should be set aside with respect to Plaintiff's alleged direct damages because they are unsupported, speculative, and remote. In Virginia, lost profits may only be recovered if they are capable of reasonable ascertainment and are not uncertain, speculative, or remote. *See Hop-In Food Stores, Inc. v. Serv-N-Save, Inc.*, 247 Va. 187, 190 (1994); *see also Integrity Auto Specialists, Inc. v. Meyer*, 2011 WL5830242 (Va. Cir. Ct. 2011) (finding that presentation of gross revenues was insufficient to warrant award of damages). Speculation and conjecture cannot form the basis of a recovery. *Isle of Wight County v. Nogiec*, 281 Va. 140, 147 (2011) (finding that the plaintiff's evidence was insufficient to support a jury verdict where the only evidence of lost reputation damages and lost income damages was testimony from the Plaintiff about what he believed he had been damaged based on his own estimates).

In fact, the Supreme Court of Virginia has specifically held that an assumption made at bid time of estimated profit is insufficient to support an award. *ADC Fairways Corp. v. Johnmark Const., Inc.*, 231 Va. 312, 318, 343 S.E.2d 90, 93 (1986) ("Lost profits should not have been awarded because they were completely speculative. The $47,781.13 figure was nothing more than the profit Johnmark hoped to make at the time of the bid. There was no evidence to establish that this is the profit that would have been made had Johnmark completed the project.").

Much like *ADC Fairways*, Plaintiffs claim of lost profit is entirely speculative. The uncertainty of Plaintiff's damages is perhaps best explained by the various iterations claimed by Heard. In its Complaint, Plaintiff claimed "approximately" $800,000.00 in lost profits (¶¶62-63). This was broken into two pieces: $500,000 in approximate general contracting profit, and $300,000 in approximate concrete profit. The first Complaint was filed over two years after the bid – certainly enough time to identify lost profits with specificity. Given that Mr. Jason Heard was responsible for putting together the bid in this Project, the only reasonable explanation for the Plaintiff's inability to identify its alleged lost profits with more specificity in the Complaint is that the profits were uncertain or unknown. Plaintiff filed a total of four complaints with these same approximate damages.

Remarkably, at trial, Plaintiff then claimed $887,158.00 in direct lost profit damages. Somehow, between filing the last Complaint and trial, Mr. Jason Heard miraculously remembered the exact amount of profit he anticipated in this Project. And he did so without his scratch sheets from the bid – because he "lost" them. In fact, the only bid document Plaintiff produced in this trial is the bid spreadsheet, which shows an estimated $391,103.97 in the profit line item. The "damages worksheet" presented to the jury at trial over Defendants' objection was created after this litigation and not supported by any historical evidence. *See* Plaintiff's Exh. 45.

Moreover, the Plaintiff's damages worksheet for direct damages requires the court to consider overhead

as profit, and, contrary to the accepted methods of proof of lost profit in Virginia, it offers no contemporaneous or historical support for the derived numbers.[1] Both Mr. Heard and Mr. Roland Davis, the alleged expert damages witness, agreed that the anticipated profits on a job can fluctuate. A job can be more difficult than anticipated, as it was in this case and anticipated profits can fluctuate significantly. Mr. Heard's estimate of anticipated profit does not consider any potential problems on the Project. Nor does Mr. Heard's estimate of anticipated profit consider the known soil issues that did occur on this Project. In fact, there is no evidence in the record to support the achievability of nearly 20% profit on the Project and no historical evidence to support profits of this magnitude.[2]

Ultimately, Plaintiff's claim of nearly 20% profit for direct damages relies on his own testimony of his "estimates" without historical or contemporaneous support and without any consideration for problems on the Project. As stated in *ADC Fairways*, the bid spreadsheet and Mr. Heard's estimates of his

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[1] *See Preferred Sys. Sols., Inc. v. GP Consulting, LLC*, 284 Va. 382, 400, 732 S.E.2d 676, 685-86 (2012) ("calculation of lost profits based on the track records of profits in established companies has long been an accepted method of estimating damages awards.").

[2] The Virginia Code also suggests that profit history evidence is a prerequisite to recovery. Va. Code 8.01-221.1 expressly states that *unestablished businesses* need not provide profit history to recover. The express consideration for unestablished businesses suggests that established businesses, by contrast, are required to provide historical profit evidence to recover lost profits.

anticipated profit at the time of the bid are insufficient to support a jury award. Accordingly, the jury verdict on direct damages should be set aside entirely as against all defendants.

2. The Consequential Damages In The Jury Verdict Should Be Set Aside Because They Are Speculative And Unreliable.[3]

The award of consequential damages to Plaintiff should be set aside because they are speculative and unreliable. As stated in the discussion on direct damages, lost profits cannot be recovered if they are uncertain, speculative, or remote.[4] Moreover, an expert's report and testimony must be based on more than assumptions and conjecture to be admissible. *See Vasquez v. Mabini*, 269 Va. 155, 160, 606 S.E.2d 809, 811 (2005) ("Expert testimony founded upon assumptions that have no basis in fact is not merely subject to refutation by cross-examination or by counter-experts; it is inadmissible.") Further, failure of the trial court to strike such testimony is reversible error. *Id.*

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[3] Defendants made four motions to strike at the close of Plaintiff's case in chief and the close of Defendants' case. The Court denied three of the motions in each instance but reserved ruling on the motion to strike the evidence related to consequential damages as speculative and unreliable. The argument for setting aside the verdict with respect to the consequential damages and Defendants' motion to strike rely on the same caselaw. For efficiency, Defendants have briefed the issue once here in support of both the motion to strike, which has already been made, and the motion to set aside the verdict.

[4] *See* Section 3, herein.

In *Vasquez*, Plaintiff brought an action for wrongful death and sought lost income damages. Plaintiff introduced an expert witness to testify regarding the lost economic benefit. However, the Plaintiff's expert analysis *assumed* full time employment from the accident through the date of retirement, *assumed* a 401k benefit, and *assumed* a 4.25% raise each year based on typical industry conventions. Damages were awarded. After the trial, the defendant appealed on the grounds that the expert testimony should have been excluded as speculative. It was appealed up to the Virginia Supreme Court. The Virginia Supreme Court agreed and held that estimates of damages based entirely on statistical assumptions are too remote and speculative to permit "an intelligent and probable estimate of damages." *Id.* ("In order to form a reliable basis for a calculation of lost future income or loss of earning capacity, such evidence *must be grounded upon facts specific to the individual whose loss is being calculated.*") (citing *Bulala v. Boyd*, 239 Va. 218, 233, 389 S.E.2d 670, 677 (1990)). In arriving at this holding, the Supreme Court specifically noted that the expert witness's opinion was based on statistics unrelated to the personal circumstances of the decedent.

While this case is for tortious interference and not wrongful death, the logic of the Virginia Supreme Court still holds because Heard is seeking the same type of damages – lost income in the form of future profits. In that regard, Plaintiffs consequential damages are even more remote and uncertain than the alleged direct damages. In its consequential damages, Plaintiff sought and was awarded damages for unidentified projects it did not bid on, and then

suggests that it might have been awarded and might have made a profit on. It is difficult to imagine a more remote, speculative category of damages in any lawsuit. Additionally, the only support Plaintiff offers for award of these damages is the alleged expert testimony of Mr. Roland Davis, whose opinion was premised entirely on Mr. Heard's after-the-fact, unsupported damages worksheet – without any independent verification.

In fact, in seeking consequential damages from this Court, Plaintiff failed to identify even one Project it was unable to bid on as a result of losing the Pier 34 work. Even after filing this lawsuit, Plaintiff did not track any alleged Project losses.[5] Plaintiff provides no evidence that it was actually prevented from bidding or proposing on additional projects at all. Moreover, neither Plaintiff, nor its expert could even identify available opportunities.[6] In addition, neither Plaintiff nor its expert provided any evidence that Heard even

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[5] Heard alleges that in the following years, if there was a project that it was unqualified for, it just moved on and did not make note of it. The plaintiff cannot meet its burden of proof with sweeping generalizations, particularly where the Plaintiff had years to identify such opportunities and keep track of them.

[6] Ironically, Mr. Davis could not even appropriately identify what time period to use for his expert report. He used 2013-2016 as the years of consideration for Heard's alleged lost future profits; however, he testified at trial that Heard would not even have gained the past performance experience at issue until the Project was done – which was mid-2014. In that regard, his calculation of average growth between 2013 and 2016 is irrelevant, and his reliance on data and charts from that time period is likewise uninstructive.

had capacity or resources to perform the additional work it supposedly would have won but for the loss of this Project. Neither Plaintiff nor its expert considered any natural lulls in business and made no account for increases in overhead. Mr. Davis's expert report expressly states that he made no attempt to independently verify or audit *any* of the information he relied upon for his opinion. He did not review any profit and loss information for Heard. Remarkably, he finds over $4.5 million dollars in damages – *more than the entire value of the contract at issue* – without being able to provide a single example of a lost opportunity. Mr. Davis alleges – remarkably – that this information is irrelevant for his analysis. Rather, the Plaintiff and its expert make blanket assumptions that this Project would have been a gateway to additional work, regardless of individual circumstances, a concept that defies logic and applicable caselaw. Plaintiff's expert even assumes a 46% growth rate based on companies that he admitted are not based in Virginia and perform work far in excess of Heard's bonding capacity.

In that regard, any jury verdict award for consequential damages is too remote and speculative to be proper under Virginia caselaw. Accordingly, the jury verdict should be set aside as against all defendants for consequential damages.

3. The Entire Jury Verdict Should Be Set Aside Because This Court Does Not Have Subject Matter Jurisdiction To Interpret The Federal HUBZone Regulations.

This Court should set aside the jury verdict because this Court does not have subject matter jurisdiction to

interpret federal contract law – this action should be adjudicated by the federal courts. Subject matter jurisdiction is the power of a court to adjudicate a class of cases or controversies. Subject matter jurisdiction exists in the courts only when it has been granted by a constitution or statute. *In re Commonwealth of Virginia*, 278 Va. 1, 11, 677 S.E.2d 236, 240 (2009). A judgment or order entered by a court that lacks jurisdiction of the subject matter is a nullity. *Morrison v. Bestler*, 239 Va. 166, 169-70, 387 S.E.2d 753, 755 (1990); *Humphreys v. Commonwealth*, 186 Va. 765, 772, 43 S.E.2d 890, 893 (1947); *Barnes v. American Fertilizer Co.*, 144 Va. 692, 705, 130 S.E. 902, 906 (1925); *Virginian-Pilot Media Companies, LLC v. Dow Jones & Co.*, 280 Va. 464, 467-68, 698 S.E.2d 900, 901-02 (2010).

Subject matter jurisdiction cannot be waived or conferred on the court by agreement of the parties. *Lucas v. Biller*, 204 Va. 309, 313, 130 S.E.2d 582, 585 (1963). A defect in subject matter jurisdiction cannot be cured by reissuance of process, passage of time, or pleading amendment. While a court always has jurisdiction to determine whether it has subject matter jurisdiction, a judgment on the merits made without subject matter jurisdiction is null and void. *Barnes v. American Fert. Co.*, 144 Va. 692, 705, 130 S.E. 902, 906 (1925). Likewise, any subsequent proceeding based on such a defective judgment is void or a nullity. *Ferry Co. v. Commonwealth*, 196 Va. 428, 432, 83 S.E.2d 782, 784 (1954); *Morrison v. Bestler*, 239 Va. 166, 169-70, 387 S.E.2d 753, 755-56 (1990). Even more significant, the lack of subject matter jurisdiction can be raised at any time in the proceedings, even for the first time on

appeal by the court *sua sponte*. *Thacker v. Hubard*, 122 Va. 379, 386, 94 S.E. 929, 930 (1918).

Under the Virginia Code and the United States Code, subject matter jurisdiction for this case rests with the federal courts, not the Virginia state courts. Title 17 of the Virginia Code gives circuit courts the right to decide civil cases, except those that fall under another Court's jurisdiction. Va. Code Ann. §17.1-513. In this case, resolution of Heard's claim requires an interpretation of a federal regulation and alleged improprieties in contract award – an act reserved for federal courts. 28 U.S.C.A. § 1331 (giving the Federal District Courts original jurisdiction over all civil actions arising under the laws of the United States); 28 U.S.C.A. §1491 ("Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting ... to the award of a [Federal] contract or any alleged violation of statute or regulation in connection with a procurement...").

Importantly, the Fourth Circuit has recognized that federal-question jurisdiction is not limited to cases where federal law creates the cause of action. Rather, where state law creates the cause of action, federal-question jurisdiction is proper if the "plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Columbia Gas Transmission Corp. v. Drain*, 191 F.3d 552, 557 (4th Cir. 1999) (citing *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)). Similarly, other circuits have expressly

considered federal jurisdiction proper when a case rests on the interpretation of a federal law (or regulation). *See New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953 (9th Cir. 1996) (finding that resolution of a federal regulation was necessary to the breach of contract cause of action between a subcontractor and a prime contractor, thus federal district court had subject matter jurisdiction).

Whether federal jurisdiction exists "is generally determined by the 'well-pleaded complaint' rule," *Childers v. Chesapeake & Tel. Co.*, 881 F.2d 1259, 1261 (4th Cir. 1989), which provides that federal jurisdiction exists when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). *Fastmetrix, Inc. v. ITT Corp.*, 924 F. Supp. 2d 668, 673 (E.D. Va. 2013)

In this case, the face of Heard's Complaint demonstrates that this Court does not have subject matter jurisdiction over the case. Heard sued Waterfront, alleging tortious interference with a contract expectancy. Ironically, Heard does not even plead subject matter jurisdiction in the Complaint. Heard alleges only personal jurisdiction pursuant to Va. Code §8.01-328.1 and venue pursuant to Va. Code §8.01-261 to 263. Further, the facts alleged for tortious interference show that this Court does not have subject matter jurisdiction. The first element of proof required is a contract expectancy. Heard's Complaint relies on the federal HUBZone program and the evaluation thereof for its alleged contract expectancy. *See e.g.*, Compl. ¶31. Further, Heard's Complaint alleges

improprieties in the award of the Navy Contract. Compl. ¶¶46-47. Thus, from the face of the Complaint, an interpretation of the federal HUBZone regulations and federal contract law is required, making federal court the appropriate court for this action.

Further underscoring this Court's lack of subject matter jurisdiction is the fact that the Plaintiffs called no one from the Navy to testify. In the absence of calling Tina Rule, Plaintiff's case relies on Mr. Calvin Jenkins' *interpretation* of the *federal* HUBZone regulations.[7] This Court has no jurisdiction to make any such interpretation as to what the Navy would have done or the laws under which the Navy makes that decision. As a result, the verdict premised on such an interpretation is null and void. Heard's reliance on the interpretation of federal contract award law at trial and the language of the well-pleaded complaint put jurisdiction of this case squarely into the federal courts.

In fact, the federal government has set forth procedures for challenging the contract award of a Project when there are perceived improprieties – a process which Heard did not pursue. The proper forum to address any *contract award* concerns for the Pier 34 Contract is exclusively reserved to the Government Accountability Office (GAO), the Court of Federal Claims (COFC), Federal District Courts, or the Navy itself. 4 C.F.R. §21.1 (an interested party may protest...

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[7] Notably, Mr. Jenkins has never worked for the Navy; therefore, he cannot even testify to the Navy's procedure. His entire testimony is based on his experience with the Small Business Administration – a federal agency with no ability to award the Contract at issue.

an award or proposed award of such a contract...); 28 U.S.C.A. §1491 ("Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting ... to the award of a [Federal] contract or any alleged violation of statute or regulation in correction with a procurement... ").[8] In such a protest, the Navy is a party, and the protestor has the opportunity to challenge the Navy's actions directly.

This Court does not have the ability to review the Navy's actions or inactions. Similarly, this Court does not have the ability to direct the Navy to award the Project to Heard (or anyone). In that regard, this Court has no ability to interpret if the Navy would have awarded a contract to Heard under federal law and whether such action was proper. Such a judicial review of an alleged improper contract award is reserved for the GAO, the COFC, federal district courts, and the procuring Agency (in this case, the Navy) itself. Since Heard's case requires a determination that cannot be jurisdictionally made by this Court, the verdict should be set aside for lack of subject matter jurisdiction.

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[8] Note that these regulations are distinct from challenging the size of a concern with the SBA. Heard never challenged the award of the Project under the bid protest regulations. Heard only ever challenged the size of Waterfront.

4. The Jury Verdict Should Be Set Aside Because Plaintiff Presented No Evidence That The Navy Would Have Awarded Heard The Project But For Waterfront's Actions or That Waterfront Knew of Any Inevitable Award.

It is well-established under Virginia law that a contract expectancy requires proof of a specific existing contract or expectancy between two parties based upon a "concrete move in that direction." *Gov't. Employees Ins. Co. v. Google, Inc.*, 330 F.Supp.2d 700, 705-06 (E.D. Va. 2004). The contract expectancy underpinning a tortious interference claim cannot be purely speculative. *See Masco Contractor Srvcs. East, Inc. v. Beals*, 279 F.Supp.2d 699, 709-10 (E.D. Va. 2003) ("[T]he first element that a party claiming under either of these torts must prove is the existence of some specific contract or relationship. Failure to allege any specific, existing economic interest is fatal to the claim.").

Heard provided no testimony or evidence from the Navy about the Project award in this case; therefore, it is impossible as a legal matter to prove a "concrete move" by the Navy to awarding Heard the Project under any circumstances. Rather than prove what the Navy ***would have done***, Heard attempted to circumvent its burden of proof by calling a witness from the Small Business Administration (SBA) to discuss his interpretation of the federal regulations and opine on what the Navy ***should have done***.[9]

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[9] Ironically, Heard did not even use the actual federal regulations in Mr. Jenkins' direct testimony – they used expired guidance from

In fact, the entirety of Heard's alleged "contract expectancy" rests on Mr. Jenkins' testimony that after C&D withdrew from the bid, the Navy should have reevaluated all of the bidders – a statement that has zero support in the text of the regulations. In fact, we know what the Navy did. The Navy evaluated the bidders on bid day. *See* Plaintiff's Exhibit 1.[10] 10% was added to all large bidders. If Waterfront had been evaluated on bid day as a large bidder, the rankings would have been as follows:

(1) C & D Construction, Inc.: $3,995,958

(2) PreCon Marine: $4,649,340

(3) Heard Construction: $4,702,084

(4) Waterfront Marine: $4,882,900

Now, Heard may argue that this ranking is incorrect, but that argument is inconsequential.[11] This ranking is the only piece of evidence showing what the

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the SBA instead, over Defendants' objections. It is difficult to understand how the Plaintiff could prevail in this case without producing anyone from the Navy or using the actual federal regulations at issue as evidence in the case.

[10] The Bid Abstract is dated September 25, 2012. The bidders are ranked with a 10% factor applied to all large businesses – as of the bid.

[11] As stated in Section 3, neither this Court, nor the SBA has the ability to direct the Navy to award the Project to anyone, or to even review the Navy's actions. Such a review and determination is exclusively reserved for the GAO, the COFC, federal district courts, and the Agency itself. Accordingly, Mr. Jenkins' testimony is insufficient to form the basis of a jury award.

Navy ***would have done*** had Waterfront been considered a large business at the time of the bid. The ***only*** evidence in this case from the Navy is the bid abstract. Any third party testimony that the Navy *should* have reevaluated the bidders five days later cannot form the basis for a contract expectancy because it is too attenuated and speculative.

Ironically, even if this Court believes that Mr. Jenkins' "reevaluation" is credible, it is not documented anywhere in the regulations or SBA guidance. If the entire premise of Heard's contract expectancy rests on an unwritten interpretation of the federal regulations, it is legally and factually impossible for Defendants to have known about it. Since the Defendants did not know of any such reevaluation, they did not know of Heard's alleged contract expectancy. In that regard, Mr. Jenkins' testimony is both insufficient to support Heard's claim of an alleged contract expectancy and simultaneously defeats Heard's claim by relying on unwritten, unknown practices. Therefore, the jury verdict should be set aside because there is no evidence that the Navy would have awarded the Contract to Heard or that Defendants knew about it.

5. The Punitive Damages In the Jury Verdict Should Be Set Aside Because There Is No Evidence Of Willful Or Wanton Conduct.

The imposition of punitive damages is not favored generally and "because punitive damages are in the nature of a penalty, they should be awarded only in cases of the most egregious conduct. *Simbek, Inc. v. Dodd-Sisk Whitlock Corp.* 257 Va. 53 (1999). When punitive damages are tied to a claim of interference

with a business expectancy, they are only proper if the acts are done "with malice or wantonness." *Id.* at 58 (noting that the defendant "violated unwritten trade customs or ethical practices" but that despite the tortious interference and violation of trade standards, the violations were insufficient to justify imposition of punitive damages). In fact, in Virginia, the standard for establishing punitive damages "is beyond even gross negligence." *Doe v. Isaacs*, 265 Va. 531, 579 S.E.2d 174, 178 (2003) (complete neglect of others' safety amounted to gross negligence, which shocks fair-minded people, but was less than willful recklessness required for punitive damages). The purpose of punitive damages is to "punish the wrongdoer if he has acted wantonly, oppressively, or with such malice as to evince a spirit of malice or criminal indifference to civil obligations. Willful or wanton conduct imports knowledge and consciousness from the act done." *Blakely v. Austin-Weston Ctr. for Cosmetic Surgery L.L.C.*, 348 F. Supp. 2d 673, 677-78 (E.D. Va. 2004). Even cases where defendant had two prior drunk driving convictions and who consumed a pitcher of beer prior to a third accident did not warrant the imposition of punitive damages. *Hack v. Nester*, 241 Va. 499, 404 S.E.2d 42, 45 (1991).

In this case, Heard presented no evidence that Defendants acted with wantonness. The testimony from Defendants was that they reasonably believed they were small at the time of the bid and responded to the protest accordingly. They have never been fined, cited, or reprimanded by the Small Business Administration, the Navy, the Department of Justice, or anyone else. In fact, no one has ever found

Defendants' conduct to be reprehensible at all. Moreover, the basis of Plaintiff's lawsuit is an unwritten interpretation of the federal regulations. It is difficult to understand how Defendants could be assessed punitive damages for failing to comply with unwritten policies of the Small Business Administration. Accordingly, the jury verdict for punitive damages should be set aside in their entirety.

6. The Punitive Damages In The Jury Verdict Should Be Reduced To The Statutory Cap.

Plaintiff and Defendants have agreed that the award of punitive damages should be reduced to the statutory cap of $350,000.00 pursuant to Va. Code §8.01-38.1, without prejudice to Defendants' Motions to, this Motion to Set Aside the Verdict, or any appeal that Defendants may take. However, at the time of the filing of this Motion, the proposed consent order had not yet been filed with this Court. Accordingly, Defendants have included this section here as a reservation of rights to assert this argument in the event that the consent order is not filed or entered for some reason.

The award of punitive damages by the jury should be reduced to the statutory cap of $350,000.00 Va. Code Ann. §8.01-38.1. The plain language of the statute *requires* this Court to reduce the amount of the award. *Id.* ("if a jury returns a verdict for punitive damages in excess of the maximum amount specified in this section, the judge ***shall*** reduce the award...") (emphasis added). The cap on punitive damages applies to all actions, unequivocally. *Wackenhut Applied*

Technologies Center, Inc. v. Sygnetron Protection Systems, Inc., 979 F.2d 980, 984 (4th Cir. 1992)("[T]he drafters of the Virginia statute, in limiting punitive damages, chose the phrase "any action" to define the class of cases to which the statute would apply – they did not further define "any action." In our view, the term is unequivocal.").

The jury awarded punitive damages in excess of the statutory cap. The statutory cap has consistently been applied and upheld in Virginia. This Court must, under the plain language of the statute, reduce the award of punitive damages to $350,000.00.

7. The Jury Verdict Should Be Reduced Because They Are In Excess Of The *Ad Damnum* Clause In The Complaint.

Plaintiff and Defendants have agreed that the award of damages should be reduced to the ad damnum clause, without prejudice to Defendants' Motions to Strike, this Motion to Set Aside the Verdict, and any appeal that Defendants may take. However, at the time of the filing of this Motion, the proposed consent order had not yet been filed with this Court. Accordingly, Defendants have included this section here as a reservation of rights to assert this argument in the event that the consent order is not filed or entered for some reason.

In Virginia, a plaintiff cannot recover more than he sues for though he can recover less. *Hook v. Turnbull*, 10 Va. (6 Call) 85 (1806); *See Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S.E. 366 (1898). "It would be

unfair to cause a defendant and other interested parties to believe that plaintiff's claim is for a certain amount and no more only to let the jury award a greater amount. Such a procedure would disrupt the orderly conduct of trials and bring uncertainty to defendants and others who may be called upon to pay the amounts awarded against defendants." *Powell v. Sears, Roebuck & Co.*, 344 S.E.2d 916 (1986) (reducing the jury award to conform to the ad damnum clause).[12]

The Plaintiff sued for approximately $800,000.00 in direct lost profits. The plaintiff requested another $1,200,000.00 in consequential damages. The jury

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[12] In keeping with the above, the General Assembly permits "any party in any civil action [to] inform the jury of the amount of damages sought by the plaintiff in the opening statement or closing argument, or both." Va. Code § 8.01-379.1. "Pursuant to this authority, a plaintiff has the power to request damages from the fact *as long as the total requested is no more than the ad damnum*." *Wakole*, 283 Va. at 494, 722 S.E.2d at 241 (emphasis added). Accordingly, a plaintiff may not request from the jury, in either opening statement or closing argument, an amount of damages that exceeds the amount of the plaintiff's ad damnum. Allowing such an improper statement as to the award's value may mislead the fact finder by skewing upwards, at the outset of the trial and immediately before the award is to be determined, the legally permissible range of an award. Such a tactic contravenes the attorney's obligation to "be just to opposing litigants" in his arguments. *Atlantic Coast Realty Co. v. Robertson*, 135 Va. 247, 263, 116 S.E. 476, 481 (1923) ("[An attorney] has no right ... to urge a decision which is favorable to his client by arousing sympathy, exciting prejudice, or upon any ground which is illegal."). *Smith v. Mclaughlin*, 289 Va. 241, 270, 769 S.E.2d 7, 22 (2015). In that regard, Plaintiff's request for damages above and beyond the ad damnum clause was improper and should cause this Court to set aside the verdict in its entirety.

awarded $887,158.00 in direct lost profits and $2,458,385.00 in consequential damages. These should be reduced at least to $800,000.00 and $1,200,000.00 respectively.

8. The Jury Verdict Should Be Set Aside As To I+Icon, ICI, and IIC Because There Is No Evidence That These Three Companies Had Any Involvement In the Bid, Protest, Or Project.

The jury verdict should be set aside as against the upstream entities because IIC, ICI, and i+icon were uninvolved in the bid, protest, and Project. *See generally Blakely v. Austin-Weston Center for Cosmetic Surgery LLC*, 348 F. Supp. 2d 673 (2004) (holding that punitive damages against a hospital for the actions of a doctor are improper because punitive damages cannot be awarded against a master or principal for the wrongful act of his servant or agent in which he did not participate, and which he did not authorize or ratify.).

The Complaint alleges that all of the Defendants got together and acted in concert to conceal Waterfront's size status and thwart Heard's alleged contract expectancy. Compl. ¶¶34, 45. However, no evidence at trial was presented to support those statements. In fact, the only evidence at trial demonstrated that the upstream entities (ICI, IIC and i+icon) had no involvement with the bid, protests or Project at all. Therefore, the jury verdict should be set aside with respect to ICI, IIC, and i+icon.

PRAYER FOR RELIEF

Defendants request that this Court set aside the jury verdict as against all Defendants for all direct, consequential, and punitive damages. In the alternative, Defendants request that this Court set aside the jury verdict as against i+icon, ICI, and IIC for all direct, consequential, and punitive damages.

Respectfully submitted this 6th day of September, 2017.

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[*Certificate of Service and Proposed Order Omitted in the Printing of this Appendix*]

APPENDIX I

VIRGINIA
IN THE CIRCUIT COURT FOR THE CITY OF CHESAPEAKE

Case No. CL16-3150

[Filed October 19, 2017]

HEARD CONSTRUCTION, INC.,	)
	)
Plaintiff,	)
	)
v.	)
	)
WATERFRONT MARINE CONSTRUCTION, INC., *et al.,*	)
	)
Defendants.	)
	)

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO SET ASIDE JURY VERDICT

NOW COMES Defendants Waterfront Marine Construction, Inc., Infrastructure Constructors, Inc. (ICI), Infrastructure and Industrial Constructors USA, LLC, (IIC), Infrastructure and Industrial Constructors USA Holdings, Inc. (i+icon), Ken Sutton, and Randy Sutton (collectively referred to as Defendants), through undersigned counsel, and files this Reply to Plaintiff's

Opposition to Defendants' Motion to Set Aside the Jury Verdict.

As a preliminary matter, Defendants did not consent to Plaintiff's motion to exceed the page limit imposed under Virginia Sup. Ct. R. 4:15. Defendants have noted their objections on the Order on the basis that the Motion did not establish good cause, the length of the brief exceeded Defendants' Motion by nearly 50%, and Plaintiff did not seek leave in advance of filing the Motion.

Moreover, in the 26 pages of Plaintiff's Opposition, Plaintiff has not set forth any credible legal argument or dispositive facts that allow this Court to uphold the verdict. Remarkably, in its Opposition, Plaintiff misrepresents testimony and misunderstands caselaw in arriving at its conclusions. In fact, while the transcript for the hearing had not yet been filed at the time of Defendants' Motion, the Court now has the complete record and the transcript further supports Defendants' contentions that: (1) Heard's claimed direct lost profits are unsupported, remote, and speculative; (2) the consequential damages are speculative and unreliable; (3) this Court does not have subject matter jurisdiction to find a violation of a federal statute or regulation, including the HUBZone regulations, in connection with a federal procurement, and such a finding is necessary to sustain the verdict; (4) there is no evidence that the Navy would have awarded Heard the Project but for Waterfront's actions or that Defendants knew of Heard's alleged contract expectancy; and (5) there is no evidence of willful or wanton conduct to support an award of punitive

damages.[1] Additionally, there is no evidence that the upstream entities were involved in the bid, the protest, or the Project at all. For all of these reasons, the jury verdict should be set aside. Each issue is discussed in detail below.

1. The Direct Damages In The Jury Verdict Should Be Set Aside Because They Are Unsupported And Speculative.

Plaintiff's Opposition asserts that damages need not be proven with exact certainty. Defendants agree that reasonable certainty - not exact certainty - is the standard; however, the Virginia Supreme Court has expressly found that unsupported assumptions of profit made at the bid time are insufficient to support a finding of reasonable certainty. *ADC Fairways Corp. v. Johnmark Const., Inc.,* 231 Va. 312, 318, 343 S.E.2d 90, 93 (1986) ("Lost profits should not have been awarded because they were completely speculative. The $47,781.13 figure was nothing more than the profit Johnmark hoped to make at the time of the bid. There was no evidence to establish that this is the profit that would have been made had Johnmark completed the project.").

In *ADC Fairways,* lost profits were awarded to Johnmark for ADC's breach of contract in rehabilitating condo units. At the time of the breach, there were 171 remaining units and Johnmark sought lost profits on the unperformed work. The president of Johnmark testified to the number of units at issue in

[1] Defendants do not discuss sections 6 and 7 because of the consent order that was filed by the Parties on September 22, 2017.

the case, the price of rehabilitation per unit, and the built-in profit of 15% per unit - the profit he figured when he bid the job. On appeal, the Virginia Supreme Court found his anticipated profit to be speculative. In particular, the Court relied on the fact that he had no documents or records to support his per unit expenses and that this profit was merely what Johnmark *anticipated he would make* for this work. *Id.* at 319 (emphasis in original). The Court expressly held that this anticipated profit was not sufficient to meet the "reasonable certainty" test.

Much like *ADC Fairways,* Plaintiff's claim of lost profit is entirely speculative – based exclusively on unsupported anticipated profit at the time of the bid. Both at the trial and in its Opposition, Plaintiff offers no evidence or testimony to establish how he derived his profit figures. He speaks only in general terms over two separate categories of anticipated profit.[2] The first is general contracting profit (which is really the combination of profit and overhead), and the second is an alleged concrete profit that is hidden within his total bid. And in remarkable similarity to *ADC Fairways,* Plaintiff has no contemporaneous documentation whatsoever for these hidden concrete

[2] Plaintiff cites to *Banks v. Mario Indus.*, 274 Va. 438 (2007) for the proposition that a business owner can testify to their expectation of profits. Defendants agree Mr. Heard can testify to his anticipated profit. The problem is that Mr. Heard did not provide sufficient information and contemporaneous documentation to meet the reasonable certainty threshold.

profits.[3] In fact, at Mr. Heard's deposition, he admitted that he has no documentation of the alleged concrete profit. Rather, his claim of $300,000 is just what he "knew" he had in there. *See* Exhibit 1, J. Heard Depo 126/17-127/6; 127/15-129/3. The similarity to *ADC Fairways* is underscored by the fact that Mr. Heard admitted profit can fluctuate, and that one can anticipate making money on a job and actually end up losing money on the job. *See* Exhibit 1, J. Heard Depo. 124/13-126/2; Trial Tr. 452/16-18.

Apparently recognizing the problem created by Mr. Heard's testimony, Plaintiff now tries to rely on a third party, Mr. Cory Neider, as the "primary evidence of Heard's lost direct profits."[4] It is unclear how Plaintiff makes such an argument given that Mr. Neider did not testify to **any** anticipated profit. His testimony was

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[3] Ironically, Plaintiff states that his 25 years of experience on "similar work" should give his bid estimate credence, and yet the entire premise of this lawsuit is that this job was the first of its kind for the Plaintiff and would open many doors for him. Both statements cannot be true.

[4] This statement alone should cause this Court to reconsider and grant Defendants' Motion to Set Aside the Verdict made at the close of Plaintiff's case in chief. Since Mr. Neider was not called during Plaintiff's case in chief, Defendants' Motion to Strike the direct damages as speculative should have been granted at the close of Plaintiff's case. *Williams v. Vaughan,* 214 Va. 307, 309 (1973) ("When the sufficiency of a plaintiff's evidence is challenged by a motion to strike ... the trial court should ... grant the motion ... when it is conclusively apparent that plaintiff has proven no cause of action against defendant or when it plainly appears that the trial court would be compelled to set aside any verdict found for the plaintiff as being without evidence to support it.") (internal citations and quotation marks omitted).

limited to the fact that Heard and W.F. Magann had a teaming agreement whereby W.F. Magann would perform $3-$4 million (or 80-90%) of the work on the Project and the fact that Heard did not have the expensive specialized marine equipment necessary to perform the work. Trial Tr. 725/8-728/17; 730/8-11. Ironically, Plaintiff objected to the only contemporaneous document that might have supported evidence of actual profit on the job, Defendants' job cost report. Additionally, Plaintiff misrepresents Mr. Heard's testimony at page 468 of the transcript by alleging that all cost overruns on the Project were due to poor management. In his actual testimony, Mr. Heard states that poor soils were also a consideration in the very same answer. Trial Tr. 468/16-20. It is unclear how Mr. Heard could form an opinion of management of a Project he had no involvement with. Moreover, at his deposition, Mr. Heard was unable to articulate why the job was tough and he admitted that he did not know if the difficulty of the job would have affected his own expected profit. *See* Exhibit 1, J. Heard Depo. 126/3-16.

Ultimately, there is no evidence in the record to support the achievability of nearly 20% profit on the Project and no historical evidence to support profits of this magnitude. Moreover, Plaintiff has no relevant caselaw to support its position. Plaintiff cites to *Banks v. Mario Indus.,* which is not relevant to this case. 274 Va. 438 (2007). In *Banks,* the Plaintiff had *existing* contracts and an *existing* profit rate calculated by its accountants that it relied on to support its anticipated profits, exactly the opposite of what Heard is trying to do in this case. In fact, for a company that alleges 25

years of experience in the concrete industry, the only reason not to provide financial history is because the history does not support the damages sought.[5] *See* Exhibit 2, Plaintiff's Supp. Response to Def. Ken Sutton's First Interrogatories No. 14.

Next Plaintiff argues that his claimed profits were precisely presented far in advance of trial despite the fact that they differ from what is claimed in the Complaint. This is inaccurate. Plaintiff wrongly states that Exhibit 45 was provided to Defendants and used at Mr. Heard's deposition. This is not true. Defendants used Trial Exhibit 46 (Mr. Heard's internal bid spreadsheet) at Mr. Heard's deposition, during which Mr. Heard stated that the concrete profits could not be identified on the bid spreadsheet. Rather, they were what he "knew" he anticipated and based on scratch sheets that he "couldn't find." *See* Exhibit 1, J. Heard Depo. 126/17-127/6; 128/19-130/20.[6] Heard confirmed this statement at trial. Trial Tr. 466/5-18. Plaintiff's Trial Exhibit 45 is an entirely made-up document for trial and was not presented prior to Jason Heard's deposition. Plaintiff's Trial Exhibit 45 was given to

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[5] Defendants sought financial information from Heard during the course of this litigation but it was not provided. Specifically, Defendants sought Heard's annual revenue for the past five years. After Plaintiff objected to disclosing this information, Defendants filed a Motion to Compel on November 17, 2015; however, the Plaintiff never provided the information.

[6] This is precisely the situation in *ADC Fairways,* discussed herein. Mr. Heard's testimony begs the question of how much more speculative a category of damages can be if they have no contemporaneous documentation?

Defendants on July 29, 2017, two weeks before trial. *See* Exhibit 3. A prior version of Plaintiff's Exhibit 45 was produced to Defendants on August 5, 2016, several months *after* Mr. Heard's deposition.[7] *See* Exhibit 4. Defendants did not have an opportunity to question Mr. Heard on either version of Plaintiff's Trial Exhibit 45 prior to the hearing in this case. Moreover, the first time any version of Exhibit 45 was created was over four years after the bid. It is hard to imagine any reasonable basis for allowing this document into evidence as support for direct damages.

Plaintiff's claim of nearly 20% profit for direct damages relies on estimates without historical or contemporaneous support and without any consideration for problems on the Project. As stated in *ADC Fairways,* the bid spreadsheet and Mr. Heard's later-drafted damages worksheet with his anticipated profit are insufficient to support a calculation of damages with a reasonable degree of certainty. Allowing this verdict to stand would be directly contrary to binding precedent in this Commonwealth. Accordingly, the jury verdict on direct damages should be set aside entirely as against all defendants.

2. The Consequential Damages In The Jury Verdict Should Be Set Aside Because They Are Speculative And Unreliable.

Plaintiff relies on Va. Code §8.01-401.1 and *Clark v. Chapman,* 238 Va. 655 (1989). However, neither citation supports the verdict on consequential damages.

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[7] Jason Heard's deposition occurred May 18, 2016.

First, Va. Code §8.01-401.1 allows experts to render an opinion or give testimony or draw inferences from facts, circumstances, or data. The entire problem with Mr. Davis's report, is that he does not have any facts and circumstances specific to Heard. He was unable to testify about Heard's historical profit, workload, available equipment, or average project size or even gross revenues.[8] Trial Tr. 539/12-540/16. All he knows is that Heard bid this job, and Heard told him he would make approximately 20% profit. Pl's Exhibit 45. Remarkably, while projecting future lost profit, he is unaware of what bids Heard was bidding on (or could not bid on) during the years of his analysis. Trial Tr. 543/4-544/19. Without any financial information specific to Heard, Mr. Davis's report is nothing more than assumptions and conjecture; and is therefore, inadmissible. *See Vasquez v. Mabini,* 269 Va. 155, 160, 606 S.E.2d 809, 811 (2005) ("Expert testimony founded upon assumptions that have no basis in fact is not merely subject to refutation by cross-examination or by counter-experts; it is inadmissible."). Moreover, the "data" he relies upon in his report is not narrowly tailored to fit Heard' s circumstances.

In fact, it is difficult to understand how Mr. Davis can claim that he calculated Heard's lost future profits based on companies with characteristics similar to

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[8] Moreover, Heard actively obstructed Defendants from accessing this information. Defendants served interrogatories on Heard requesting annual revenue information. Heard objected to the interrogatory and never provided Defendants with the information. *See* Exhibit 2, Plaintiff's Supp. Response to Def.'s Ken Sutton's First Interrogatories No. 14.

Heard, when he testified that knows nothing about Heard's average project size, number of projects, typical jobs, or even identify a single project Heard lost out on. Trial Tr. 539/12-541/25. Based on this admission, how can he make accurate comparisons? Moreover, of these so-called similar companies, Mr. Davis admitted that he did not know if the companies he selected were all HUBZones. Trial Tr. 518/10-13. He agreed that not all of them were Virginia companies. Trial Tr. 550/21-551/14. He agreed that some of them were performing work for the federal government far in excess of Heard's bonding capacity. Trial Tr. 551/23-552/25. Mr. Davis cherry picked ten companies from a database of thousands and claimed that they were similarly situated to Heard merely by virtue of the location in which they do business. Mr. Davis further admitted that he did not use any companies that had gone bankrupt. *See* Exhibit 5, R. Davis Depo. 45/14-16. By that admission alone, his report is not reliable because he is not considering the full picture of data across an industry or across a NAICS code.

Further, he admitted that he did not tailor his data to the NAICS code at issue in this case. Trial Tr. 548/10-19. He admitted that his data was comprised of a large portion of defense contracts, which Heard does not perform. Trial Tr. 547/18-548/9. In other words, the bulk of Mr. Davis's report is based on information not grounded to Heard, thereby rendering his report unreliable as a matter of law.

By contrast, in *Clark,* the expert witness considered actual past work history in estimating future damages. The expert's assumptions were grounded in the

specifics to the Plaintiff, including the type of work she was able to do – the exact opposite of what Mr. Davis did in this case. In fact, while Plaintiff says that Mr. Davis's report was grounded in facts specific to Heard, Plaintiff does not list any specific facts that were considered. Mr. Davis says such facts are irrelevant, directly contrary to the caselaw. Trial Tr. 539/12-541/25, 549/10-14, 554/20-555/4. Moreover, the plaintiff's use of averages in *Clark* was because the work history of the plaintiff was limited. That should not be a problem for a company that claims it has "25 years" in the industry. Viewed in this light, it is improper for an expert witness to testify to consequential damages without considering the profit history of the company.

Ultimately, Plaintiff failed to identify even one Project it was unable to bid on as a result of losing the Pier 34 work. Even after filing this lawsuit, Plaintiff did not bother to track any alleged Project losses.[9] *See* Exhibit 1, J. Heard Depo. 132/9-133/4; Trial Tr. 466/24-467/3. Plaintiff provides no evidence that it was actually prevented from bidding or proposing on additional projects.[10] In that regard, any jury verdict

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[9] Heard alleges that in the following years, if there was a project that it was unqualified for, it just moved on and did not make note of it. The plaintiff cannot meet its burden of proof with sweeping generalizations, particularly where the Plaintiff had years to identify such opportunities and keep track of them.

[10] Ironically, Mr. Davis could not even appropriately identify what time period to use for his expert report. He used 2013-2016 as the years of consideration for Heard's alleged lost future profits; however, he testified at trial that Heard would not even have

award for consequential damages is too remote and speculative to be proper under Virginia caselaw. Accordingly, the jury verdict should be set aside as against all defendants for consequential damages.

3. The Entire Jury Verdict Should Be Set Aside Because This Court Does Not Have Subject Matter Jurisdiction To Find A Violation Of A Federal Statute Or Regulation, Including HUBZone Regulations, In Connection With A Federal Procurement Or Proposed Procurement.

Plaintiff's Opposition does not understand federal contracts law and procedure. At the outset, Plaintiff confuses a size protest with a bid protest. The two are different. A size protest is filed the Small Business Administration (SBA) asking for a determination of size status. The SBA does not (and did not in this case) make a determination regarding the propriety of a contract award or the rights of each party. Trial Tr. 221/4-222/8, 348/5-11; *see also, White Hawk Group, Inc. v. United States,* 91 Fed. Cl. 669, 673 (2010) ("A size protest is a purely administrative claim before the SBA in which a small business concern ... objects to the size determination of another offeror .... 'size protests' bear no relation to bid protests"). By contrast, a bid protest is filed to challenge the award of a project. *See* 28 U.S.C. 1491(b)(1) (a bid protest is "an action by an

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gained the past performance experience at issue until the Project was done – which was mid-2014. In that regard, his calculation of average growth between 2013 and 2016 is irrelevant, and his reliance on data and charts from that time period is likewise uninstructive.

interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award ***or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."*)** (emphasis added). Heard's tort lawsuit against Waterfront is nothing more than an attempt to circumvent the statutes and regulations governing bid protests and Federal contract awards.

A disappointed bidder who files a bid protest can seek injunctive relief to prevent the project from moving forward. *See* 28 U.S.C. § 1491(b)(2) (giving the Court of Federal Claims the power to award in bid protests "any relief that the court considers proper, including declaratory and injunctive relief"). Therefore, as soon as Heard believed that the award was improper[11], Heard was required by federal law to file a bid protest if he wanted to challenge the alleged violation of the HUBZone regulation. Heard understands this process. Trial Tr. 451/8-452/11. Heard did not file a bid protest and there has never been a determination that the award of the Pier 34 Project to Waterfront was improper. Trial Tr. 221/4-222/8. Even Mr. Jenkins agrees that SBA's sole purpose is to determine size status. Trial Tr. 348/5-23. As a result, Heard's complaints that the size protest was ineffective at providing Heard a remedy is Heard's own fault, because Heard never sought the available remedy of contesting the alleged violation of the regulations.

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[11] *See* Exhibit 2, Plaintiff's Supp. Responses to Def. Ken Sutton's First Interrogatories No. 13. (Plaintiff believed there were improprieties as of the day of the bid, September 25, 2012.)

Heard's failure to file a bid protest moots its ability to challenge the propriety of the award. *See Nat. Telecommuting Institute, Inc. v. United States,* 123 Fed. Cl. 595, 602 (2015) (stating that a plaintiff who "sit[s] on his rights in bringing a bid protest while the Government moves forward with a contract" cannot recover).

Plaintiff offers two arguments in support of subject matter jurisdiction, both of which fail. First, Heard tries to circumvent the bid protest regulations and statutes by stating that their claim is not against the government. Second, Heard urges this Court to find concurrent jurisdiction over the claim.[12] However, the named Defendants listed in a Complaint is not dispositive. Heard's lawsuit attempts to re-award a federal procurement (and the anticipated profits therefrom) in a jurisdiction that is unable to make that determination. *See* 28 U.S.C. §1491 ("the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on ... any alleged violation of statute or regulation in connection with a procurement or a

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[12] Heard's reliance on *Pearman v. Indus. Rayon Corp.,* 207 Va. 854 (1967) is misplaced. That case dealt with collective bargaining agreements and the remedy granting statute says that a party "may" bring a claim in the federal district courts. By contrast, the Tucker Act says that the Court of Federal Claims "shall" have jurisdiction. Moreover, contrary to Heard's argument, the U.S. Court of Appeals for the Federal Circuit has determined that the Tucker Act grants **exclusive** jurisdiction. Heard's reliance on *Nat'l State Bank of Newark v. U.S.* is misplaced as it is not on point and is contradicted by *Distributed Solutions, Inc. v. United States,* 539 F.3d 1340 (Fed. Cir. 2008)

proposed procurement"); *Distributed Solutions, Inc. v. United States,* 539 F.3d 1340 (Fed. Cir. 2008) (finding that §1491 confers **exclusive** jurisdiction") (emphasis added).[13] The only forum which can determine the proper awardee of a federal procurement is the Court of Federal Claims. 28 U.S.C. §1491. Therefore, this Court does not have subject matter jurisdiction to determine whether the Contract award to Waterfront was improper. Further, this Court lacks the authority to determine that the Navy would have awarded the Project to Heard or that a Federal judge would have determined that Waterfront intentionally violated the HUBZone regulations and issued a permanent injunction as a result. Since Heard's case requires a determination that cannot be jurisdictionally made by this Court, the verdict should be set aside for lack of subject matter jurisdiction.

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[13] Plaintiff's discussion of removal is irrelevant. Defendants do not argue that this case should have been removed under 28 U.S.C. §§ 1441 and 1331. Defendants cited to those cases for the proposition that jurisdiction does not lie with this court – it lies with federal courts. Since subject matter jurisdiction cannot be waived, Defendants failure to remove the case at the outset is immaterial. This Court lacks subject matter jurisdiction and, therefore, the verdict issued is null and void. *Morrison v. Bestler,* 239 Va. 166, 169-70 (1990); *Humphreys v. Commonwealth,* 186 Va. 765, 772 (1947); *Barnes v. Am. Fertilizer Co.,* 1444 Va. 692, 705 (1925); *Virginian-Pilot Media Cos., LLC v. Dow Jones & Co.,* 280 Va. 464, 467-68 (2010).

4. The Jury Verdict Should Be Set Aside Because Plaintiff Presented No Evidence That The Navy Would Have Awarded Heard The Project But For Waterfront's Actions or That Waterfront Knew of Any Inevitable Award.

Plaintiff alleges that Defendants had both actual and constructive knowledge of Heard's contract expectancy and that Mr. Jenkins's testimony was sufficient to establish a contract expectancy. Both arguments fail. Ironically, Plaintiff refers to the "plain text" of the HUBZone regulations; however, the plain language of the regulation does not support the Plaintiff's allegations. Mr. Jenkins agrees that if C&D were considered the lowest responsive responsible offeror, the price preference would not apply in this case. Trial Tr. 319/22-320. As of the day of the bid, Mr. Jenkins agrees that C&D was the low bidder. Trial Tr. 305/2-4. As of bid day, Mr. Jenkins agrees that no leapfrog would occur regardless of Waterfront's size. Trial Tr. 305/9-307/6. Moreover, the bid abstract shows that the HUBZone price preference evaluation was performed on the day of the bid. Pl's Exhibit 1. Without any documented support, Mr. Jenkins's alleges that the basis for Heard's contract expectancy is an *unwritten* requirement to reevaluate bidders when the lowest bidder drops out several days after the bid. Trial Tr. 313/17-314/24.

Further, while Mr. Jenkins's credentials are not at issue, Plaintiff's reliance on his testimony cannot support a jury award because it requires this Court to insert language into the HUBZone regulations to impose a new requirement not otherwise included in

the plain text. The plain language of the HUBZone regulations do not contemplate a reevaluation at any point. Def's Exh. 15; Trial Tr. 326/5-9. Mr. Jenkins admitted that the reevaluation is not written in the text of the regulation. Trial Tr. 313/17-314/24. In fact, the expired guidance cited by Plaintiff in its case in chief does not allow for or even suggest that a reevaluation can occur. Pl's Exh. 27.

Moreover, the Plaintiff is asking this Court to punish the Defendants for their failure to know an unwritten requirement. This Court cannot do so. Mr. Jenkins agrees that the unwritten reevaluation process was "not for [Waterfront Marine] to know." Trial Tr. 314/25-315/7. Rather, it was for the contracting officer to know. *Id.* In fact, the expired guidance that Mr. Jenkins testified to was a document "primarily internal to SBA." Trial Tr. 268/16-21. In other words, it was not something for the contractors to be using. It is difficult to imagine how a contractor can be held to have constructive knowledge of something not written in the Contract or the law.[14]

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[14] Plaintiff's citation to Trial Tr. 660-661 is misleading. Randy Sutton's testimony never agrees that C&D was not an otherwise successful offeror because it withdrew its offer. Rather, Mr. Sutton reiterated his belief that on the day of the bid he believed that the price preference wouldn't be applied because C&D was the low bidder. He later answered "no" when asked whether C&D was successful in their bid. However, Mr. Sutton never agreed that C&D was not considered to be the lowest otherwise successful offeror within the meaning of the HUBZone regulations because they withdrew their bid. That is a disingenuous comment.

Ultimately, Heard provided no testimony or evidence from the Navy about the Project award in this case; therefore, it is impossible as a legal matter to prove a "concrete move" by the Navy to award Heard the Project under any circumstances. In that regard, even if this Court had subject matter jurisdiction over this claim, which it does not, this Court cannot insert language into the Federal HUBZone regulations for the purpose of finding a contract expectancy. Further this Court cannot hold Defendants responsible for actual or constructive knowledge of words that are not included in the plain text of the statute. Therefore, the jury verdict should be set aside because there is no evidence that the Navy would have awarded the Contract to Heard or that Defendants knew about it.

5. The Punitive Damages In the Jury Verdict Should Be Set Aside Because There Is No Evidence Of Willful Or Wanton Conduct.

Plaintiff alleges that Defendants conduct was willful and wanton; however, Plaintiff bases these statements on the assumption that Heard had a right to the Contract – a fact which has never been established by a Court of competent jurisdiction. Plaintiff's Opposition relies on the Form 355; however, Mr. Sutton repeatedly testified that he filled out the form as of the time of the bid because that is how the question was posed to him by the SBA. Trial Tr. 214/2-12; Pl's Exh. 3. He further testified that the majority of the confusion related to the protest was Heard's inaccurate allegations in the size protest. Trial Tr. 218/20-221/3; Pl's Exh. 9.

Additionally, the SBA has the ability to make criminal referrals and seek fines against contractors for false statements. As evidenced by the testimony at trial, Defendants have never been fined by the SBA, imprisoned by the SBA, been liable for treble damages or civil penalties under the False Claims Act, been assessed double damages and civil penalties under the Program Fraud Civil Remedies Act, or been suspended or debarred. Trial Tr. 215/16-216/14. In other words, the Defendants have never been accused of any wrongdoing by the Government in connection with this Form 355.

Plaintiff's allegations that Mr. Sutton and the Defendants willfully disregarded Heard's rights during the size protest is another fundamental misunderstanding of federal procurement law. As discussed herein, an SBA size protest does not adjudicate the rights of one party compared with another, it merely issues a size determination.[15]. No matter when the size protest was determined, if Heard believed the award was based on an intentional

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[15] Since this project was an open procurement, large businesses were eligible to compete. Therefore, any adverse size determination would never have rendered them ineligible for award. *Delaney Const. Corp. v. United States,* 56 Fed. Cl. 470, 475 (2003) ("the post-award protest and small business size determination that [contract awardee's] certification was erroneous does not impact the legality of the prior award" because it was an open procurement); FAR 19.302(j) ("When a concern is found to be other than small under a protest concerning a size status representation a contracting officer may permit contract performance to continue, issue orders, or exercise option(s), because the contract remains a valid contract.").

violation of the HUBZone regulations, Heard's remedy was to seek injunctive relief at the Court of Federal Claims. 28 U.S.C. §1491(b). Heard did not need to wait for the size protest determination to file such a protest. *Id*. In fact, Heard admits that it discovered the "alleged fraud" as early as Sep. 25, 2012, yet Heard failed to seek such relief. *See* Exhibit 2, Plaintiff's Supp. Responses to Def. Ken Sutton's First Interrogatories No. 13. Defendants should not be punished for Heard's failure to follow the procedures in place for challenging the award, especially considering that the Court of Federal Claims could have reviewed the allegations of fraud in 2012 and taken any action on the Contract award at that time. Heard did not attempt to avail itself of the procedure available it to raise alleged fraud in connection with the Contract award. .

Moreover, as discussed herein, the basis of Plaintiff's lawsuit is an unwritten interpretation of the federal regulations. It is difficult to understand how Defendants could be assessed punitive damages for failing to comply with unwritten policies of the Small Business Administration. Accordingly, the jury verdict for punitive damages should be set aside in their entirety.

6. The Jury Verdict Should Be Set Aside As To I+Icon, ICI, and IIC Because There Is No Evidence That These Three Companies Had Any Involvement In the Bid, Protest, Or Project.

Without any caselaw support, Heard contends that the jury verdict should be upheld against IIC, ICI, and i+icon because they had the power to control

Waterfront Marine, a legal conclusion that directly contradicts precedent cited in Defendants' Motion. *See generally Blakely v. Austin-Weston Center for Cosmetic Surgery LLC,* 348 F. Supp. 2d 673 (2004) (holding that punitive damages against a hospital for the actions of a doctor are improper because punitive damages cannot be awarded against a master or principal for the wrongful act of his servant or agent in which he did not participate, and which he did not authorize or ratify.). Plaintiff cites no support that the 'power to control' standard for size affiliation in a size protest is used to impute liability for judgments.

The Complaint alleges that all of the Defendants got together and acted in concert to conceal Waterfront's size status and thwart Heard's alleged contract expectancy. Compl. ¶¶34, 45. However, no evidence at trial was presented to support those statements. In fact, the only evidence at trial demonstrated that the upstream entities (ICI, IIC, and i+icon) had no involvement with the bid, protest, or Project at all. Trial Tr. 717/9-24. Ms. Spear, the corporate designee for the upstream entities did not even talk to the Suttons about the bid or protest. Trial Tr. 714/4-13. There was no discussion at i+icon regarding Heard Construction's status as a HUBZone business. Trial Tr. 715/21-24. Further, the bid was not considered as part of the acquisition. Trial Tr. 709/20-24. Therefore, the jury verdict should be set aside with respect to ICI, IIC, and i+icon.

PRAYER FOR RELIEF

Defendants request that this Court set aside the jury verdict as against all Defendants for all direct,

consequential, and punitive damages. In the alternative, Defendants request that this Court set aside the jury verdict as against i+icon, ICI, and IIC for all direct, consequential, and punitive damages.

Respectfully submitted this 19th day of October, 20 17.

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[*Certificate of Service, Proposed Order and Exhibits Omitted in the Printing of this Appendix*]

APPENDIX J

SUPREME COURT OF VIRGINIA

Record No. 180666

[Filed May 17, 2018]

WATERFRONT MARINE CONSTRUCTION, INC. ET AL. *Defendant-Appellant,*	)
v.	)
HEARD CONSTRUCTION, INC., *Plaintiff-Appellee.*	)

Appeal from the Circuit Court
City of Chesapeake
Case Nos. CL14-2757, CL16-3150

PETITION FOR APPEAL

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TO THE HONORABLE CHIEF JUDGE AND JUDGES OF THE SUPREME COURT OF VIRGINIA:

ASSIGNMENTS OF ERROR

I. The Trial Court erred in denying Defendants' Motion to Set Aside the direct damages because they are unsupported, speculative, and rely on alleged documents that were never produced. [Error preserved in the signed and objected to Final Order; Defs.'s Mot. to Set Aside the Verdict 3-5; Defs.'s Reply Mot. to Set Aside the Verdict 2-6; Oral Arg. on Defs.'s Mot. to Set Aside the Verdict Tr.)Nov. 15, 2017) 18-20, 31-34; Trial Tr., vol. 2, 435:21-436:25 & vol. 3, 586:23-592:11, 743:6-744:6 (Aug. 14-18, 2017).]

I. The Trial Court erred in finding subject matter jurisdiction over this lawsuit because the Trial Court cannot interpret federal law or make a determination on the proper awardee on a federal contract. [Error preserved in the signed and objected to Final Order in Defs.'s Mot. to Set Aside the Verdict 8-12; Defs.'s Reply Mot. to Set Aside the Verdict 9-11; Oral Arg. on Mot. to Set Aside the Verdict Tr. (Nov. 15, 2017) 55-64, 72:17-75:11.]

II. The Trial Court erred in rejecting Defendants' subject matter jurisdiction argument as an untimely affirmative defense because Defendants' timely pled the appropriate affirmative defenses. [Error preserved in the signed and objected to Final Order in Defs.'s

Mot. to Set Aside the Verdict 9-11; Oral Arg. Tr. 59:13-60:3; 72-75.]

III. The Trial Court erred in denying Defendants' Motion to Set Aside the Verdict in its Entirety because the Plaintiff failed to present evidence that the Navy would have awarded Plaintiff the Project but for Defendants' actions. [Error preserved in the signed and objected to Final Order in Trial Tr., vol. 3, 592: 14-598:24, 744:7-753:8; Defs.'s Mot. to Set Aside the Verdict 12-14; Defs.'s Reply Mot. to Set Aside the Verdict 12-13.]

IV. The Trial Court erred in denying Defendants' Motion to Set Aside the Verdict in its Entirety because the Plaintiff failed to present evidence that Defendants' knew of Plaintiff's alleged contract expectancy, and in fact Plaintiff's own expert witness admitted that Defendants' would not know of any alleged contract expectancy. [Error preserved in the signed and objected to Final Order in Defs.'s Mot. to Set Aside the Verdict 12-14; Defs.'s Reply Mot. to Set Aside Verdict 12-13; Oral Arg. Tr. 76-77.]

V. The Trial Court erred in denying Defendants' Motion to Set Aside the Punitive Damages award because there was no evidence of willful or wanton conduct. [Error preserved in the signed and objected to Final Order in Trial Tr., vol. 3, 598:24-599:17, 753:7-14; Defs.'s Mot. to Set Aside the Verdict 14-15; Defs.'s Reply Mot. to Set Aside the Verdict 13-15; Oral Arg. Tr. 85-88, 91-92.]

VI. The Trial Court erred in excluding non-hearsay admissions against interest from evidence during the cross examination of Plaintiff's expert, and such exclusion was prejudicial because the factual statements were material on the issue of an alleged contract expectancy. [Error preserved Trial Tr. vol. 2, 320:2-323:4; Defs.'s Refused Ex. 36 & 37.]

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This is an appeal from a verdict in a jury trial in the Circuit Court of the City of Chesapeake (the Trial Court) on August 14, 2017 to August 17, 2017, finding in favor of the Heard Construction, Inc. (Plaintiff) on its Tortious Interference with a Contract Expectancy claim against Waterfront Marine Construction, Inc. et al. (Waterfront or Defendants) and the partial denial of Defendants' Motion to Set Aside the Verdict by the Honorable Timothy Wright.

Plaintiff filed its original Complaint on November 12, 2014. Two of three counts were dismissed on Defendants' demurrer. After multiple amended complaints and additional demurrers, only the tortious interference claim survived. Defendants issued requests for production of documents and interrogatories throughout 2015 and 2016 seeking to identify documents created by Plaintiff in connection with its bid. In response, Plaintiff produced a bid spreadsheet. This was the only document Plaintiff produced that was created in connection with Plaintiff's bid. However, several years after the bid, and years into this litigation, Plaintiff created a "Damages

Worksheet" which claimed more than twice the profit shown in the bid worksheet created at the time of the bid. The Damages Worksheet represents damages not supported by any contemporaneous evidence.

Plaintiff nonsuited the original action on November 22, 2016 and refiled its Complaint on December 21, 2016. The parties entered a consent order stipulating that all discovery conducted in the nonsuited action would have the same force and effect in the refiled action. Two weeks before trial, Plaintiff produced a new version of its litigation-created Damages Worksheet, and introduced that new Damages Spreadsheet into evidence at trial over Defendants' objection. Defendants' made several Motions to Strike at the close of Plaintiff's case in chief and again at the close of evidence. All were denied. The jury returned a verdict in favor of the Plaintiff.

Defendants filed a Motion to Set Aside the Jury Verdict on September 7, 2017. The Trial Court heard arguments regarding the Motion to Set Aside the Jury Verdict on November 15, 2017. On January 10, 2018, Judge Wright set aside approximately two-thirds of the jury verdict and dismissed three of the six defendants from the case. Specifically, Judge Wright set aside all of the consequential damages alleged by Plaintiff, reduced the punitive damages to the statutory cap, and dismissed three companies related to Waterfront, against whom no evidence of tortious interference had been presented. However, Judge Wright denied Defendants' Motion as to direct damages and punitive damages, and denied Defendants' arguments related to subject matter jurisdiction and Plaintiff's failure to

present evidence of a contract expectancy or knowledge by the defendants of the same. A final order was entered on February 20, 2018. Defendants timely filed their Notice of Appeal on February 21, 2018.

STATEMENT OF FACTS

The U.S. Navy issued an invitation for bids for the Contract underlying this dispute in 2012. The Project was an open procurement, which means that any business – large or small – was eligible to bid and perform the Project. Trial Tr. vol. 2, 303:16-304:14. Relevant to this litigation, qualified HUBZone contractors could receive a 10% price preference, although that preference did not apply against a company, which had the lowest bid and was also a small business under applicable U.S. Small Business Administration (SBA) regulations. Defs.'s Ex. 15. Bids were due at 2 pm Eastern Time on September 25, 2012. Trial Tr. vol 2, 415:16-21. Waterfront submitted a bid. Pl.'s Ex. 1. The lowest bidder was C&D Construction (C&D), a small business. Pl.'s Ex. 1; Trial Tr. vol 1, 120:24-121:5, 123:12-124:8. Waterfront, a Defendant in this litigation, was the second low bidder. *Id.* PreCon Marine Construction was the third low bidder. *Id.* Plaintiff was the fourth low bidder. *Id.* The Navy's Contracting Officer ranked the bidders as described above and identified C&D as the apparent awardee because it was a small business, meaning that the HUBZone price preference did not apply against C&D. Pl.'s Ex. 1; Defs.'s Ex. 15.

By September 28, 2012, three days after the bids were submitted and the Navy declared C&D the apparent awardee, C&D withdrew its bid. On

September 28, 2012, the Navy circulated an abstract of offers and requested all remaining bidders confirm their bid price. Pl.'s Ex. 2. Following this process, on September 30, 2012, the Navy awarded Waterfront the Contract due to its status as the second lowest bidder. Pl.'s Ex. 1. Following the Navy's award, Plaintiff filed a "size protest" against Waterfront with the SBA, claiming that Waterfront should be declared a large business due to its recent acquisition by a large business, and further claiming that under the HUBZone regulations Plaintiff, the fourth-lowest bidder, should have been awarded the Contract. Pl.'s Ex. 3.

Relevant to this appeal, Plaintiff never filed a "bid protest" at the Court of Federal Claims to challenge the award of the Contract, despite being aware of the process. Trial Tr. vol 2, 451:20-452:11. If Plaintiff had filed a bid protest in 2012 at the Court of Federal Claims and proven the same claims based on the same facts it brought to the Trial Court, it could have received an injunction against Contract performance and other relief as determined by the Court, including but not limited to award of the Contract to Plaintiff. Instead, Plaintiff pursued two years of size protest administrative proceedings before the SBA, which is a federal agency that had no authority to provide injunctive or contract award relief. The SBA ultimately ruled that Waterfront should be considered a large business, but did not make any findings as to whom the Navy should have awarded the Contract Pl.'s Ex. 11. In fact, Plaintiff itself admits that it never received any indication from the Navy that it would have received the award if Waterfront had not received it, which is

highly relevant since another small business was the third low bidder, while Plaintiff was the fourth low bidder. Trial Tr. vol 2, 457:5-9. The SBA also did not find that Waterfront had acted fraudulently, in bad faith, or with any improper motive in connection with its bid, despite being urged by Plaintiff to make such a finding. Pl.'s Ex. 11. Evidently unsatisfied with this result, more than two and a half years after the bid opening, Plaintiff filed this lawsuit alleging it was entitled to the Contract and Defendants tortiously interfered with the Contract at issue.

SUMMARY OF ARGUMENT

At the core of this lawsuit are allegations that a federal construction contract was improperly awarded to Waterfront, and that the Plaintiff would have received the contract award but-for the improper award to Waterfront. The Federal Acquisition Regulation (FAR), Tucker Act, 28 U.S.C. § 1491 (2016), and bid protest regulations, 4 C.F.R. §§ 21.0-21.14 (1996), are in place to provide relief for this exact fact pattern. And, as relevant to this litigation, the Tucker Act establishes that the only Court with subject matter jurisdiction over a federal contract award dispute is the Court of Federal Claims.[1] As a result, no other trial court is capable of determining if a federal contract award was improper or if a disappointed

[1] A disappointed bidder may also file an administrative agency protest with either the federal procuring agency or the U.S. Government Accountability Office (GAO), although decisions issued by these agencies are advisory only and can be appealed to the Court of Federal Claims.

bidder/plaintiff was required to receive the contract award by the federal procuring agency.

The Plaintiff did not follow the required procedures to challenge the award of this contract. In fact, the Plaintiff never filed a bid protest and there has never been a determination from a court of competent jurisdiction that Waterfront was improperly awarded the Project.[2] Instead, Plaintiff waited more than two and a half years after bids were submitted and award was made to file a lawsuit for tortious interference with a contract expectancy. Plaintiff's lawsuit is a bid protest couched in terms of a tortious interference filed in a court without jurisdiction to adjudicate a bid protest. Moreover, Plaintiff's claim of a contract expectancy rests on a complicated leapfrog scheme pursuant to an alleged-but-unwritten SBA policy that is not found in the actual text of the regulations.

In addition to Plaintiff's failure to file suit in the only court which could provide relief for its claims, Plaintiff failed to present testimony by the Navy's contracting officer to support its claim of a contract expectancy. Instead, Plaintiff offered expert testimony by a former SBA official to opine on what the Navy's contracting officer might have done if she had followed the expert witness's interpretation of complicated SBA regulations. In doing so, Plaintiff's expert presumes that the Navy's contracting officer was not aware of the

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[2] As noted, Plaintiff filed a size protest, which is distinct. *White Hawk Grp., Inc. v. United States,* 91 Fed. Cl. 669, 673 (2010) ("Despite the similar label, "size protests" bear no relation to bid protests.")

relevant facts and his interpretation of SBA regulations. There is no evidence in the record to establish this. Given that the expert's testimony relied on expired, internal SBA guidance and unwritten policies, it may be that the Navy's contracting officer was fully aware of the facts and regulations as presumed by Plaintiff's expert, and simply disagreed with his interpretation. That would certainly provide a logical explanation as to why she awarded the contract to Waterfront and directed Waterfront to perform the contract, despite the fact that she was aware of the size protest proceedings and aware of Plaintiff's claims of impropriety. Whatever Plaintiff's motives or strategy, only the Navy's contracting officer could have testified in support of a contract expectancy, not a retired SBA employee who was not involved in the contract award.

The Trial Court also prevented Defendants from fully cross-examining Mr. Calvin Jenkins, Plaintiff's SBA witness, because the Court erroneously excluded Plaintiff's admission against interest regarding the lowest responsible, responsive bidder (and hence the proper award to Waterfront as the second low bidder). In his testimony, Mr. Jenkins admits that Waterfront would not have known about this alleged re-evaluation scheme under SBA regulations (and therefore contract expectancy), thereby making it impossible for Plaintiff to prove its case.

Finally, during discovery, Defendants sought all documents Plaintiff intended to rely upon for its damages at trial. Plaintiff identified only one contemporaneous document, a bid spreadsheet, during the first three years of this pending litigation. Late in

this litigation, and at trial, Plaintiff created and relied upon a damages document which more than doubled its alleged lost-profit from what was shown on the actual bid spreadsheet Plaintiff created at the time it was bidding. In doing so, Plaintiff relied on other "records" that were never produced to Defendants for review and cross-examination, and estimates based on memory that are not supported by any contemporaneous documents or information. Such hidden records and estimates cannot support a verdict.

For the foregoing reasons, the Trial Court lacked subject matter jurisdiction to adjudicate this dispute and erroneously excluded relevant non-hearsay evidence. Additionally, the Trial Court erred in finding sufficient evidence to support a contract expectancy, knowledge of a contract expectancy, direct damages, and punitive damages. Therefore, the Trial Court's ruling should be vacated and the case dismissed. In the alternative, the Trial Court's ruling should be vacated and the case remanded for a new trial.

ARGUMENT

I. The Trial Court erred in denying Defendants' Motion to Set Aside the direct damages because they are unsupported, speculative, and rely on alleged documents that were never produced. [Error preserved in the signed and objected to Final Order in Defs.'s Mot. to Set Aside the Verdict 18-20, 31-34; Trial Tr. vol. 2, 435:21-436:25 & vol. 3, 586:23 592:11, 743:6-744:6.]

Plaintiff's alleged direct damages are unsupported, speculative, and rely on documents never produced. In

Virginia, lost profits may only be recovered if they are capable of reasonable ascertainment and are not uncertain, speculative, or remote. *See Hop-In Food Stores, Inc. v. Serv-N-Save, Inc.,* 247 Va. 187, 190, 440 S.E.2d 606, 608 (1994); *see also Integrity Auto Specialists, Inc. v. Meyer,* No. CL10-114, 2011 WL 5830242 (Va. Cir. Ct. June 28, 2011) (finding that presentation of gross revenues was insufficient to warrant award of damages). Speculation and conjecture cannot form the basis of a recovery. *Isle of Wight County v. Nogiec,* 281 Va. 140, 147, 704 S.E.2d 83, 85-86 (2011) (finding plaintiff's evidence insufficient to support a jury verdict where the only evidence of lost reputation damages and lost income damages was plaintiff's testimony about what he believed he had been damaged based on his own estimates).

In fact, the Supreme Court of Virginia has specifically held that an assumption made at bid time of estimated profit is insufficient to support an award. *ADC Fairways Corp. v. Johnmark Constr., Inc.,* 231 Va. 312, 318, 343 S.E.2d 90, 93 (1986) ("Lost profits should not have been awarded because they were completely speculative. The $47,781.13 figure was nothing more than the profit Johnmark hoped to make at the time of the bid. There was no evidence to establish that this is the profit that would have been made had Johnmark completed the project.").

In *ADC Fairways,* lost profits were awarded to Johnmark for ADC's breach of contract in rehabilitating condominium units. *Id.* at 317, 92. At the time of the breach, there were 171 remaining units and Johnmark sought lost profits on the unperformed work.

Id. The president of Johnmark testified to the number of units at issue in the case, the price of rehabilitation per unit, and the built-in profit of fifteen percent per unit – the profit he figured when he bid the job. *Id.* On appeal, this Court found his anticipated profit to be speculative. *Id.* In particular, the Court relied on the fact that he had no documents or records to support his per unit expenses and that this profit was merely what Johnmark *"anticipated he would make"* for this work. *Id.* (emphasis in original). This Court expressly held that this anticipated profit was not sufficient to meet the "reasonable certainty" test. *Id.*

Much like *ADC Fairways,* Plaintiff's claim of lost profit is entirely speculative – based exclusively on unsupported anticipated profit at the time of the bid. At trial, Plaintiff offered no evidence or testimony to establish how he derived his profit figures. While Plaintiff's bid spreadsheet shows a total profit of $391,103.97, it claimed $887,158.00 in direct lost profit damages at trial. *Compare* Pl.'s Ex. 45 *with* Pl.'s Ex. 46. The "damages worksheet" used by Plaintiff in arriving at the claimed number presented to the jury at trial, over Defendants' objection, was created solely for purposes of this litigation and was not supported by any historical evidence, contrary to the accepted

methods of proving lost profit in Virginia.[3] *See* Pl.'s Ex. 45.[4]

Mr. Jason Heard's testimony and "damages worksheet" identify in general terms two separate categories of anticipated profit. The first is general contracting profit and the second is an alleged concrete profit that is hidden somehow in the bid. Trial Tr. vol. 2, 439: 18-440:1. And in remarkable similarity to *ADC Fairways,* Plaintiff has no contemporaneous documentation for these hidden concrete profits. In fact, Mr. Heard stated that the concrete profits could not be identified on the bid spreadsheet. Rather, they were what he anticipated, based on scratch sheets that he could not find. Trial Tr. vol. 2, 466:5-18. The

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[3] *See Preferred Sys. Sols., Inc. v. GP Consulting, LLC,* 284 Va. 382, 400, 732 S.E.2d 676, 685-86 (2012) ("[C]alculation of lost profits based on the track records of profits in established companies has long been an accepted method of estimating damages awards.").

[4] Plaintiff's Trial Exhibit 45 is an entirely made-up document for trial and was not presented prior to Jason Heard's deposition. Plaintiff's Trial Exhibit 45 was given to Defendants on July 29, 2017, two weeks before trial. *See* Defs.'s Reply Mot. to Set Aside the Verdict, Ex. 3. A prior version of Plaintiff's Exhibit 45 was produced to Defendants on August 5, 2016, several months *after* Mr. Heard's deposition. *See* Defs.'s Reply Mot. to Set Aside the Verdict, Ex. 4. Defendants did not have an opportunity to question Mr. Heard on either version of Plaintiff's Trial Exhibit 45 prior to the hearing in this case. Moreover, the first time any version of Exhibit 45 was created was over four years after the bid. It is hard to imagine any reasonable basis for allowing this document into evidence as support for direct damages; however, it was admitted over Defendants' objection. Trial Tr., vol. 2, 435:21-436:7; Defs.'s Mot. to Set Aside the Verdict 18-20, 31-34; Defs.'s Reply Mot. to Set Aside the Verdict 5-6.

similarity to *ADC Fairways* is underscored by the fact that Mr. Heard admitted profit can fluctuate, and that one can anticipate making money on a job and actually end up losing money on the job. Trial Tr. vol. 2, 452:16-18, 467:24-468:6. Additionally, Mr. Heard's estimate of anticipated profit does not consider any potential problems on the Project. Nor does Mr. Heard's estimate of anticipated profit consider the known soil issues that actually did occur on this Project. Trial Tr. vol. 2, 468:16-20.

Moreover, the Plaintiff's damages worksheet for direct damages requires the court to consider overhead as profit. Without any documents to support his testimony, Mr. Heard testified that he covered his overhead that year and thus any money brought in as overhead would have been considered profit. Trial Tr. vol. 2, 437:19-22. This is, of course, nonsense from an accounting standpoint. When questioned *how* he knew that, he responded that he "can look back in [his] records." Trial Tr. vol. 2, 453:1-7. These records, however, were never produced to Defendants' despite being sought in discovery requests. *See* Defs.'s Reply Mot. to Set Aside the Verdict, Ex. 4 (Pl.'s Resp. to Defs.'s Second Interrogs. No. 17 & Pl.'s Resp. to Defs.'s Third Doc Requests No. 1). As such, reliance on them for damages is improper and renders Mr. Heard's claimed damages unsupported and remote.

While recognizing the tenuous nature of Plaintiff's alleged damages, the Trial Court erroneously denied Defendants' Motion to Set Aside the Jury Verdict with respect to direct damages. In doing so, the Trial Court relied on precisely the type of testimony held to be

insufficient in *ADC Fairways*. The Trial Court recognized that Mr. Heard's bid spreadsheet showed only $391,103.97 in profit, yet simultaneously allowed an unsupported direct damages verdict of $887,150.00 in lost profit based solely on Mr. Heard's testimony of his recollection of what he anticipated he would make in the Project. *See Heard Constr., Inc. v. Waterfront Marine Constr. Co., et al.,* No. CL16-3150, Order on Defs.'s Mot. to Set Aside the Verdict 3 (Jan. 10, 2018) [hereinafter Order on Defs.'s Mot.]. This ruling is directly contrary to binding precedent from this Court and is reversible error.[5]

II. The Trial Court erred in finding subject matter jurisdiction over this lawsuit because the Trial Court cannot interpret federal law or make a determination on the proper awardee on a federal contract. [Error preserved in the signed and objected to Final Order in Defs.'s Mot. to Set Aside the Verdict 8-12; Defs.'s Reply Mot. to Set Aside the Verdict 9-11; Oral Arg. Tr. 55-64, 72:17-75:11.]

This Trial Court should have set aside the jury verdict because the Trial Court does not have subject matter jurisdiction to interpret federal contract law or determine the proper awardee of a federal contract –

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[5] The Trial Court's ruling is all the more egregious because Plaintiff had previously represented to the Trial Court that the bid spreadsheet is not a reflection of what Plaintiff was going to do on the Project. *See* Pl.'s Opp'n to Defs.'s Mot. for Summ. J. 2; Trial Tr. vol. 2, 421:24-422:8. In other words, the Trial Court upheld the jury verdict on Mr. Heard's testimony of estimated lost profit based on a bid spreadsheet that was not even reflective of anticipated performance. Such a verdict cannot stand.

this action must be adjudicated by the Court of Federal Claims. Subject matter jurisdiction exists in the courts only when it has been granted by a constitution or statute. *In re Commonwealth of Virginia,* 278 Va. 1, 11, 677 S.E.2d 236, 240 (2009). A judgment or order entered by a court that lacks jurisdiction of the subject matter is a nullity. *Morrison v. Bestler,* 239 Va. 166, 169-70, 387 S.E.2d 753, 755 (1990); *Humphreys v. Commonwealth,* 186 Va. 765, 43 S.E.2d 890 (1947); *Barnes v. American Fertilizer Co.,* 144 Va. 692, 705, 130 S.E. 902, 906 (1925); *Virginian-Pilot Media Companies, LLC v. Dow Jones & Co.,* 280 Va. 464, 467-68, 698 S.E.2d 900, 901-02 (2010).

Subject matter jurisdiction cannot be waived or conferred on the court by agreement of the parties. *Lucas v. Biller,* 204 Va. 309, 313, 130 S.E.2d 582, 585 (1963). A defect in subject matter jurisdiction cannot be cured by reissuance of process, passage of time, or pleading amendment. While a court always has jurisdiction to determine whether it has subject matter jurisdiction, a judgment on the merits made without subject matter jurisdiction is null and void. *Barnes,* 144 Va. at 705, 130 S.E. at 906. Likewise, any subsequent proceeding based on such a defective judgment is void or a nullity. *Ferry Co. v. Commonwealth,* 196 Va. 428, 432, 83 S.E.2d 782, 784 (1954); *Morrison,* 239 Va. at 169-70, 387 S.E.2d at 755-56 (1990). Further, the lack of subject matter jurisdiction can be raised at any time in the proceedings, even for the first time on appeal by the court *sua sponte. Thacker v. Hubard,* 122 Va. 379, 386, 94 S.E. 929, 930 (1918).

Under the Virginia Code and the United States Code, subject matter jurisdiction for this case rests with the Court of Federal Claims, not Virginia state courts. Title 17 of the Virginia Code gives Virginia trial-level courts the right to decide civil cases, except those that fall under another court's jurisdiction. Va. Code Ann.§ 17.1-513 (2015). In this case, resolution of Plaintiff's claim requires an interpretation of a federal regulation and alleged improprieties in contract award – acts reserved exclusively for the Court of Federal Claims. *See* 28 U.S.C. § 1331 (2016) (giving the federal district courts original jurisdiction over all civil actions arising under the laws of the United States); 28 U.S.C. § 1491(b)(l) ("[T]he United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting . . . to the award of a [Federal] contract or any alleged violation of statute or regulation in connection with a procurement . . . ."); *Distributed Solutions, Inc. v. United States,* 539 F.3d 1340, 1344 (Fed. Cir. 2008) (finding that Section 1491 "confers **exclusive** jurisdiction") (emphasis added). In that regard, the only court that can determine the proper awardee of a federal procurement is the Court of Federal Claims. 28 U.S.C. § 1491.[6]

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[6] While the text of Section 1491 includes federal district courts, the Administrative Dispute Resolution Act (ADRA), which amended the Tucker Act, included a sunset provision that jurisdiction of the federal district courts would expire on January 1, 2001 unless otherwise extended by Congress. *See* Pub. L. No. 104-320, 110 Stat. 3870 (1996) ("The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code . . . shall terminate on January 1, 2001 unless extended by Congress."). Congress did not extend the

Plaintiff sued Defendants, alleging tortious interference with a contract expectancy. The first element of proof required is a contract expectancy. *Maximus v. Lockheed Info. Mgmt. Sys.* Co., *Inc.,* 254 Va. 408, 414, 493 S.E.2d 375, 378 (1997). Plaintiff's Complaint relies on the federal HUBZone program and the evaluation thereof for its alleged contract expectancy. *See, e.g.,* Compl. ¶ 31. Further, Plaintiff's Complaint alleges improprieties in the award of the Navy Contract. Compl. ¶¶ 46-47. Thus, based on the allegations in the Complaint, the Court of Federal Claims is the appropriate court for this action.

Federal bid protest procedures are in place to challenge a contract award when there are alleged improprieties – a process which Plaintiff did not pursue. A disappointed bidder who files a bid protest can seek injunctive relief to prevent the contract from moving forward. *See* 28 U.S.C. § 149l(b)(2) (giving the Court of Federal Claims the power to award in bid any protests "any relief that the court considers proper, including declaratory and injunctive relief"). Therefore, as soon as Plaintiff believed that the award was improper,[7] Plaintiff was required by federal law to file

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deadline. As the Federal Circuit has explained, "it is clear that Congress's intent in enacting the ADRA with the sunset provision was to vest a single judicial tribunal with exclusive jurisdiction to review government contract protest actions." *Emery Worldwide Airlines, Inc. v. United States,* 264 F.3d 1071, 1079 (Fed. Cir. 2001).

[7] *See* Defs.'s Reply Mot. to Set Aside the Verdict, Ex. 2 (Pl.'s Supp. Resp. to Def. Ken Sutton's First Interrog. No. 13 stating Plaintiff

a bid protest if it wanted to challenge and enjoin an allegedly improper contract award based on a violation of HUB Zone regulations. Plaintiff, a presumably sophisticated HUBZone contractor, understands this process. Trial Tr. vol. 2, 451:8-452:11.

Plaintiff never filed a bid protest challenging the award of this Project. Plaintiff relies on a size protest instead. However, the two are different. A size protest is filed with the SBA asking for a determination of size status. The SBA does not (and did not in this case) make a determination regarding the propriety of a contract award or the rights of each party. Trial Tr. vol. 1, 221:4-222:8, 348:5-11; Pl.'s Ex. 11; *see also, White Hawk Grp., Inc. v. United States,* 91 Fed. Cl. 669, 673 (2010) ("A size protest is a purely administrative claim before the SBA in which a small business concern ... objects to the size determination of another offeror. ... 'size protests' bear no relation to bid protests."). Even Plaintiff's expert witness, Mr. Jenkins agrees that SBA's sole purpose is to determine size status. Trial Tr. vol. 2, 348:5-23.

By contrast, a bid protest is filed to challenge the award of a project. *See* 28 U.S.C. § 1491(b)(1) (A bid protest is "an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award ***or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.")***

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believed there were improprieties as of the day of the bid, September 25, 2012).

(emphasis added). Plaintiff's tort lawsuit against Defendants is nothing more than an attempt to circumvent the statutes and regulations governing bid protests and federal contract awards, simply because it apparently didn't like the result it got from the size protest proceeding.

Further underscoring this Court's lack of subject matter jurisdiction is the fact that the Plaintiff did not call anyone from the Navy to testify. In the absence of calling Tina Rule, the Navy Contracting Officer responsible for awarding the Contract, Plaintiff's case relies on Mr. Calvin Jenkins' *interpretation* of the *federal* HUBZone regulations.[8] The Trial Court has no jurisdiction to make any such interpretation as to what the Navy would have done or of the laws under which the Navy makes that decision. As a result, the verdict premised on such an interpretation is null and void.

Further, Plaintiff's failure to file a bid protest moots its ability to challenge the propriety of the award at this time. *See Nat. Telecommuting Inst., Inc. v. United States,* 123 Fed. Cl. 595, 602 (2015) (stating that a plaintiff who "sit[s] on his rights in bringing a bid protest while the Government moves forward with a contract" cannot recover). The Trial Court does not have the ability to review the Navy's actions or inactions. Similarly, the Trial Court does not have the ability to direct the Navy to award the Project to

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[8] Notably, Mr. Jenkins has never worked for the Navy; therefore, he cannot even testify to the Navy's procedure. His entire testimony is based on his experience with the SBA – a federal agency with no ability to award the Contract at issue.

Plaintiff (or anyone). In that regard, the Trial Court has no ability to interpret if the Navy would have awarded a contract to Plaintiff under federal law and whether such action was proper. Such a judicial review of an alleged improper contract award is reserved for the Court of Federal Claims.

The Trial Court recognized its inability to re-award a federal contract, or direct award of such, yet denied Defendants' Motion to Set Aside the Verdict for lack of subject matter jurisdiction. *See* Order on Defs.'s Mot. 3-5. In doing so, the Trial Court found that Plaintiff's claim was not a bid protest to be brought under the Tucker Act, but rather a state claim. The Trial Court relied on *GTSI Corp. v. Wildflower Int'l, Inc.,* No. 1:09CV123 (JCC), 2009 WL 2160451, at *5 (E.D. Va. July 17, 2009). This reliance, however, is misplaced. The ruling in *GTSI* came at the motion to dismiss stage and even then the Court expressly recognized "that litigants may improperly use state causes of action to take a second (or belated first) bite at a federal procurement challenge." *Id.* The Court was constrained at the Motion to Dismiss stage by the allegations of improper bidding and affiliation as state law claims. The Court, however, also recognized that if the allegations required the Court "to make legal findings reserved exclusively to administrative or other executive agencies – such that this Court lacks all power to make them – then summary judgment may be the proper remedy." *Id.*

The facts in this case fall squarely into this category. The lawsuit alleges that Plaintiff would have been awarded the Contract by the Navy but for

Defendants actions. Compl. ¶¶ 31 & 46-47. There are only two ways to prove that the Contract would have been awarded to Plaintiff under the complicated scheme alleged: (1) the Contracting Officer responsible for award could testify or (2) the Court of Federal Claims could make a finding that Plaintiff was the proper awardee. The Plaintiff did not call the Contracting Officer as a witness in this case and did not file a bid protest with the Court of Federal Claims. The Trial Court does not have subject matter jurisdiction to opine on what a Contracting Officer would have done in the absence of her testimony or interpret Federal regulations to determine whom should be awarded a federal government contract. Yet the Trial Court could only find a tortious interference with a contract expectancy in this case by doing so. Since such a determination is required to resolve this case, any attempt to resolve it in state court (rather than through the bid protest process set forth in the 28 U.S.C. § 1491(b)(1)) is an improper attempt to take a "second bite (or belated first bite) at the apple." *GTSI,* 2009 WL 2160451, at *5.

III. The Trial Court erred in rejecting Defendants' subject matter jurisdiction argument as an untimely affirmative defense because Defendants timely pled the appropriate affirmative defenses. [Error preserved in the signed and objected to Final Order in Defs.'s Reply Mot. to Set Aside the Verdict 9-11; Oral Arg. Tr. 59:13-60:3, 72-75.]

The Trial Court also rejected Defendants' subject matter jurisdiction argument by erroneously

characterizing Defendants' subject matter jurisdiction argument as an untimely affirmative defense. Order on Defs.'s Mot. 3-5. In doing so, the Trial Court relies on *New Dimensions, Inc. v. Tarquini,* 286 Va. 28, 35-36, 743 S.E.2d 267, 271-72 (2013). As addressed in Argument II above, the Trial Court lacked subject matter jurisdiction; however, even if Defendants' allegations are properly characterized as an affirmative defense, Defendants pled as much. Therefore, the Court's allegation of untimeliness and rejection of Defendants' argument is error. Specifically, Defendants' Answer and Affirmative Defenses identifies both (1) failure to state a claim upon which relief can be granted and (2) laches. Each of these defenses encompasses Plaintiff's failure to timely and properly file a bid protest to contest the award of the Project and allege improprieties in such award. *See Nat. Telecommuting Inst.,* 123 Fed. Cl. at 602 (relying on the doctrine of laches to bar a claim after a six month delay); *see also Global Dynamics, LLC v. United States,* No. 17-1875C, 2018 WL 1312051 at *9-10 (Fed. Cl. Mar. 14, 2018) (finding that a year delay was sufficient to bar plaintiff's claim). Therefore, the Trial Court erred in denying Defendants' Motion to Set Aside the Verdict.

IV. The Trial Court erred in denying Defendants' Motion to Set Aside the Verdict in its Entirety because the Plaintiff failed to present evidence that the Navy would have awarded Plaintiff the Project but for Defendants' actions. [Error preserved in the signed and objected to Final Order in Trial Tr. vol. 3, 592:14-598:24, 744:7-753:8; Defs.'s Mot. to Set Aside the Verdict 12-

14; Reply to Motion to Set Aside the Verdict at 12-13.]

It is well-established under Virginia law that a contract expectancy requires proof of a specific existing contract or expectancy between two parties based upon a "concrete move in that direction." *Gov't Emps. Ins. Co. v. Google, Inc.,* 330 F. Supp. 2d 700, 705-06 (E.D. Va. 2004). The contract expectancy underpinning a tortious interference claim cannot be purely speculative. *See Masco Contractor Servs. East, Inc. v. Beals,* 279 F. Supp. 2d 699, 709-10 (E.D. Va. 2003) ("[T]he first element that a party claiming under either of these torts must prove is the existence of some specific contract or relationship. Failure to allege any specific, existing economic interest is fatal to the claim.").

Plaintiff provided no testimony or evidence from the Navy about the Project award in this case; therefore, it is impossible as a legal matter to prove a "concrete move" by the Navy to awarding Plaintiff the Project under any circumstances. In fact, Plaintiff admits that he had no communication from the Navy supporting the contention that the Plaintiff would have been awarded the contract. Trial Tr. vol. 2, 457:5-9. Rather Plaintiff attempted to circumvent its burden of proof by calling a witness retired from the SBA to discuss his interpretation of the federal regulations.[9]

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[9] Ironically, Plaintiff did not even use the actual federal regulations in Mr. Jenkins' direct testimony – they used expired guidance from the SBA instead, over Defendants' objections. Trial Tr. vol. 1, 267:4-271:18; Pl.'s Ex. 27. It is difficult to understand how the Trial Court could determine that the jury had sufficient

Ironically, Mr. Jenkins agreed that if C&D were considered the lowest responsive responsible offeror, the price preference would not apply in this case. Trial Tr. vol. 2, 319:22-320. As of the day of the bid, Mr. Jenkins agrees that C&D was the low bidder. Trial Tr. vol. 2, 305:2-4. As of bid day, Mr. Jenkins agrees that no leapfrog would occur regardless of Waterfront's size. Trial Tr. vol. 2, 305:9-307:6. Moreover, the bid abstract shows that the HUBZone price preference evaluation was performed on the day of the bid. Pl.'s Ex. 1.

Without any documented support, the entirety of Plaintiff's alleged "contract expectancy" rests on Mr. Jenkins' testimony that after C&D withdrew from the bid, the Navy has an unwritten requirement to reevaluate all of the bidders – a statement that has zero support in the text of the regulations. Trial Tr. vol. 2, 313:17-314:24. The plain language of the HUB Zone regulations do not contemplate a reevaluation at any point. Defs.'s Ex. 15; Trial Tr. vol. 2, 326:5-9. Mr. Jenkins admitted that the reevaluation is not written in the text of the regulation. Trial Tr. vol. 2, 313:17-314:24. The regulations do not expressly state, nor even suggest that any reevaluation of the bids occur at any point in an award (and this Court does not have subject matter to interpret the federal regulations, as discussed in Argument II). Similarly, the expired guidance cited by Plaintiff in its case in chief does not allow for or even suggest that a reevaluation can occur. Pl.'s Ex. 27 (admitted over Defendants' objection).

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evidence to find in favor of the Plaintiff when the Plaintiff fails to produce anyone from the Navy and relies on expired guidance, internal to the SBA.

Any third party testimony from a non-Navy witness alleging that the Contracting Officer would have reevaluated the bids five days later cannot form the basis for a contract expectancy because it is too speculative and has no showing of a "concrete move in that direction." *Gov't Emp. Ins. Co.*, 330 F. Supp. 2d at 705-06. Therefore, the Trial Court's denial of Defendants' Motion to Set Aside the Verdict was error.

V. The Trial Court erred in denying Defendants' Motion to Set Aside the Verdict in its Entirety because the Plaintiff failed to present evidence that Defendants knew of Plaintiff's alleged contract expectancy, and in fact Plaintiff's own expert witness admitted that Defendants would not know of any alleged contract expectancy. [Error preserved in the signed and objected to Final Order in Defs.'s Mot. to Set Aside the Verdict 12-14; Defs.'s Reply Mot. to Set Aside the Verdict 12-13; Oral Arg. Tr. 76-77.]

The second element of proof required for a claim of tortious interference with a contract expectancy is knowledge by the Defendant of the contract expectancy. *Maximus,* 254 Va. at 414, 493 S.E.2d at 378 (1997). Even if this Court believes that Mr. Jenkins' "reevaluation" is credible, it is not documented anywhere in the regulations or SBA guidance. If the entire premise of Plaintiff's contract expectancy rests on an unwritten interpretation of the federal regulations, it is legally and factually impossible for Defendants to have known about it.

In other words, the Trial Court erroneously found knowledge by Defendants of an alleged contract

expectancy based on an unwritten process. Mr. Jenkins agrees that the unwritten reevaluation process was "not for [Defendants] to know." Trial Tr. vol. 2, 314:25-315:7. Rather, "it's for the contracting officer to decide who is in line for the award and what proper preferences should be applied." Trial Tr. vol. 2, 315:5-7. In fact, the expired guidance that Mr. Jenkins testified to was a document "primarily internal to SBA." Trial Tr. vol. 1, 268:16-21. In other words, it was not something contractors would use or even be aware of. It is difficult to imagine how a contractor can be held to have constructive knowledge of something not written in the Contract or the law.

Since Defendants could not know of any such reevaluation, they could not possibly know of Plaintiff's alleged contract expectancy. In that regard, Mr. Jenkins' testimony is both insufficient to support Plaintiff's claim of an alleged contract expectancy and simultaneously defeats Plaintiff's claim by relying on unwritten, unknown practices. Therefore, the Trial Court erred in denying Defendants' Motion to Set Aside the Jury Verdict.

VI. The Circuit Court erred in denying Defendants' Motion to Set Aside the Punitive Damages award because there was no evidence of willful or wanton conduct. [Error preserved in the signed and objected to Final Order in Trial Tr., vol. 3, 598:24-599:17, 753:7-14; Defs.'s Mot. to Set Aside the Verdict 14-15; Defs.'s Reply Mot. to Set Aside the Verdict 13-15; Oral Arg. Tr. 85-88, 91-92.]

The imposition of punitive damages is not favored generally and because punitive damages are in the nature of a penalty, they should be awarded only in cases of "the most egregious conduct." *Simbek, Inc. v. Dodd-Sisk Whitlock Corp.,* 257 Va. 53, 58, 508 S.E.2d 601, 604 (1999). When punitive damages are tied to a claim of interference with a business expectancy, they are only proper if the acts are done "with malice or wantonness." *Id.* (noting that the defendant "violated unwritten trade customs or ethical practices" but that despite the tortious interference and violation of trade standards, the violations were insufficient to justify imposition of punitive damages). In fact, in Virginia, the standard for establishing punitive damages "is beyond even gross negligence." *Doe v. Isaacs,* 265 Va. 531, 538, 579 S.E.2d 174, 178 (2003) (complete neglect of others' safety amounted to gross negligence, which shocks fair-minded people, but was less than willful recklessness required for punitive damages). The purpose of punitive damages is to "punish the wrongdoer if he has acted wantonly, oppressively, or with such malice as to evince a spirit of malice or criminal indifference to civil obligations. Willful or wanton conduct imports knowledge and consciousness from the act done." *Blakely v. Austin-Weston Ctr. for Cosmetic Surgery LLC,* 348 F. Supp. 2d 673, 677-78 (E.D. Va. 2004). Even a case where a defendant had two prior drunk driving convictions and who consumed a pitcher of beer prior to a third accident did not warrant the imposition of punitive damages. *Hack v. Nester,* 241 Va. 499, 505, 404 S.E.2d 42, 45 (1991).

In this case, Plaintiff presented no evidence that Defendants acted with wantonness. Defendants have

never been fined, cited, or reprimanded by the SBA, the Navy, the Department of Justice, or anyone else. Trial Tr. vol. 1, 215:16-216:14; Pl.'s Ex. 11. In fact, no one has ever found Defendants' conduct to be reprehensible. Moreover, the basis of Plaintiff's lawsuit is an interpretation of the federal regulations that does not have support in the text of the regulations (or in any written document anywhere). It is difficult to understand how Defendants could be assessed punitive damages for failing to have knowledge of these alleged unwritten policies of the SBA.

The Trial Court upheld the punitive damages on the premise that Defendants willfully disregarded Plaintiff's rights in responding to the size protest. Order on Defs.'s Mot. 6-7. However, such a ruling is a fundamental misunderstanding of federal procurement law (and perhaps underscores the Trial Court's lack of subject matter jurisdiction). As discussed herein, an SBA size protest does not adjudicate the rights of one party compared with another; it merely issues a size determination.[10] In that regard, Plaintiff had no

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[10] Since this project was an open procurement, large businesses were eligible to compete. Therefore, any adverse size determination would never have rendered them ineligible for award. *Delaney Constr. Corp. v. United States,* 56 Fed. Cl. 470, 475 (2003) ("The post-award protest and small business size determination that [contract awardee's] certification was erroneous does not impact the legality of the prior award" because it was an open procurement); FAR 19.302(j) ("When a concern is found to be other than small under a protest concerning a size status representation a contracting officer may permit contract performance to continue, issue orders, or exercise option(s), because the contract remains a valid contract.").

"rights" in the size protest that Defendants could have ever willfully disregarded.

Moreover, a finding of willful disregard for the Plaintiff's "right" assumes that Plaintiff had a right to the Contract – a fact that has never been established by a Court of competent jurisdiction. Accordingly, the jury verdict for punitive damages should have been set aside in their entirety and the Trial Court's failure to do so was error. Therefore, this Court should reverse the Trial Court's ruling and set aside the punitive damages as a matter of law

VII. The Trial Court erred in excluding non-hearsay admissions against interest from evidence during the cross examination of Plaintiff's expert, and such exclusion was prejudicial because the factual statements were material on the issue of an alleged contract expectancy. [Error preserved in Trial Tr. vol. 2, 320:2-323:4; Defs.'s Refused Exs. 36 & 37.]

Admissions against interest are expressly allowed under the Virginia Rules of Evidence and are not excluded by the hearsay rule. *See* Va. Sup. Ct. R. 2:803(0) ("A statement offered against a party that is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or employee, made during the term of the agency or employment, concerning a matter within the scope of such agency or employment, or (E) a statement by a co-conspirator of

a party during the course and in furtherance of the conspiracy" are not excluded by the hearsay rule).

This Court has not expressly considered the admissibility of a factual statement made in a Motion or Opposition by an attorney as a representative authorized to make such representations to a court; however, this Court has found statements made in a Grounds of Defense to be an admission. *See West v. Anderson,* 186 Va. 554, 564, 42 S.E.2d 876, 880 (1947) (finding a valuation of property made in a grounds of defense to be an admission even though it is not considered to be part of the pleading).[11] Additionally, the Court of Appeals for the Fourth Circuit has upheld the admissibility of written, factual representations in consent orders. *See United States v. Dukes,* 242 Fed. App'x 37, 48-49 (4th Cir. 2007) (holding that it was not plain error to introduce factual findings expressly agreed to by the defendant in a consent decree).

Federal courts in other circuits have expressly considered factual assertions made in memoranda of law to the Court to be admissions, conclusively binding on the party who made it. *Nola Ventures, LLC v. Upshaw Ins. Agency, Inc.,* No. 12-1026, 2014 WL

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[11] The Virginia Supreme Court has recognized that factual allegations contained in Motions can be judicial admissions when drafted by the party himself, however. *See Hedrick v. Warden of the Sussex I State Prison,* 264 Va. 486, 502, 570 S.E.2d 840, 850 (2002) (finding that a defendant's factual statements in a motion to withdraw a habeas corpus petition constituted judicial admissions, which precluded his claim of ineffective assistance of counsel). A motion or opposition drafted by the attorney should not be treated any differently.

12721912 at *5 (E.D. LA Nov. 6, 2014) ("Plaintiffs submitted these documents to the Court with the expectation that the Court would take them under consideration. The Court does not find that unfair prejudice to Plaintiffs will result from being confronted by their own submissions. Moreover, these exhibits constitute admissions by a party opponent and are, by definition, not hearsay.").

Further, other jurisdictions have expressly found that a counsel's failure to contradict a written, factual statement renders it to be non-hearsay, adoptive, authorized, and/or vicarious admissions. *See, e.g., Weinstein v. Siemens,* 756 F. Supp. 2d 839, 849 (E.D. Mich. 2010) (finding written statements made by an employee in the presence of corporate counsel were admissions of the company because "if corporate counsel was of the opinion that the assertions of fact made by the witnesses were untrue, the party would under all circumstance naturally be expected to deny them"); *see also United States v. Paulino,* 13 F.3d 20, 24 (1st Cir. 1994) ("[W]hen the evidence shows a party to have manifested an adoption or belief in the truth of a statement made by another, the statement loses its hearsay character and becomes admissible in evidence if offered against the adopting party. In applying this doctrine, courts frequently have construed possession of a written statement as an adoption of what its contents reveal.").

Plaintiff's Complaint alleges that it was entitled to a ten percent price preference on the Project as a HUBZone contractor. Compl. ¶ 31. Plaintiff's lawsuit alleges that such a price preference allows it to leapfrog

over Waterfront in the bid process. *Id.* However, the price preference is not applied if the lowest responsible, responsive bidder in a Project is a small business, a fact that Plaintiff's expert witness admits. Trial Tr. vol. 2, 319:22-320:1; Defs.'s Ex. 15.

Prior to the trial, Defendants filed a plea in bar alleging that C&D, a small business, was the lowest responsible, responsive bidder. Defs.'s Plea in Bar 3 ¶ 5. This factual allegation is significant because if true, the ten percent price preference claimed by Plaintiff does not apply to the Project. Trial Tr. vol. 2, 319:22-320:1; Defs.'s Ex. 15. Therefore, by the plain terms of the regulation Plaintiff has no contract expectancy and no claim for tortious interference. In Plaintiff's Opposition to the Plea in Bar, Plaintiff expressly provided that "it does not dispute" this allegation. Pl.'s Opp'n to Defs.'s Plea in Bar 2. This admission is dispositive.

At trial, Plaintiff took the opposite position, alleging that C&D Construction was *not* the lowest responsive, responsible bidder. In fact, the basis of Plaintiff's expert witness's conclusions and the allegation of a contract expectancy is the underlying factual allegation that C&D was *not* the lowest responsible, responsive bidder. Defendants' counsel questioned Mr. Jenkins about the price preference application and C&D specifically as follows:

> **Question:** "Okay. Let's take that – let's assume that as a hypothetical. Let's say C&D was the lowest responsive responsible offeror. Would that change your testimony?
> **Answer:** "Yes."

> **Question:** "Okay. So if the plaintiff agrees, for example, that C&D was the lowest responsive responsible offeror, you would agree that the HUBZone price preference doesn't apply in this case?"
> **Answer:** "That's correct."

Trial Tr. vol. 2, 319:17-320:1.

Defendants' counsel then offered into evidence Defendants' Plea in Bar and Plaintiff's Opposition. Plaintiff's counsel objected to the introduction as hearsay and the Court erroneously sustained the objection. Trial Tr. vol. 2, 320:2-321:12; Defs.'s Refused Exs. 36 & 37.

As an admission against interest, the factual statements in Plaintiff's Opposition to the Plea in Bar should have been admitted as non-hearsay. The jury must be allowed to evaluate the admissions made by the Plaintiff. To hold otherwise would allow an attorney, as an agent of a client, to make dispositive factual representations to a trial court in a motion, order, or other court document, and then later seek to prohibit the jury from reviewing those statements.

Given the dispositive nature of the admission, exclusion of the evidence was highly prejudicial. Had the jury been allowed to review this evidence, it may have reasonably found that the Plaintiff was never in line for the contract, had no contract expectancy, and not entitled to any damages. The admission could also have impacted the jury's evaluation of the credibility of Mr. Jenkins and the Plaintiff. The prejudice is compounded given that the Plaintiff's expert witness,

by his own statements, would have changed his testimony on a representation that C&D was the lowest responsible, responsive bidder. Because exclusion of this evidence was error, and because the error was prejudicial, this Court should vacate the Trial Court's ruling.

CONCLUSION

For the foregoing reasons, the Trial Court lacked subject matter jurisdiction to adjudicate this dispute and erroneously excluded relevant non-hearsay evidence. Additionally, the Trial Court erred in finding sufficient evidence to support a contract expectancy, knowledge of a contract expectancy, direct damages, and punitive damages. Therefore, the Trial Court's ruling should be vacated and the case dismissed. Or in the alternative, the Trial Court's ruling should be vacated and the case should be remanded for a new trial.

Respectfully submitted this 17th day of May 2018,

/s/J Haire
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REQUIRED STATEMENTS

I hereby certify, pursuant to Rule 5:17 of the Rules of the Supreme Court of Virginia that:

A. The name of the Appellants are Waterfront Marine, Inc.; Randy Sutton; Ken Sutton. The counsel for the Appellants are Jessica Haire, Esq. (VSB No. 82513) and Ronni Two, Esq. (VSB No. 91663) of Fox Rothschild LLP, 1030 15th Street, NW, Suite 380 East, Washington, DC 20005, telephone number (202) 461-3109, fax number (202) 461-3102, email address jhaire@foxrothschild.com and rtwo@foxrothschild.com. Counsel for Appellant was trial counsel throughout all proceedings in the Circuit Court of the City of Chesapeake.

B. The name of the Appellee is Heard Construction, Inc. Counsel for the Appellee is Christopher D. Davis, Esq. (VSB No. 74809), J. Andrew Baxter, Esq. (VSB No. 78275), and Merrit J. Green, Esq. (VSB No. 50995), of General Counsel, PC, 6849 Old Dominion Drive, Suite 220, McLean, VA 22101. Mr. Davis's office telephone number is 703-556-0411, fax number is 703-774-3965, email address is cdavis@gcpc.com.

C. This petition is to be filed with the Clerk of the Supreme Court of Virginia at her office located at 100 North Ninth Street, Fifth Floor, Richmond, Virginia, 23219-1315 and copies were mailed on May 17, 2018 to all counsel of record.

D. Counsel does desire to state orally in person the reasons for granting this petition.

E. That an Appeal Bond for the judgment, one year interest, and court costs has been filed with the Trial Court by Appellants pursuant to a Consent Order between Appellants and Appellee.

F. Counsel for Appellant is retained.

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[*Certificate of Service and Certificate of Compliance Omitted in the Printing of this Appendix*]