No. 18-37

In the
Supreme Court of the United States

SECURIFORCE INTERNATIONAL AMERICA, LLC,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF OF PETITIONER

Robert J. Wagman, Jr.
BRACEWELL LLP
2001 M Street, NW
Suite 900
Washington, D.C. 20036
(202) 828-5872
Robert.wagman@bracewell.com

Frederick W. Claybrook, Jr.
Counsel of Record
CLAYBROOK LLC
700 Sixth Street, NW
Suite 430
Washington, D.C. 20001
(202) 250-3833
rick@claybrooklaw.com

SUMMARY OF ARGUMENT

In its Opposition, the United States does not contest that the question as presented in the petition is suitable for consideration by this Court. Nor does it defend the actual rationale of the Federal Circuit. Instead, it attempts to obfuscate what the Federal Circuit did by presenting a revised question and positing a misleading statement of facts already rejected by the trial court.

This petition is not about disputed facts. And it is not about the question as rewritten by the United States. As the United States would have it, the issue is whether a contracting officer ("CO"), the Executive Branch agent authorized to determine whether a termination is in the best interests of the government, may consult with others before reaching her decision. Of course she may.

But what the Court of Federal Claims ("CFC") found was that the CO here had completely abdicated her obligation to make a judgment of her own about that procurement decision committed to her discretion, acting instead as a mere functionary. The Federal Circuit did not challenge that fact finding, but simply regarded it as irrelevant, stepped into the CO's shoes, and adopted what it considered, *de novo,* to be a sufficient justification for the termination. This was not the court's role to play in our system of separation of powers, and, unless corrected, the consequences to the federal procurement system will likely be dramatic.

ARGUMENT

I. THE OPPOSITION MISSTATES THE QUESTION PRESENTED

By misstating the question presented, the United States demonstrates that it has no real defense to the actual question. The issue is not now—and has never been—whether a CO may ask for advice in reaching a decision entrusted to her discretion. The issue is whether the authorized Executive Branch official abuses her discretion when she abdicates her responsibility entirely to others. Heretofore, the law has been clear that a CO, as the sole individual authorized to exercise the government's contractual discretion, must exercise independent judgment, *i.e.*, that a CO, as a specially designated type of Executive Branch official, must make her own decision after hearing from others.

The numerous cases cited in the Petition (at 6-9) cover an unbroken, 100-year period and include decisions by the Federal Circuit itself. Those cases confirm the unremarkable proposition that, when a contracting agent of the government is tasked with making a discretionary decision, she is the one who must exercise that discretion. In none of those cases did the applicable contract clauses or regulations require the authorized government official to act "wholly" independently. But they *all* required the designated official to "put [her] own mind to the problems." *N.Y. Shipbldg. Corp. v. United States,* 385 F.2d 427, 435 (Ct. Cl. 1967). And, here, the applicable regulations specified that it was the CO who was to determine whether termination was in the best interests of the government. 48 C.F.R. § 12.403(b), (d).

As Professor Ralph Nash, the preeminent government contracts academic, addressed in his Amicus Brief in Support of the Petition, the Federal Circuit's ruling here is a reversal of longstanding precedent that will have a deleterious, ripple effect throughout the entire procurement process as established by Congress and regulation.

II. REVIEW OF THE FEDERAL CIRCUIT'S DECISION PRESENTS AN UNCOMPLICATED, UNDISPUTED FACT SITUATION

Despite spending two-thirds of its pages arguing what it perceives to be the relevant factual and procedural history, the United States does not—indeed, cannot—directly challenge the trial court's factual findings for clear error. Rather, the long factual wind-up in its Opposition is needed to advance new contentions for the first time before this Court and to support its misinformed restatement of the question presented.

The relevant facts are neither complex nor in dispute and were found on manifestly adequate evidence by the trial court and accepted by the Federal Circuit. The CFC held that the authorized CO did not make the best-interests-to-the-Government determination that is the essence of the termination decision and did not recall the content of any discussions held with the "team" the United States so heavily relies on in its factual recitation. (App. 105a.) Thus, the CFC concluded that CO Watson had "abdicated her duty to exercise her own independent business judgment . . ." (App. 108a.) The Federal Circuit did not dispute the CFC's factual findings or find them to be clear error. It just did an end run around them by making its own determination of what satisfied the best-interests-of-

the-government standard. Thus, the relevant record is simple, clear, and concise.

The United States in its Opposition wants to rewrite this record, but that is inappropriate, and what the United States relates is inaccurate in important respects. Most notable is the fact that the United States litigated this case for nearly seven years without ever identifying the person who made the determination to partially terminate Petitioner's contract for convenience, claiming only that it was a "team" decision, but now it alleges that Ms. Shepherd was that person. (Opp. at 5.) Not surprisingly, the United States does not cite to Ms. Shepherd's testimony; when she was asked that question directly, she denied making any such decision and correctly pointed to CO Watson as the one authorized to make the decision:

> Q: So it would have been Ms. Watson's decision, ultimately, to partially terminate this contract for convenience?
>
> A: Correct.

Tr. 2285.[1]

Likewise, the United States now asserts for the first time that the September 20, 2011, memo drafted by a contract administrator and the September 23, 2011, letter from Ms. Shepherd to Securiforce provide

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[1] Nor do the citations to Ms. Watson's testimony (at 5) establish that Ms. Shepherd determined that termination was in the government's best interests. *See* Tr. 1750 ("Q: Do you recall what was—the specifics of those discussions? A: No, sir."); Tr.1754 ("We had discussions, not with Ms. Bass, but with Ms. Shepherd, but not to the point—I don't remember all the discussions.").

a rational basis for CO Watson's actions (even though irrelevant because they were not reasons adopted by CO Watson). (Opp. at 4.) Unlike now, the United States below took pains to distance itself from the purported rationales of these documents because they were objectively false.[2] Moreover, these documents do not even support the Federal Circuit's adopted rationale that a USTR waiver could have taken four to six weeks (despite the only knowledgeable witness testifying that it repeatedly had taken only about one week). (App. 14a-15a.) No contemporaneous document makes any reference to a waiver taking four to six weeks, nor could there be, given that all of the DLA contracting personnel testified that they did not know how long the waiver process would take and had made no effort to find out. (App. 154a-156a.)

The marshalling of these copious additional facts by the United States is only an exercise in obfuscation. The Federal Circuit did not reject the CFC's factual findings that CO Watson had not exercised her discretion. Instead, accepting that she had not, the Federal Circuit then improperly assumed her CO role and decided for itself that particular allegations, allegations that just happened to be disproven on the record, were sufficient to sustain a termination. But, even if they had not been disproven, those allegations were not relied upon by the CO who was tasked to make the decision and so are irrelevant. No matter how much the United States in its

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[2] Those documents claimed the contract was awarded in error because DLA did not realize that Securiforce was sourcing fuel from Kuwait. Numerous pre-award documents confirmed that DLA was not only aware, but expressly approved Kuwait as Securiforce's source for fuel. (*E.g.*, Fed. Cir. App. 715, 722.)

Opposition spins a new tale of rationales that could have supported a termination decision by the CO and asks this Court to take its assertions at face value and make new findings, it is to no avail. Its efforts only underscore that the Federal Circuit stepped outside its proper role when it relied on rationales not adopted by the CO.

CONCLUSION

The Petition should be granted. The Federal Circuit has upended settled precedent and violated the FAR, giving reviewing courts *de novo* review authority and upsetting the CO system established by Congress. The consequences to the federal procurement system will be widespread unless this Court accepts review and reverses.

Respectfully submitted,
This 18th day of October 2018

Frederick W. Claybrook, Jr.
CLAYBROOK LLC
Counsel of Record
700 Sixth Street, NW, Suite 430
Washington, D.C. 20001
(202) 250-3833
rick@claybrooklaw.com

Robert J. Wagman, Jr.
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