NO. 21-

In the

Supreme Court of the United States

OPTIMUM SERVICES, INC.,

Petitioner

v.

DEBRA ANNE HAALAND, SECRETARY OF THE INTERIOR,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is an agency's termination for convenience of a contract for voluntary corrective action in response to the filing of a post-award bid protest in the Court of Federal Claims subject to review under the Contract Disputes Act ("CDA") for breach of contract, where the record shows that:

* the agency knew or should have known that the post-award bid protest had no merit;

* the agency knew or should have known that the post-award bid protest was subject to a motion to dismiss for untimeliness;

* the agency had a requirement and the funding and ability to perform the contract; and

* the termination for convenience was based in part on the agency's stated desire to obtain a better bargain for the same work by terminating the contract and cancelling the solicitation and awarding new contracts for the same work to other contractor(s).

II. If a termination for convenience is subject to judicial review for breach of contract under the CDA, what standard(s) of judicial review should be applied when reviewing a termination for convenience for breach of contract under the CDA?

III. If a termination for convenience is subject to judicial review for breach of contract under the CDA, should a CDA board of contract appeals give preclusive effect or deference to a non-binding GAO advisory opinion approving of the termination, that was issued months after the termination in

the terminated contractor's GAO protest against the cancellation of the solicitation, without considering the merits of the GAO's advisory opinion?

PARTIES AND CORPORATE DISCLOSURE

Petitioner, Optimum Services, Inc., is a Florida corporation. There is no parent company or publicly held company that owns 10 percent or more of Petitioner's stock.

RELATED PROCEEDINGS

Optimum Services, Inc., GAO B-400677. This was Petitioner's first GAO protest, filed on October 3, 2008, against the award of the contract to Westwind on September 18, 2008. After a conference call with the GAO, Respondent decided to take voluntary corrective action. A copy of Petitioner's first GAO protest is at 243a-263a. A copy of Respondent's notice of voluntary corrective action to the GAO, dated November 21, 2008, is at 264a.

Westwind Contracting, Inc.'s agency-level bid protest, filed with Respondent on November 17, 2008, denied December 2008. A copy of Westwind's protest letter is at 267a. Respondent's denial is at 299a.

Westwind agency-level bid protest "supplement" filed November 21, 2008, denied December 18, 2008. A copy of Westwind' protest "supplement" letter is at 320a. Respondent's denial of Westwind's bid protest supplement is at 326a.

Westwind Contracting, Inc. v United States, No 09-25C (Court of Federal Claims, filed January 12, 2009, dismissed 14, 2009) This was Westwind's post-

award bid protest in Court of Federal Claims Copies of Westwind's COFC complaint, motion for TRO and brief, and supporting affidavit are at 478a–530a.

Optimum Services, Inc., GAO B-40105, (filed January 23, 2009, decided April 15, 2009. This was Petitioner's second GAO protest, against the cancellation of the solicitation A copy of Petitioner's protest is at 537A. A copy of the GAO's April 15, 2009 decision is at 616a.

Optimum Services, Inc. v. Department of the Interior, CBCA 2617. This was a predecessor action to CBCA 4968, that was filed on then withdrawn and dismissed without prejudice by joint motion and Order dated June 4, 2012, because of an jurisdictional defect in Petitioner's certification of its claim, after the contracting officer issued a "final determination" (but not a "final decision") that denied Petitioner's claim for lost profits for breach of contract, as certified by Petitioner as part of Petitioner's termination for convenience settlement proposal. A copy of the dismissal ORDER dated June 4, 2012 for CBCA 2617 is at 656a.

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OPINIONS AND ORDERS BELOW

The November 9, 2020 judgment of the United States Court of Appeals for the Federal Circuit in No. 2020-1087 is at Petitioner's Appendix 1a-2a.

The opinion and decision of the United States Civilian Board of Contract Appeals that granted summary judgment to Respondent is 3a-18a.

The contracting officer final decision dated June 12, 2015 is at 20a-27a Petitioner's complaint in CBCA

JURISDICTION

On November 8, 2020, the court of appeals issued an order denying Petitioner's appeal from the judgment of the board of contract appeals. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5 U.S.C. §§ 701-706

A verbatim copy is at 28a-31a. In most pertinent part, 5. U.S.C. § 706 provides states the scope of judicial review of administrative action under the Administrative Procedures Act, for non-contract cases.

28 U.S.C. 1491

A verbatim copy is at 32a-36a. In pertinent part, 28 U.S.C. § 1491(b) provides for Court of Federal Claims jurisdiction in bid protest cases.

31 U.S.C. §§ 3551-3557

A verbatim copy is at 37a-48a. In most pertinent part, § 3556 provides that in bid protest actions in the Court of Federal Claims, "***any decision or recommendation of the Comptroller General under this subchapter with respect to such procurement or proposed procurement shall be considered to be part of the agency record subject to review***."

31 U.S.C. § 3704.

A verbatim copy is at 49a. 31 U.S.C. § 3704 expressly provides for post-award debriefings.

41 U.S.C. §§ 7101-7109

A verbatim copy of 41 U.S.C. §§ 7101-7109 is at 51a-62a.

In most pertinent part, 41 U.S.C. § 7104(b)(4) expressly provides for "de novo" review of all final contracting officer decisions on certified claims for breach of contract, as follows:

> **An action under paragraph (1) [in the United States Court of Federal Claims] or (2) [in a district court] shall proceed de novo in accordance with the rules of the appropriate court.**

And 41 U.S.C. § 7105(e)(2) provides that:

> **"... an agency board may grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims."**

REGULATIONS INVOLVED

Federal Acquisition Regulation, 48 C.F.R Part 15, Subpart 15.5 –Preaward, Award, and Post-Award Notifications, Protests, and Mistakes, §§ 15.501-15.509. A verbatim copy is at 63a-67a. In most pertinent part, 48 C.F.R. 15.1507 expressly provides for post-award debriefings.

Federal Acquisition Regulation, 48 C.F.R. Part 16, Subpart 16.5 – Indefinite Delivery Contracts, §§ 16.500-16.506. A verbatim copy is at 68a-84a.

Federal Acquisition Regulation, 48 C.F.R. Part 33 – Protests, Disputes, and Appeals, §§ 33.101 to 33.106. A verbatim copy is at 85a-106a.

Federal Acquisition Regulation, 48 C.F.R. Part 49 – Terminations, §§ 49.000-49.607. A verbatim copy is at 107a-175a. In most pertinent part, 48 C.F.R. § 49.101(b) expressly limits the authority of the contracting officer to terminate for convenience with the following language:

> **The contracting officer shall terminate contracts, whether for default or convenience, only when it is in the Government's interest.**

(112a).

STATEMENT OF THE CASE

Introduction

The case arises from the termination for convenience of a National Park Service indefinite quantities task order contract for land clearing in the Everglades National Park, with a guaranteed 2 million dollar minimum.

The Solicitation notified the offerors that the amount of funding was uncertain, and that the amount of contract work would be dependent on available funding. Amendment 1 to the Solicitation notified offerors "that the … amounts of the work and tasks ordered may vary from year to year as funding and projects become available."

Amendment 5 to the Solicitation notified offerors that "[w]ork is based on available funding. Usually we are aware of the work we can do for the upcoming winter by the summer months July-August of the preceding year. Once funding is made available, a task order will be negotiated."

First and Second Rounds of Proposals

The NPS first received price proposals from Petitioner and other offerors on July 30, 2008, and Petitioner had the lowest price, and the best proposal, but the NPS incorrectly determined that Petitioner's price was materially imbalanced, and the Petitioner's proposal should therefore be rejected.

The NPS received a second round of price proposals on September 3, 2008, and Petitioner had the lowest price and best proposal for the second time, and once

again the NPS made an erroneous determination that Petitioner's price was imbalanced and should be rejected.

Award to Westwind in September 2008

Based Respondent's erroneous determination that Petitioner's price was materially imbalanced, Respondent awarded the contract to Westwind Contracting, Inc. ("Westwind"), on September 18, 2008.

Debriefing of Petitioner on September 23, 2008 as required by FAR 15.506

Respondent debriefed Petitioner in accordance with FAR 15.506 on September 23, 2008, and disclosed aspects of Westwind's September 2, 2008 pricing to Petitioner, as required by FAR 15.506, without any preferential treatment of Petitioner or any misconduct by NPS or Petitioner. (

Petitioner's first GAO protest, filed on October 3, 2008, B-400677

Petitioner filed its first GAO bid protest – of the September 18, 2008 award of Contract 232 to Westwind – on October 3, 2008, which GAO assigned number B-400677.

On November 12, 2008, after a call with the GAO, Respondent decided to take corrective action, including a stay of Westwind's Contract 232 pending another round of price proposals.

NPS changed the Solicitation evaluation quantities in December

On December 4, 2008, NPS asked Petitioner and Westwind to submit another round of price proposals by December 14, 2008, using revised evaluation quantities.

Respondent's December 5, 2008 notice to Westwind of Petitioner's September debriefing

On December 5, 2008, Respondent gave Westwind another written notice that Petitioner had been debriefed under FAR 15.506 in September, by releasing and faxing redacted, releasable versions of the November 5, 2008 agency report memo of law and statement of facts to counsel for release to Westwind. Respondent's December 5, 2008 fax also gave Petitioner notice NPS had disclosed to Westwind that Petitioner's September price was lower than Westwind's September price.

Petitioner had the lowest price on December 15, 2008, for the third time

Westwind and Petitioner submitted their third (and truly final) round of price proposals to NPS on December 15, 2008. Petitioner's December price was the lowest price using the evaluation quantities, for the third time, at about 71% of the IGE; Westwind's December price was about 76% of the IGE.

When Petitioner prepared its December 2008 pricing, Petitioner considered Westwind's September price outdated and expected Westwind to lower its price in December, because Petitioner knew that Respondent had disclosed to Westwind that Westwind's September price was higher than Petitioner's September price.

Respondent's fax of unredacted copy of Petitioner's first GAO protest to Westwind's president, on October 7, 2008

On October 7, 2008, Respondent's solicitor faxed Westwind' president an unredacted copy of Petitioner's October 3, 2008 GAO protest letter, which gave Westwind written notice that Petitioner had been debriefed under FAR 15.506 on September 23, 2008, and information about Petitioner's most recent (September 2) prices.

Westwind's two agency-level protest(s), in November and December 2008.

Westwind filed an agency level protest with Respondent on November 17, 2008, in which Westwind challenged Respondent's decision to reopen negotiations on price only, and the Solicitation language, on several grounds, including on the grounds that differences between the terms in the Source Selection Plan and the Solicitation made the evaluation defective.

Respondent denied Westwind's November 17, 2008 agency-level protest on November 21, 2008.

Westwind challenged the solicitation again in a second agency level protest that Westwind filed on November 21, 2008, and NPS denied Westwind's November 21, 2008 protest on December 18, 2008.

Third Round of Proposals in December, 2008

Petitioner and Westwind submitted a third round of proposals on December, 2008, and Petitioner had the lowest price and best proposal for the third time.

On December 19, 2008, Respondent's source selection panel recommended that Westwind's contract be terminated, for an award to Petitioner.

Award to Petitioner on December 23, 2008

On December 23, 2008, Respondent terminated Westwind's contract, and awarded the contract to Petitioner.

Debriefing of Westwind, on December 30, 2008.

Respondent debriefed Westwind on December 30, 2008, and disclosed Petitioner's December (award) pricing to Westwind in that debriefing.

Westwind's January 12, 2009 COFC Bid Protest

Westwind filed a bid protest against the December 23, 2008 award to Petitioner in the Court of Federal Claims on Monday, January 12, 2009, which included a 3-count Complaint, a motion for a TRO to suspend performance of Petitioner's contract; a supporting memo of law, and a supporting affidavit from Westwind's President.

Petitioner moved to intervene, and on January 14, 2009, COFC granted Petitioner's motion to intervene, and scheduled a status conference for January 15.

On January 15, 2009, before any opportunity for a ruling by the COFC on Westwind's motion for TRO, Respondent notified the COFC, the DOJ, Westwind's counsel, and Petitioner's counsel that NPS had decided to take corrective action in

response to Westwind's protest, including termination of Petitioner's contract and cancellation of the solicitation

On January 16, 2009, Westwind filed a motion to dismiss its COFC protest as moot.

Petitioner opposed and objected to Westwind's motion to dismiss in the COFC on Monday, January 19, on the grounds that there was no change in the NPS's requirements and the NPS had no reasonable basis to cancel the RFP.

Respondent did not oppose Westwind's motion to dismiss, and COFC dismissed Westwind's protest for mootness on January 22, 2009, over Petitioner's objection.

At the time of the termination, Respondent knew or should have known that Westwind's January 12 COFC bid protest lacked merit

The Agency knew or should have known that Westwind's COFC bid protest lacked merit.

The Agency had rejected Westwind's COFC protest arguments about the terms in the Solicitation previously, when the Agency rejected Westwind's agency-level protest(s), in November and December, 2008.

Concerning Westwind's new arguments to the COFC about the debriefing. unfair competitive advantage, and FAR 15.506-07, *ALL* of the GAO decisions that Westwind cited in its brief to the COFC clearly indicated that Westwind's debriefing, unfair competitive advantage, and FAR 15.506-07 arguments had no merit whatsoever.

Westwind cited *Alatech Healthcare* in its protest brief to the COFC on January 12, 2009 — and in *Alatech Healthcare*, the GAO had written that:

> "While it is possible that CSI's possession of Alatech's pricing information may provide it with a competitive advantage, **the agency is not required to equalize such an advantage unless it is the result of preferential treatment or other improper action on the part of the agency.** *Norvar Health Servs. – Protest and Reconsideration*, B-286253.2 et al., Dec. 8, 2000, 2000 CPD ¶ 204 at 4. Alatech has not directed our attention to any legal authority to support its assertion that the agency's disclosure of its pricing information in a post-award setting was improper, and we are aware of no such authority; in fact, the FAR expressly contemplates that the successful offeror's pricing information, including unit prices, will be provided during an ordinary debriefing. FAR § 15.506(d)(2). The protester also does not allege (and nothing in the record shows) that the agency's disclosure of its pricing information resulted from preferential treatment in favor of CSI. Accordingly, **there is no basis for our Office to find that the agency is required to equalize any competitive advantage that may have been afforded to CSI as a result of Alatech's pricing being revealed**.

Alatech Healthcare, LLC—Protest; Custom Servs. Int'l, Inc.—Costs, B–289134.3, B–289134.4, Apr. 29, 2002, 2002 CPD ¶ 73 at 4.

Westwind also cited *Norvar* in its protest brief in the COFC on January 12, and in that bid protest decision, the GAO had written that:

> "While [the Comptroller General] recognize[s] that possession of this information could provide a competitive advantage under some

> circumstances, **an agency is not required to equalize such an advantage unless it results from preferential treatment or other improper action by the government.** [citation]. We have held that **where later events require the reopening of a procurement, there is nothing improper about any competitive advantage provided by the disclosure of an awardee's price and rating (or ranking), where that disclosure has been made pursuant to the FAR's debriefing requirements."**

Norvar Health Services, Comp. Gen. Dec. B-286253.2 et al., 2000 CPD ¶ 204 (December 8, 2000).

Westwind also cited *NavCom* in its protest brief in the COFC on January 12, 2009, and in that bid protest decision, the GAO had written that:

> **No unfair competitive advantage results where an agency carries out the FAR requirements for notices of award and post-award debriefings and later events require the reopening of proceedings under the procurement.**

NavCom Defense Elec., Inc., B-276163.3, 97-2 CPD ¶ 126, at 4 (October 31, 1997).

Westwind also cited *Sherikon* in its protest on January 12, 2009, and in that bid protest decision, the GAO had written that:

> [Protestor] also challenges the Navy's proposed action because unsuccessful offerors have had the benefit of debriefings, and because [Protestor's] price has been revealed, which allegedly will result in an improper auction.
>
> The Navy points out that under Federal Acquisition Regulation (FAR) § 15.1003 it was required to provide unsuccessful offerors with

> debriefings, on request, as soon as possible after award. We have held that **no unfair competitive advantage results where an agency carries out this FAR requirement and later events require reopening proceedings under the procurement.**

Sherikon, Inc., B-250152.4, 93-1 CPD ¶ 188 at 4 (February 22, 1993).

Westwind also cited *Federal Auction Serv. Corp.* in its protest on January 12, 2009, and in that bid protest decision the GAO had written that:

> Both protesters contend that unless VA provides such [equalizing] information, Kaufman will enjoy an unfair competitive advantage in the [re-] procurement.
>
> **A contracting agency is not required to equalize a competitive advantage enjoyed by an offeror unless that advantage results from preferential treatment or other unfair action by the government.** [citation] Here, VA held a debriefing for Kaufman, an unsuccessful offeror, after award was made, in accordance with Federal Acquisition Regulation (FAR) § 15.1003, and released the evaluators' written comments to Kaufman under FOIA. [FN 1] In Respondentng so, **VA was merely carrying out the requirements of the FAR and FOIA. The fact that later events—specifically, the need to remedy the statutory violation involved in allowing award to Latham to stand—required reopening proceedings under the procurement does not mean that VA now must compensate for any advantage Kaufman may have derived from the debriefing and disclosure of documents under FOIA, both of which were proper at the time VA provided them to Kaufman.**

Federal Auction Serv. Corp., et al., B-229917.4 *et al.*, 88-1 CPD ¶ 553 (June 10, 1988), *recon. denied*, B-229917.8, 88-1 CPD ¶ 597 (June 22, 1988).

Westwind had also cited *PCA Aerospace* in its protest brief on January 12, 2009, and in *PCA Aerospace*, the GAO had written that:

> PCA argues that, because offerors were informed of its low price, rescinding the original award and reopening the competition will foster an auction and put PCA at a competitive disadvantage. However, the Federal Acquisition Regulation does not prohibit auctions, and agencies are not otherwise prohibited from taking corrective action in the form of requesting revised price proposals where the original awardee's price has been disclosed. In this regard, the possibility that the contract may not have been awarded based on a fair determination of the most advantageous proposal has a more harmful effect on the integrity of the competitive procurement system than does the possibility that the original awardee will be at a disadvantage in the reopened competition. *[citation].*
>
> Finally, the protester requests that all prices be disclosed so that "the other offerors would then be placed in the same predicament as PCA." Supplemental Comments at 2. However, **there is no requirement that agencies disclose other offerors' prices under circumstances such as those here, where the awardee's contract price has properly been disclosed.**

PCA Aerospace, Inc., B–293042.3, 2004 CPD 65 at 4 (February 17, 2004).

Westwind had also cited *Symvionics* in its protest brief in the COFC on January 12, 2009, and in *Symvionics* the GAO had written that:

> "As a general matter, **an agency is not required to equalize the possible competitive advantage flowing to other offerors as a result of the release of pricing information in a post-award setting where the release was not the result of preferential treatment or other improper action on the part of the agency**. [citations]... **Because the SYMVIONICS prices were not disclosed as a result of preferential treatment or any improper action on the part of the agency—they were disclosed in letters to the unsuccessful offerors and in the context of a post-award debriefing as contemplated by Federal Acquisition Regulation (FAR) 15.506(d)(2)—the Navy was not required to equalize any competitive advantage that may have been afforded to the protester's competitors as a result of the release of its prices.**

Symvionics, Inc., B-293824.2, 2004 CPD ¶ 204 at 4 (October 8, 2004).

Westwind had also cited *Alfa Consult* in its protest brief in the COFC on January 12, 2009, and in *Alfa Consult*, the GAO had written that:

> **"[N]o improper competitive advantage accrues to an offeror by virtue of its obtaining proposal information, as here, pursuant to the FAR sect. 15.506 debriefing requirements."**

Alfa Consult S.A., B-298288, B-298164.2 (August 3, 2006).

In addition to the foregoing GAO decisions, at all relevant times, there were two published Court of Federal Claims decisions that were directly contrary to Westwind's January 12 debriefing, improper competitive advantage, and FAR 15.506-507 theories. See *DGS Contract Service, Inc. v. U.S.*, 43 Fed.Cl. 227, 237 (1999) ("IRS's act of reopening negotiations voided that 'award,' and therefore ***48***

CFR § 15.507 is inapplicable."); *Fore Systems Fed., Inc. v. U.S.*, 40 Fed.Cl. 490, 491 (1998) ("Once a contract has been quote-unquote, 'awarded,' but performance has not yet commenced and negotiations are reopened, that voids the earlier contract. *** that is, there was no existing contract once the Government reopened negotiations.*** Absent an award, the Agency's disclosure of Cisco's unit pricing to the other offerors was not authorized by FAR 15.1003(b) [or] FAR 15.1006, and ***FAR 15.507 does not require the Agency to disclose Cisco's unit pricing in the resolicitation***.").

At the time of the termination, Respondent knew or should have known that Westwind's COFC bid protest was subject to a motion to dismiss

The agency also should have known that Westwind's January 12 COFC bid protest was subject to an immediate motion to dismiss, under the Federal Circuit's established *Blue and Gold* rule, and the Federal Circuit's established rule that ""are presumed to have constructive knowledge of federal procurement regulations." *Blue and Gold Fleet, L.P. v. U.S.*, 492 F.3d 1308, 1313 (Fed.Cir. 2007); *General Eng'g & Mach. Works v. O'Keefe*, 991 F.2d 775, 780 (Fed.Cir. 1993), because the FAR clearly and unambiguously *required* Respondent to disclose Westwind's September prices during Petitioner's debriefing. FAR 15.506(d)(2) ("At a minimum, the debriefing information *shall* include * * * [t]he overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror…").

Petitioner's second GAO Protest, filed January 23, 2009, B-401051

Optimum filed its second GAO protest on January 23, 2009, to protest NPS' January 15, 2009 decision to cancel Solicitation 232, which the GAO numbered B-401051.

Respondent's March 2, 2009 analysis of Westwind's debriefing/unfair competitive advantage bid protest arguments was irrational

The Agency's March 2, 2009 legal analysis of Westwind's January 12 theories about debriefing &unfair competitive advantage was irrational, because in the March 2, 2009 Agency Report Memorandum of Law (at A), the Respondent Solicitor relied on at least three GAO decisions *that expressly reject* Westwind's FAR 15.506/15.507 protest arguments: *Alfa Consult S.A.*, B-298288, B-298164.2 (August 3, 2006) ("**it is our view that no improper competitive advantage accrues to an offeror by virtue of its obtaining proposal information, as here, pursuant to the FAR sect. 15.506 debriefing requirements.**"); *Phenix Research Products*, B- 292184.2, 2003 CPD ¶ 151 (August 8, 2003) ("**the prior disclosure of information in a vendor's quotation does not preclude resolicitation where, as here, the resolicitation is undertaken to correct perceived flaws in the original solicitation process.**"); *Fisher-Cal Industries, Inc.*, B-285150.2, 2000 CPD ¶ 115 (July 6, 2000) ("**the prior disclosure of information in an offeror's proposal does not preclude the corrective action, and the resolicitation of the same requirement is not improper.")**

The Agency has *never* cited any legal authority which supports its erroneous conclusion that Westwind's debriefing/unfair competitive advantage arguments had any merit.

Respondent's stated desire to obtain better pricing under a new solicitation

In the March, 2009 Agency Report, the Respondent's solicitor and contracting officer also justified the termination decision based on a an alleged "recent change in anticipated funding." Concerning funding, Respondent's solicitor's March 2, 2009 memo of law states in detail that:

> Additionally, the scope of NPS' needs has changed because NPS's anticipated funding for the project has been significantly reduced. ... The IDIQ contract had a total quantity of service ordered in all orders not to exceed $24 million worth of services during the base year, and $26 million during each of the option year periods. . . . The new anticipated total quantity of services ordered in all orders will not to [sic] exceed $10 million worth during the base year and each option year period. Although the minimum quantity of $2 million worth during the base year and each option year period is not anticipated to change***, NPS believes that the significant reduction in the maximum quantity will have an effect on the competitor's price proposals***.

The Agency solicitor's March 2, 2009 representation to the GAO that the "anticipated funding for the project has been significantly reduced" was false, or at least misleading, because Respondent's program officials had knew (or should have known) of the funding reduction -- and a total funding level of approximately

$10,000,000-12,000,000 for Petitioner's $2,00,000-guaranteed-minimum contract -- by no later than August 2008 – long before the second and third rounds of price proposals, and the September 2008 award to Westwind, and the December 2008 award to Petitioner. The August 2008 funding reduction was not viewed as a cause for cancellation of the solicitation in August, September, October, November, or December. 2008, and it was not a just cause for cancellation of the solicitation or termination of Petitioner's contract in January, 2009, and the GAO and the Board of Contract Appeals never had a hearing to hear evidence on Respondent's sudden change in position as to the significance of the $10,000,000-12,000,000 funding level in January, 2009.

After terminating Petitioner, NPS paid other contractors more than $5.5 million to perform work in 2009, 2010, 2011, and 2013 that could have performed for a lower price under Petitioner's contrac

After terminating Petitioner, NPS paid other contractors more than $5,518,182 to perform work that Petitioner could have performed under Petitioner's Contract, at a lower overall price, including: $1,341,304 paid to other contractors for work om 2009; $1,568,044 paid to contractors for work in 2010; $1,527,300 paid to other contractors for work in 2011; and $2,081,532 paid to other contractors for work in 2013.

In 2010 and 2011, the contracting officer confirmed to Petitioner that NPS always had enough funding for Contract 200 – and that the termination for convenience was not based on any change in funding.

In correspondence with Petitioner in 2010 and 2011, the contracting officer repeatedly confirmed that NPS always had adequate funding and an actual requirement for the guaranteed minimum in Petitioner's Contract

In June 2010 the contracting officer wrote that "NPS had the funding to cover the minimum amount for the base year."

In October 2010 the contracting officer wrote: "[T]here was still ample funding in place to cover the $2.0 Million minimum amount referenced in the IDIQ for the contract period of one base year and four one-year options periods."

In March 2011 the contracting officer wrote: [NPS] always had the funding [for the $2 million guaranteed minimum] and never lost the funding.".

Petitioner's CDA request for final decision on January 15, 2015, which was denied in June, 2015, and timely appealed to the CBCA.

Petitioner submitted a request for a contracting officer final decision with a CDA certification, on January 15, 2015, claiming $21,468 for costs under the termination for settlement clause, and $584,785 for breach of contract "lost profits" damages), which was denied by final decision dated June 12, 2015.

Petitioner timely filed its notice of appeal with the CBCA on September 11, 2015.

During the course of CBCA 4968, Petitioner and Respondent settled all of Petitioner's claims except for Petitioner's claim for anticipated profits on the guaranteed minimum. (Appx2887-2889).

Petitioner's Proof in the Board of Contract Appeals

In the board of contract appeals, Petitioner filed thousands of pages into the Rule 4 file, that showed the board of contract appeals that

(a) the agency knew or should have known that the post-award bid protest lacked merit;

(b) the agency knew or should have known that the post-award bid protest was subject to a motion to dismiss for untimeliness;

(c) the agency had a continuing requirement, funding, and the ability to perform the contract for at least the minimum contract quantity; and

(d) that the termination for convenience was based in part on the agency's stated desire to obtain a better pricing for the same work by terminating the contract and cancelling the solicitation and awarding new contracts for the same work to other contractor(s).

Petitioner also showed the board of contract appeals Petitioner's estimate for the contract, and the financial information that shows that Petitioner had a history of consistently making profits (in excess of its estimated profits) on similar government contracts during the time period from 2006 to 2010, with the same management, same estimating personnel, and same estimating methods.

Board of contract appeals' grant of summary judgment to Respondent

The CBCA granted Respondent's motion for summary judgment, and denied Petitioner's motion for summary judgment, and Petitioner timely filed its notice of appeal.

The board of contract appeals held that the termination for convenience was justified by Westwind's filing of its post-award bid protest, regardless of the merit or lack of merit of the post award protest.

The board of contract appeals also held that the board should give preclusive effect to the GAO's April 15, 2009 decision in Petitioner's second GAO protest.

Respondent Position in the Court of Appeals

In the court of appeals, Respondent's DOJ counsel did not even attempt to argue that the agency had a reasonable basis for the termination for convenience. Instead, Respondent's DOJ counsel argued that terminations for convenience are not reviewable under the Contract Disputes Act, except for bad faith. In summary, Respondent's entire argument in the court of appeals was that:

> There is simply nothing of substance for a board or court to review, absent an allegation that the termination was based on some bad faith motive.

(753a-754a).

ARGUMENT

I. The Court should grant certiorari because an agency's termination for convenience for voluntary corrective action in response to the filing of a post-award bid protest in the Court of Federal Claims should be subject to *de novo* review under the Contract Disputes Act ("CDA") for breach of contract, where the record shows that:

(a) the agency knew or should have known that the post-award bid protest lacked merit;

(b) the agency knew or should have known that the post-award bid protest was subject to a motion to dismiss for untimeliness;

(c) the agency had a continuing requirement, funding, and the ability to perform the contract for at least the minimum contract quantity; and

(d) the termination for convenience was based on the agency's stated desire to obtain a better bargain for the same work by terminating the contract and cancelling the solicitation and awarding new contracts for the same work to other contractor(s).

The Supreme Court has recognized previously that:

> "The CDA provides certain significant protections for private parties contracting with federal agencies. It authorizes de novo review of a contractor's disputed decision, payment of prejudgment interest if a dispute with the agency is resolved in the contractor's favor, and expedited procedures for resolving minor disputes. §§ 607-612. The value to contractors of these protections … are unquestionably significant.

National Park Hospitality Association v. Department of the Interior, 538 U.S. 1, 13 (2003).

In the instant case, the board of contract appeals' decision shows that the declined to apply a true *de novo* CDA standard of review to the contracting officer's final decision. The board declined to apply a true ***de novo*** standard of review the reasonableness of the agency's decision to take voluntary corrective action in response to the frivolous and untimely protest that Westwind filed in the COFC on January 12, 2009. The board also declined to apply a true de novo standard of review by giving preclusive effect to the April 15, 2009 GAO decision in Petitioner's second GAO bid protest, against the cancellation of the solicitation, in which the GAO approved of the termination solely on the grounds of the erroneous reduction in funding arguments that change).

The board of contract appeals and Federal Circuit's decisions in this case have created new rules - that an agency can always terminate for convenience in response to a post-award bid protest.

Petitioner respectfully submits that the law should be otherwise. The new rule is inconsistent with the language of the CDA, and allowing terminations for convenience in response to a frivolous post-award protests without any judicial review is also anti-competitive, unfair, and unwise public policy, at least because such a rule creates an incentive for the filing of frivolous post award protests.

II. The Court should grant a petition for certiorari to provide guidance on the standard of judicial review for reviewing terminations for convenience for breach of contract under the CDA

In the court of appeals, Respondent' argued that agency contract terminations for convenience are *only* subject to review for "bad faith." According to Respondent, all of the Federal Circuit's existing caselaw about the "abuse of discretion" standard of review is erroneous dicta.

The Contract Disputes Act provides for a "de novo" standard of review of all contracting officer final decisions. The APA also states a broad standard of review of adminstrative actions for non-contract cases. The Federal Circuit's decisions about the standard of review do appeal to be dicta.

Petitioner respectfully submits that the Court should grant certiorari to address the question of what standard of review should be applied by the boards of contract appeals and the Court of Federal Claims when reviewing contract terminations for breach of contract under the Contract Disputes Act.

The Contract Disputes Act uses the words "de novo." Petitioner respectfully submits that is the standard that Congress intended for the boards of contract appeals to apply under the CDA, in all cases.

Without a writ, the question of the proper CDA standard of review will likely evade review, because the Federal Circuit has declined to decide the question, and no other court of appeals has jurisdiction to decide it. The facts of this case presented the Federal Circuit with an excellent opportunity to clear the air about the standard of review for terminations for convenience. Respondent based its

entire position in the court of appeals on the standard of review question, and the Federal Circuit declined to address it.

Again, 48 C.F.R. § 49.101(b) expressly limits the authority of the contracting officer to terminate for convenience with the following language:

> **The contracting officer shall terminate contracts, whether for default or convenience, only when it is in the Government's interest.**

If there is no "de novo" judicial of review of terminations for convenience under the Contract Disputes Act, the words of 48 C.F.R. § 49.101 have no meaning or effect, because without "de novo" review under the CDA, contracting officers have unchecked authority to terminate for convenience.

III. The Court should grant a petition for certiorari to prevent the board of contract appeals from erroneously giving preclusive effect to irrational GAO advisory opinions in CDA cases

The Contract Disputes Act provides for "de novo" review by the boards of contract appeals or the Court of Federal Claims. of all contracting officer final decisions on certified claims for money damages for breach of contract.

In contrast, the GAO only has statutory authority to issue decisions in bid protest matters, and the GAO bid protest statutes specifically provide that the GAO decisions are subject to judicial review in subsequent bid protest actions:

Since GAO's decisions are subject to judicial review in bid protest cases, and the boards of contract appeals and the Court of Federal Claims have exclusive

jurisdiction to decide monetary claims in CDA cases, it just makes no sense for a board of contract appeals to give preclusive effect to a GAO decision in a CDA case.

If Congress made GAO decisions subject to judicial review in bid protest cases, where Congress gave the GAO some authority to act, how can be that GAO decisions are not subject to judicial review in CDA cases, where Congress intended that there be a "de novo" standard of review, without any grant of authority whatsoever to the GAO?

The board of contract appeals relied on the authority of *College Point Boat Corp. v. United States*, 267 U.S. 12, 15-16 (1925) to justify the board's reliance on the April 14, 2009 GAO decision. Petitioner respectfully submits that *College Point Boat* does not support the board of appeals decision. College Point Boat is distinguishable on the facts -- in the instant case, there was no GAO or COFC decision for the contracting officer to follow at the time of the termination for convenience. Also, the rule of College Point Boat cannot be controlling, because that decision pre-dates the enactment of the Contract Disputes Act "de novo" standard of review, and the Supreme Court's decisions in *Bowsher v. Synar*, 478 U.S. 714, 731 (1986), and *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966).

Without a writ of certiorari, the question of whether a GAO decision should be given preclusive effect in a CDA case will likely evade review. There will be no circuit split, and the Federal Circuit has declined to address this question in this case.

Conclusion

The petition for certiorari should be granted and the Federal Circuit's affirmance should be reversed, or, in the alternative, the Court should set the case for plenary review.

Respectfully submitted,

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