No. 21-7077

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Catherine Kurkjian — PETITIONER
(Your Name)

vs.

Sec of the Army — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals, Federal Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Catherine Kurkjian
(Your Name)

25 Crocker St.
(Address)

Centerville, MA 02632
(City, State, Zip Code)

339-206-3670
(Phone Number)

QUESTIONS PRESENTED

Question 1: Whether a Court can neglect the legal and statutory obligations of an agency to adhere to a signed contract and the referenced clauses; by saying the contract was "effectively" completed?

Question 2: Whether a Court can rely on "facts" that are in conflict with the testimony of the Contracting Officer?

Question 3: Whether the Court erred in discounting evidence that the Contractor suffered a reprisal for disclosing information about violations of law and other conditions that she believed posed a specific and substantial danger?

Question 4: Whether "bad faith" entitles a contractor to the lost profits of the unexercised option years stipulated in a signed contract?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Statement of Related Cases. There are no related cases on any other appeal in or from the preceding in the lower court or body previously before this or any other appellate court

TABLE OF CONTENTS

INDEX TO APPENDICES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix 1 to the petition and is

[ ] reported at ?; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix 3 to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Aug 26, 2021.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Nov 2, 2021, and a copy of the order denying rehearing appears at Appendix 2.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

TABLE OF AUTHORITIES

STATUTES

REGULATIONS

CASES

Facts of the case

The U.S. Soldier Systems Command (Natick Labs) issues contracts to independent contractors to prepare technical documents to be forwarded to the Defense Logistics Agency to procure food for the Military. Catherine Kurkjian was issued Contract W911QY-P-014; signed by Mr. Abate on 28 Feb 2012 and Ms. Kurkjian on March 2012. It included a base year of $38,110 and three exercisable option years at 37,000 per year. Referenced within the contract are clauses that are enforced with the same force of Law as the Contract. Amongst the references are the Federal Acquisition Regulations (FAR). The FAR which had its beginnings in the Armed Services Procurement Regulation since 1947, is a substantial and complex set of rules governing the federal government's purchasing process. The purpose of the FAR is to publish uniform policies and procedures for federal agencies to follow when going through the procurement process These rules provide a consistent yet flexible purchasing procedure so that government contracts may be conducted in transparent, fair, and impartial manner. Also referenced in the contract is the Requirement to inform the contractor of Whistleblower Rights. The plaintiff Contractor challenged the authority of the Government to make the decision to terminate the contract by "just paying the contract and just saying the contract was completed". The Plaintiff Contractor appealed to the US Court of Appeals to decide if the Board erred in defending the Agency's breach of the contract by improperly terminating the existing contract by using undocumented and

unsubstantiated performance concerns as a pretext to discharge her without notice and deny the "fruits of the Contract".

. The Board concluded that the Government did not have to adhere to the administrative laws, rules, and regulations because the contractor had been paid (or at least invoiced for 95% of the work for the base year of the contract. The contractor was discharged without notice 7 weeks prior to the delivery date. *stipulated in the contract. The Court proffered no laws, rules, or regulation giving* authority to Natick Lab's to dispose of the contract. Both Courts dispensed of evidence that the *inspection criteria contained in* Government documents, is not in compliance with Us Department of Agriculture (USDA)/Food and drug administration (FDA), Bacterial Analytical Methods (BAM) which poses a specific and substantial danger to the Military food supply. Both Courts dispensed of testimony from the Contracting Officer that the contract file contained no documented evidence to support the Court's fact finding. To the extent the government is asserting that their decision not to exercise the option years was not done in bad faith, and instead was based on "appellant's behavior," the evidence shows that the "behavior" in question was Kurkjian's resistance to, and refusal to comply with directives issued by employee supervisors that she be believed would put military personnel in danger and the hostile work environment that allowed the "bullying" of the technical writers in the Document Preparation Division of the Food Engineering Services Department in Combat Feeding.

Plaintiff Contractor was not provided with the requirements that she needed to perform, correspondence regarding USDA's request to increase sample sizes to ensure the statistical probability that the food was safe for human consumption was withheld from her, and instructions from the new Employee Supervisor was not in accordance with USDA guidelines. Plaintiff Contractor suggested two other options so that she would not have to follow "inappropriate instructions" to change the date of a procurement document from 2011 to 2013 without a revision or even a review. Kurkjian did not change the date. She wrote a letter to the base commander requesting a meeting to discuss her fear that she was getting lined up to be rail roared out her job for speaking out about the stress of the hostile work environment that she; and others believed, contributed to the death of a federal government employee, and her fear that her contract was in jeopardy because of her refusal to "draw less attention to herself about the conditions of the Base that she believed to pose a specific and substantial danger to the soldiers in the field . She was warned not to send the letter because it would only get her in trouble. She was discharged without notice 4 days later. The government refused to provide her any documentation of the events that occurred on Jan 9, 2013 nor reassurance that she had nothing to fear in regard to the threat: You don't want to do that. Things could get messy. Think about your family in response to her request to be "officially terminated" to be provided documentation of the means and date of her departure and the turn in slips for her government furnished equipment. Kurkjian exhausted all means to resolve the issues but the government refused to provide her with the

completed' to make all the laws an ínsequia'.

REASONS FOR GRANTING THE PETITION

This Writ of Certiorari is being submitted because a) the United States Court of Appeals has entered a decision in conflict with decisions of the US Supreme Court and other Federal courts in the same important matters; b) has so far departed from the accepted and usual laws, rules, and regulations governing government contracts that it requires the supervisory power of this Court; and c) because the court neglected two compelling facts: 1) citing non-compliant inspection criteria in government documents increases the risk of Military personnel being sickened by contaminated food, and 2) Since the obligations arising out of a signed contract have the force of law between the contracting parties, neglecting the laws will have far reaching consequences for all contractors if Court's decide contract cases based on employer/employee relationship instead of the terms of the contract.

Question 1: Whether; contrary to an individual's classification as an independent contractor, a Court has the authority to neglect the legal and statutory obligations of an Agency to adhere to a signed contract and the referenced clauses – by saying that the contract was effectively completed?

The Court wrote, "We see no error in them Board's conclusion that the base year of the contract was Effectively completed.

1) The error is not in the Court's "interpretation" of an effective completion but in the "conclusion" that that an Agency does not have to adhere to the legal and statutory obligations of a signed contract and the laws referenced therein.

2) <u>The Board did not interpret the FAR regulations.</u> The Court wrote:

In applying de novo review, however, "we give 'careful consideration and great respect' to the Board's legal in interpretations in light of its

considerable experience in the field of government contracts, including its experience ininterpreting the FAR." K-Con, Inc. v. Sec'y of the Army, 908 F.3d 719, 724 (Fed. Cir. 2018) (quoting Frwm-Co/^on Corp. V. United States, 912 F.2d 1426, 1429 (Fed. Cir. 1990).

The Board disposed of the statutory obligation of the FAR by saying that the contract was not terminated. The Court upholding the Board's rationalization that 95% of the hours being paid vested authority to Government employees to violate the terms of the contract and the well settled contract law lacks legal merit. The Court's Decision fails to follow these existing decisions of the US Supreme Court.

a) The Supreme Court made clear We *have never applied {Chevron deference} to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practices, (That counsel advances a particular statutory interpretation during the course of trial does not confer upon that interpretation any special legitimacy Id at 212 See also City of Kansas City v. HUD, 923 F. 2nd 188, 192 D.C, Cir. 1991)*

b) *Chevron deference is accorded only when a court finds a permissible construction "made by the administrator of an agency. Chevron, 467 U.S. at 844. Under Chevron step Two, the agency action was not based on a permissible interpretation of its enabling statute. The agency acted outside of its compass of its delegated authority and the agency's action rests on an impermissible construction of its authorizing statute. In such circumstances, the agency's action is vacated See, e.g., Michigan v. EPA, 135 S. CT. 2699, 2711 (2015); Am Library Assn v. PCC, 406 F. 3d 689, 708 (D.C. Cir. 2005)*

c) Furthermore, in determining the breadth of the deference granted to the agency, the Supreme Court put the brakes on unbridled and excessive deference in Christopher v. Smith Kline Beecham Corp., 132 S.Ct. 2156 (2012).

Deference is not appropriate when: it appears that the interpretation is nothing more than a "convenient litigating position," or a "'post hoc rationalization[n]' advanced by an agency seeking to defend past agency action against attack. (Citations omitted). Christopher v. Smith Kline Beecham Corp. 132 S.Ct. at 2166 -2167 (2012).

3. Natick Labs did not fulfill the legal and statutory obligations of the contract. The Court wrote:

the Board found that the government fulfilled all of its material obligations to Kurkjian under the base year of the contract.

a) Failure to adhere to the terms of Contract W911QY-P-0194 (Addendum 3)

The plain language of the contract is clear:

Period of Performance: One full year.

Deliverable(s) (stated in terms of contract tasks, not hours):

□ Distribute, coordinate and reply to requests for Engineering Support requests as needed on or before their due date with 100% accuracy.
□ Convert raw technical and packaging requirements received from CFD project managers/food technologists and industry into formal procurement documents (PCR, MIL-DTL or MIL-PRF, or PKG&QAP) with 100% accuracy in the current established format using Microsoft Word.
□ Coordinate documents with all applicable government agencies and industry, resolve comments received with FEST and CFD project managers/food technologists.
□ Prepare reply to comments document to send out to government and industry for each specification.
□ Set up and maintain an organized project folder, historical folder and active folder for each specification prepared.
□Set up and maintain electronic files in accordance with FEST established procedures.

DELIVERY INFORMATION
0001 POP 28-FEB-2012 TO 26-FEB-2013
0002 POP 27-FEB-2012 TO 26-FEB-2013
0003 POP 28-FEB-2014 TO 27-FEB-2015
0004 POP 27-FEB-2015 TO 26-FEB-2016

INSPECTION AND ACCEPTANCE TERMS are stated in terms of supplies/services being delivered and inspected/accepted at a certain destination.

b. Failure to Follow the Federal Acquisition Regulations (FAR)

The Federal Acquisition regulations (FAR), described in Appellant's brief, are well established and sound contract laws.

As a general matter, "agencies are bound to follow their own regulations.

"Wilson V Comm'r of Soc. Sec., 378 F.3d 541, 545 (6th Cir.2994).

i. The Contract was not Physically Completed. FAR 4.804-4 states a contract is physically complete when the contractor has completed the required deliveries, the Government has inspected and accepted the supplies, the options have expired, or the contract is terminated. The Government didn't inspect any deliveries. The contractor was discharged 7 weeks before the delivery date with 4 incomplete projects. There are no laws that define "substantial completion", "effective" completion, or that give the government the authority to order a contractor to "stop work immediately" without a stop work order.

c. *Natick Labs' Failure to Issue a Cure Notice. If a Contractor is not* performing at a level that met the government's standards, as alleged by the government, they should have provided a "cure notice". A "cure notice" is issued by the government to inform the contractor of a condition that is endangering performance of the contract. The cure notice specifies a period (typically 10 days) for the contractor to remedy the condition. If the condition is not corrected within this period, the cure notice states that the contractor may face termination of its contract for default. A proper cure notice must inform the contractor in writing: a. That the government intends to terminate the contract for default; b. Of the reasons for the termination; and, c. That the contractor has a right to cure the specified deficiencies within the cure period (10 days). FAR 49.607(a). To support a default decision, the cure notice must clearly identify the nature and extent of the

performance failure. FAR 49.402-3(d) required a cure notice to the contractor before a termination. The Swanson Group, Inc., ASBCA No. 44664, 98-2 BCA ¶ 29,896 at 147,993. The Court claims that a cure notice was not needed but also states that "problematic behavior" ended her contract. There were 7 weeks before the deliverable date for the Contractor to cure any alleged deficiency. To the extent the government is asserting that their decision not to exercise the option years was not done in bad faith, and instead was based on "appellant's behavior," the evidence shows that the "behavior" in question was Kurkjian's resistance to, and refusal to comply with directives issued by employee supervisors that she be believed would put military personnel in danger and the hostile work environment that allowed the "bullying" of the technical writers in the Document Preparation Division of the Food Engineering Services Department (FEST) in Combat Feeding Directorate (CFD). (Discussed in Question 3)

d. Agency's Failure to Follow Procedure for a Termination of Convenience

Additionally, the government was required to provide Appellant with a letter stating that her contract was going to end. It either had to be a termination for convenience or it had to be a termination for default. Neither policy was followed during the decision-making process to discharge the contactor without notice. Supervisor Carter testified about the decision making (Tr 201):

6 I think we talked about different scenarios,
7 one was not to terminate, let her finish out the
8 contract. I think we also discussed letting her do it
9 from home. And I think that the lawyers came up with
10 just paying the contract and just saying the contract
11 was completed

i. Scenario 1: Letting her finish out the contract would be in accordance with FAR 49.101(c) The FAR regulations require that "When the price of the undelivered balance of the contract is less than $5,000, the contract should not normally be terminated for convenience but should be permitted to run to completion." Despite the outstanding balance of Appellant's contract being less than the $5,000 threshold outlined above, the government, contrary to FAR 49.101 (c) still terminated Appellant's contract and refused to allow the contract to run to completion.

ii. Scenario 2: Letting her work at home would be consistent with her classification as a contractor.

iii. Scenario 3: "Just paying the contract and just saying the Contract was completed" is not supported by any regulations.

The legal definition of "bad faith" is: "intentional dishonest act by not fulfilling legal or contractual obligations, misleading another, entering into an agreement without the intention or means to fulfill it, or violating basic standards of honesty in dealing with others." Courts have found bad faith when confronted by a course of government conduct that was "designedly oppressive," Struck Const. Co v. United States, 96 Ct. Cl. 186, 222 (1942), or that "initiated a conspiracy" to "get rid" of a contractor, Knotts v. United States, 121 F. Supp. 630, 636 (Ct. Cl. 1954). See also C. Sanchez & Son, Inc., 6 F.3d at 1542; North Star, 76 Fed. Cl. at 291. In Information Systems & Networks, Corp. v. United States, the court acknowledged that because the duty to act in good faith is an implied term in every contract, "a party may breach a contract by acting in bad faith." However, the court reverted to the traditional formulation of the duty of good faith by advising that parties must abide by covenants requiring them "not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract."

d. The agency's interpretation of its enabling statute, whether an initial construction or a change must "*be within the scope of its lawful authority.*" *Michigan v. EPA, 135 S. Ct. at 2706.* In other words, the arbitrary and capricious standard is effectively incorporated as a part of a court's review under Chevron Step

Two. See, e. g., *Ala. Educ. Assn v. Chao, 4555F.3d 386, 396-97 (D.C. Cir.* (2006) (reversing an agency statutory interpretation under Step Two, because the agency "*failed to supply a reasoned analysis supporting its change in position")* see also *AFL-CIO v. Brock, 835 F. 2d 912, 919-20 (D.C. Cir. 1987)*

The only reasoned analysis not to adhere to the well-established contract law, described above, was to remove the Contractor from the facility as soon as possible after the incident on Jan 8, 2013, when Ms. Kurkjian: along with Ms. Aucoin, witnessed the remote access of her computer and the subsequent discovery of her compromised office.

> *The Supreme Court has warned that an agency's interpretation of an ambiguous regulation will not be upheld if it results in "unfair surprise" to regulated parties. Christopher v. SmithKline Beecham Corp., 567 U. S.142, 156 (2012). The Supreme Court also made clear in Christopher v Smith Kline Beecham Corp., 567 U.S. 142 (2012), no Auer deference will be afforded to an agency interpretation of a disputed regulation if the statute, published regulations, and the agency's prior enforcement regime gave no notice to regulated parties of the interpretation proposed by the agency during the course of litigation*

On Jan 9, 2013, Contractor Kurkjian was instructed to stop work immediately, turn in her computer, and leave the base. $3182 remained on the contract (calculates to 91% completion when the decision was made). At what percentage would the Court have concluded that the contract was no longer "effectively completed" but a "wrongful termination" if the amount owed to the contractor was 9%; instead of 5%. The participants at the meeting did not know what percentage of hours were paid. The Contracting Officer could not testify that he even participated in the 9:00am meeting by telephone (discussed infra). At the 1:00pm meeting, the Contractor's request to be "officially terminated" to be provided with documentation of the date and means of her departure was denied. The Natick Labs

denied subsequent requests to be provided with reassurance that she had nothing to fear in regard to the government's threat: "You don't want to do that. Things could get messy. Think about your family. The Contractor was denied representation. The Contractor was instructed to submit a final voucher for the remainder of the contract. The contractor submitted a voucher for the hours she worked up to the Jan 9, 2013. Natick Labs insisted on submission of a final voucher for hours that she did not work (which is against federal and state laws). The contract was modified and then closed without a final voucher and without the contractor's completion statement. The Agency refused to provide any of the documentation she requested (discussed in Question 4).

e) The Court did not provide an adequate explanation as to why Natick Labs was not required to give Fair Notice.

> *A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required*[1]*. An agency cannot enforce a rule against a party if it is unduly vague or the party did not otherwise have fair notice of the rule. The "requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." Id*
>
> A government regulation "*which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at it meaning and differ as to its application violates the first essential of due process of law*" *' Connolly v. Gen. Constr. Co. 269 U. S. 385, 391 (1926), see Fox Television Stations, 567 U.S. at 253* (noting that "[*a] conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide" such notice.*

The Contractor was denied fair notice and due process. CO Streeter testified that there was no investigation which is in violation of FAR 1.602-2. (Discussed in Question 4)

Question 2: Whether a Court can base its Decision on "facts" that are not supported

[1] Fecks. Fox Television Stations, 567 U.S. 239,253, (2012).

by any written documentation and in conflict with the testimony of the Contracting Officer?

Omitted case law: *Whenever an agency is required to act "on the record after opportunity for an agency hearing." See 5 U. S. C., i.e., pursuant to formal rulemaking or adjudicatory procedures, the Administrative Procedures Act ("APA") requires that agency findings and conclusions be supported by "substantial evidence" id 706(2)(E). substantial evidence review requires consideration of the whole record upon which an agency's factual findings are based, including "whatever in the record fairly detracts "from the evidence supporting the agency's decision. Id. At 487-88. In reaching this conclusion, the Court rejected the approach of lower courts that looked only to the evidence supporting an agency decision "without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." Id. ; see also id. At 478. Under the whole record review standard, "evidence that is substantial viewed in isolation may become insubstantial when contradictory evidence is taken into account." Landry v. Fed. Deposit Ins. Corp., 204 F. 3d 1125, 1140 (D.C). Cir. 2000). This means that an agency cannot ignore evidence that undercuts its judgement or discount evidence without adequate explanation. See Morall v. DEA, 412 F. 3d 165, 179-180 (D. C. Cir. (2005); see also, e.g., Bellagio, LLC v. NLRB, 863 F. 3d 839, 850-52 (D.C. Cir. 2017) (vacating agency decision where the agency ignored or otherwise did not adequately weigh contrary record evidence); Miller v. Dep't of Justice, 842 F. 3d 1252, 1259-64 (Fed. Cir. 2016) (reversing agency decision that failed to consider contradictory evidence); Lakeland Bus Lines, Inc. v NLRB, 347 F. 3d 955, 963 (D.C. Cir. 2003) (holding that the Board's "clipped view of the record"*

1) The Court wrote: "according to Evangelos, the options were not exercised because of fiscal uncertainties, quality of her work, and ability to get along with CFD members"

i. Fiscal uncertainties were discounted by the Board.
ii. Quality of her work was discounted by the Contracting Officer.

Q So the other alleged justification for the non-renewal -- the non-exercising of the option, is the quality of her work, right. there's nothing wrong with her work, was there?
A No, there wasn't, in my eyes. I saw no evidence of that.

iii. Ability to get along with CFD members

Q Is that considered -- when you did your

10 appeals, did you consider that to be one of the failures
11 of her ability -- or challenges with her ability to get
12 along with CFD team members?
13 A No, not that.

2) The Court wrote that it was her "increasingly and problematic behavior" not her concerns about Salmonella and Aflatoxin and Salmonella that resulted in the adverse employment action.

The Contracting Officer testified:

17 I reviewed the file
18 and I saw no -- nothing derogatory in there. I saw no
19 cure notices, nothing that would document poor behavior.
20 Q You said document poor behavior, do you mean.
21 non-performance or --
22 A Non-performance or other things like that.
15 Q Now, it's clear that the contract was
16 performed in a satisfactory manner, right?
17 A Yes.
22 Q And there's nothing in her record indicating
23 any poor work performance, right?
24 A That's correct.

18 Q You had said, also, that at some juncture,
19 you looked into her file. There was no written
20 documentation that demonstrated poor behavior on her
21 parts, right?
22 A That was on January 9th I looked at the file,
23 prior to the meeting.
24 Q Whenever the date was, it's clear, as of
25 January 9th, there was no written documentation
1 regarding poor behavior on her part. Isn't that true?
2 A Yes.

3) The Court reports, "In attendance at the meeting were Contracting Officer Streeter, by phone . . . "Contracting Officer testimony:

13 Q Were you physically present?
14 A No, I'm not sure that I was even present by
15 telephone.
16 Q I'm trying to understand. You're
17 representing -- you're the representative, as the

18 contracting officers, that occurs perhaps just day.
19 A It may have been.
20 Q Never met her, right?
21 A Yes, that's true.
22 Q Never spoke with her.
23 A Right
24 Q Had no idea what her background was.
25 A Correct.

3 Q The incident that was also a part of the
4 discussions at the 9:00 meeting was the events that had
5 transpired the evening before, on January 8th, correct,
6 with Kathy Evangelos?
7 A I see that in the report, but I'm not sure
8 that I even participated in that meeting by telephone.
13 Q Can you testify here today, under oath, that
14 -- we know you weren't there physically, correct?
15 A Correct.
22 Q Having in mind -- I listened to your words.
23 Having in mind the importance of making a decision and
24 having a representative there as the contracting
25 officers, can you tell this Court here today, under oath,
1 that you have a specific memory of participating in that
3 A No, I can't.

4) The judge then led the witness so that he could report that the Contracting Officer was at the 9 am decision-making meeting.

4 JUDGE PROUTY: While we're talking about
5 that, just to be clear, your testimony is not that you
6 weren't at the meeting; you just don't know one way or
7 the other.
8 WITNESSES: I don't recall if I sat in on the
9 telephone conversation.
10 JUDGE PROUTY: I understand. Do you have any
11 reason to believe you did not?
12 WITNESSES: I don't.

Q Sir, just a moment. If you, in fact, were
4 present and participated in the conversation at 9:00,
5 why would you need to renew the conversation and talk
6 about it again at 1:00 -- just before 1:00?
7 A As I said, that's why I'm not positive I was

8 involved in the 9:00 phone conversation. I am sure that
9 I had the conversation, whether it was just to re-affirm
10 that this would be terminated -- or the contract would
11 ends with substantial completion in a satisfactory
12 manners. But before we talked to the appellant, I wanted
13 to make that I understood what they were trying to do
14 and give my best advice.

5. The Court's statement, "Although Kurkjian takes issue with the Board's reliance on testimony from Bates, Evangelos, and Dr. Carter— all of whom she refers to as "third parties to the contract - is not correct.

Carter and Evangels were identified as "third parties' to the Contract because their unlawful interference resulted in the termination of the Contractor's contract and the destruction of her reputation in both her professional and personal stature.

Bates was not a third party to the contract. She was Kurkjian's Contracting Officer Representative. COR Bates testified that she had no Official documentation of anything she testified to. She also testified:

Q There's no documentation, no written
19 documentation of any alleged misconduct, right?
20 A Right.
21 Q No cure notice, right?
22 A Right.

The Board discounted hundreds of pages of documented evidence, the testimony and portrayal of Ms. Kurkjian as a conscientious professional, and the testimony of the Contracting officer to instead rely on a memo written by the Assistant to the Direct of Combat Feeding, "hearsay", and his interpretative conclusion that the contract was not terminated.

5) The Court also discounted Mrs. Kurkjian's exemplary 28-year work history. She was highly praised for professional expertise and performance with the US Army.

i) Special Act or Service Awards: April '86, March '87 stated "Expertise in the area of document preparation, willingness and synergetic spirit were major contributing factors in meeting the commitment of this Center to provide the Procurement Center with updated TDPs for MRE."

i. Sustained Superior Performance Award for "outstanding and highly successful performance during the period 1 February 1986 through 31 January 1987." "Handled priority work... in a very efficient and timely manner. . . Outstanding performance was demonstrated by her attention to detail and evaluation of technical requirements."

ii. Rating by Supervisor Nancy Kelley, Chief, PESS, PDEB, FTD, FED; Dec 91:

"Ms. Kurkjian managed her projects for the preparation and maintenance of Technical data Packages (TDPs) such that all work was scheduled in accordance with procedures. . . She supported full and open competition by assuring that none of her TDPs contained unjustified restriction to competition. . . She prepared concise, well written, replies to all comments on a timely basis, without fail. . . She followed up by including the appropriate comments in all approved documents. . . She handled the action very thoroughly and with attention to detail, so that no incorrect actions were taken, all conflicting comments were successfully resolved, and then consolidated comments were forwarded to the initiating activity within the required time schedule. . . The majority of these responses required the preparation of engineering changes, which were well researched by Ms. Kurkjian. Without fail, all of her responses were Performance *technically accurate...* Ms. *Kurkjian meticulously updated document files, card records, and the A&A index as she completed her projects, without fail, and with no errors. . . Ms. Kurkjian continues to perform her work in a dedicated, professional, and highly organized manner.*

iii. Mr. Valvano wrote in a letter on December 13, 2007, notarized by Valerie J DeAngelis:

"She is very professional and well-liked by the Team and others. Her work is excellent, well thought out, and she is meticulously in detail. The tasks assigned are always completed ahead of schedule to meet established deadlines. I have not heard of any complaints or seen any unprofessional behavior or conduct."

"I knew Catherine as a coworker in the 1990's when I started at Natick. She was smart, very helpful and had a pleasant personality. No matter how hard the task, she always had a smile. When I had a need to find another person to work on some critical projects last year, Catherine was the first person I called to ask if she would be interested."

iv.. L--Intent to award the 2011 contract to Catherine Kurkjian to "Provide Support to Combat Feeding Directorate (CFD) Document Preparation and Technical Support Program" Posted November 30, 2010 stated:

"Contractor is an essential part of CFD mission, based on her level of expertise and knowledge of CFD document preparation and technical support processes and procedure that Is unique to the Government."

Discounted evidence from co-worker that the problem was not Ms. Kurkjian:

- July 5, 2012 (9:03 AM): Painter to Kurkjian: Subject: RE: USDA input for Beef Patty (MRE) document coordination also demonstrates violations of Work and Wage Laws.

  Back in the saddle again. . .. . As I was leaving Tuesday night (they gave us 59 minutes, but I had already worked 45 of them, and had worked until 6:30 pm on Monday night, you can never seem to get away and always give more here) at any rate, Mary stopped me on the way out to tell me that "we" were going to be calling Jeannette on Thursday morning to discuss this whole water temperature issue. . .

- July 6, 2012 (8:51AM): Painter to Kurkjian ABCs all posted S: 1400 5 Jul 12

  Please be careful of what you say because Jill is still Mary C's friend. Mary C brought Jill into the government in 2005, plus she is your COR."

- July 16, 2012 (3:59PM); Kurkjian to Painter; Subject: *Checking in; "Hi Betsy, just checking in to make sure you are alright. The clock is ticking!!!*

  - July 17, 2012 (9:30AM): Response from Painter; "You mean the time bomb is ticking! I'm just doing the best I can."

- July 17, 2012: 1:37PM *Stop that kind of thinking immediately! Cathy, I can assure you that it is not about you, it's about HER. Just ignore HER and it will get better. Try to get your documents done, that's all you can do. Concentrate on the WORK, not HER. Remember, SHE needs YOU. She needs your work to get done. Getting rid of you would be like shooting herself in the foot. She's not that stupid!*

- July 17, 2012 (1:43PM), Painter, *"Stop thinking about that! You are a valuable employee, someone who takes pride in their work and wants to get it right! Think of that first. She will be on maternity leave soon and someone has to do the work for MRE34! Just do like Mary Nash and I do, ignore her! That's what Mary Friel would say too!*

- July 17, 2012 1:52PM Painter: *You get your work done too, Cathy. No one can complain about an employee who gets the job done, I hope to see you tomorrow. Think positive, you're an excellent employee!"*

November 12, 2012 Mary Caniff Resigned: Co-worker wrote; Ray and Mary were singing in heaven.

A co-worker's words after Kurkjian's discharge without notice:

6.2.3.3 After I was discharged without notice, this co-worker wrote: *"I am very sorry that you were not a member of the Union so they could fight for you too. And even though they fought for me, they could not restore what was taken away from me and given to someone else. The major consequence has been working a job I was never hired to do all the while watching someone else taking credit for my former work. The constant abuse of one major bully has been replaced by the (sometimes) more subtle abuse of others. I have been fighting all of my own "private battles" while still working for and with these culprits, some of whom are still around you know..... You have no idea just how many of those battles I have fought and in fact continue to fight, just like a stone thrown into a pond the circles of water keep getting larger and are ever more encompassing....*

The Serenity Prayer gives me hope and helps to keep me calm at work. It helps me to come to a point where I just look past all of this (Job situation) and I realize it's not very important in the real scope of life. I have had to make choices, to care or not to care, so these people and these situations don't drive me mad. I made a CHOICE to LIVE by my own terms and I just ignore the culprits and the uncomfortable situations that constantly come up at work

v. Employee Supervisor Interference. In November 2012, Melvin Carter became the Supervisor of the Food Engineering services Team in the Combat Feeding Directorate. He was not versed in Contract law nor FEST procedures and apparently, did not know that he was prohibited from directing, supervising, government contractors. (Addendum H) In less than 2 months, the employee

Supervisor's unlawful interference destroyed Kurkjian's livelihood, and her reputation, in both her professional and personal stature. He made undocumented, unsubstantiated allegations about her work performance and libelous publications about her mental state. "This was not officially brought to me just rumored." He said, He denies that he told the Contractor that she needed to "care less, think less, and ask less questions" because she was making people look bad, to do as she was told, and to stop "drawing attention to herself" or her contract would be in jeopardy. She continued to draw attention to herself and she was terminated.

Question 3: Whether the Court erred in discounting evidence that the Contractor suffered a reprisal for disclosing information about violations of law and other conditions that she believed posed a specific and substantial danger?

The basic elements of retaliation include

(a) protected activity by the plaintiff; (b) adverse action by the employer; and (c) a causal connection between the two.

(b) United States Supreme Court decision *McDonell Douglas Corp* v Green criteria for retaliation:30 The plaintiff must first establish a prima facie case of retaliation. Federal cases require that plaintiffs prove (1) he or she engaged in a protected activity, known to the employer

Employee Supervisor Carter testified

(2) He or she suffered an adverse employment action; and (3) there was a causal connectionbetween the protected activity and the adverse employment action. The federal burden is "not onerous" and requires only "the production of admissible evidence which, if uncontradicted, would justify a legal conclusionof [retaliation] 32

b) Federal law requires that the reason for the adverse action was a pretext and that the action taken was the result of retaliatory animus or motive 43

(C) A substantial and specific danger to public health or safety.

According to FDA BAM procedures Dairy shakes fell into Category I because a) the food has a history of Salmonella contamination, b) does not receive a kill-step between sampling and consumption, and c) is intended for consumption by the Military (considered a food-risk-sensitive population akin to the aged, infirm, or infants).

Department of Homeland Security, petitioner v. Robert J. Maclean chief Justice Roberts states: *Federal law generally provides whistleblower protections to an employee who discloses information revealing "any violation of any law, rule, or regulation," or "a substantial and specific danger to public health or safety." 5 U. S. C. §2302(b)(8) (A*

1) Issues Posing substantial and specific danger to the Military food supply.

a) Non-compliant sample sizes for Salmonella testing increase the risk of Being sickened by Salmonella tainted rations

Supervisor Canniff refused to increase sample sizes for Salmonella testing in response to the essential USDA comments below.

i. *PCR-D-002B; Dairy shake: Increase sample size from 5 to 60.*

Justification: The AMS laboratory is not comfortable with the sampling plan for this product since it does not follow the FDA guidelines. The essential comment includes an FDA compliant sampling plan that can be performed by the Government laboratory."

ii. PCR-B-053; Breakfast Skillet: Increase sample size from 5 to 15.

Justification: Ensures the statistical probability that the lot is safe for human consumption.

The Natick Microbiologist concurred with the USDA essential comment but Supervisor Caniff deferred to Defense Logistics Center (DLA) and retained the sample size of 5; not 60 for Dairy shakes and 5, not 15 for Breakfast Skillet

iii. Bacterial Analytical Methods (BAM) state Salmonella laboratory results will be meaningless if a representative sample is not tested:

> *The adequacy and condition of the sample or specimen received for examination are of primary importance. If samples are . . . not representative of the sampled lot, the laboratory results will be meaningless. A representative sample is essential when pathogens or toxins are sparsely distributed within thefood. The number of units that compromise a representative sample from a designated lot of food product must be significantly significant.*
> *BAM also states in paragraph titled, 'Adherence to sampling plan. Most foodsare collected under a specifically designed sampling plan in one of several ongoing compliance programs. Foods to be examined for Salmonella, however, are sampled according to a statistically based sampling plan designed exclusively for use with this pathogen.*

This would mean that Salmonella contaminated product would not be screened out of the food supply if sample sizes are not sufficient to detect the tainted product. BAM specifies sample sizes for 3 categories of food.

Category 1: 60
Category 2: 30
Category 3: 15.

A sample size of 5 is not compliant with any of the specified categories which renders the test results meaningless; increasing the risk of Military personnel being sickened by Salmonella contaminated food

b) The Contractor's resistance to follow instructions from Employee Supervisor Carter to delete all Certificateof Analysis (COA) for Aflatoxin and Salmonella

i) The instructions conflicted with USDA inspection criteria that was previously agreed upon by all stakeholders since 2006.

ii) The instructions were wrong. PCR-N-003A was approved 7 months later with Aflatoxin testing that was not in accordance with the instructions employee Supervisor Carter ordered the contractor to include in the document.

iii) Kurkian's concerns are further validated by the study conducted by The US Army Combat Capabilities Development Command Soldier Center, Technical Report Natick/TR-20/011. A study for the Survival of Salmonella Enterica in Low Moisture Military Ration Products,[2] indicates the importance of certificate of analysis to mitigate the risks of Salmonella contamination, A study excerpt follows:

iv) Non-typhoidal Salmonella is a foodborne pathogen which has one of the highest incidences of hospitalizations and deaths. The foodborne illness symptoms can include fever, abdominal pain, diarrhea, nausea and vomiting [1]. Within U.S. Armed Forces personnel there was an average rate of 12.4 Non-typhoidal Salmonella cases per 100,000 from 2007-2016 [2]. In addition, the Center for Disease Control has estimated that for each culture-confirmed case there are an average of 29 unreported cases [3]. This identification of a high number of cases in both the general population and the U.S. Armed Forces suggests an increased need for research in S. enterica survivability in food. Also, the high incidence of foodborne illness coupled with a large number of outbreaks in commercial low moisture foods (LMF) such as peanut butter prompted Army researchers to investigate S. enterica survivability in LMF rations. The majority of LMF are not cooked priorto consumption so contamination at the time of manufacture could lead to illnesswhen consumed by the soldier.

v) These results of the study demonstrated "the need for additional research onways to control S. enterica in LMF to enhance soldier protection against

[2] https://apps.dtic.mil/sti/citations/ad1100853

foodsafety threats. An increased focus on ingredient sourcingand certification will play an important role in pathogen risk mitigation.

vi) Ingredient sourcing with certificates of analysis showing negative S. entericatesting; proper handling and separation of raw ingredients from finished products; and microbiological testing of finished product reduce risk."

vii) Only one of the documents include compliant sample sizes for finished product Salmonella testing.

viii) A vendor, Trans packers, stated the importance of verifying the incoming product to ensure that contaminated product is not packaged into rations resulting in recalls of entire meal bags. The Dairy shake recall in 2009 resulted in thousands of recalled product and years of subsequent litigation. [3]

ix) The importance of ensuring Salmonella free ingredients is also seen in the Salmonella poisoning (700 cases with 9 deaths) from the Peanut Corporation of America that resulted in the sentencing of former corporate CEO Stewart Parnell and other plant executives for shipping Salmonella tainted product that was not tested to verify that the peanuts were Salmonella free. [4]

Omitted case law: The action was an invalid exercise of its decision-making authority under *5 U.S.C. & 706 (2)(A)* because the agency "entirely failed to consider an important aspect of the problem" or otherwise failed to engage in reasoned decision-making *State Farm, 463 U.S. at 43, see also, e.g., Humane Soc'y of the U.S. v. Zinke, 865 F. 3d 585, 805 (D.C. Cir. 2017)*

The Court failed to consider the fact that government documents citing non-

[3] https://www.salmonellalawsuit.com/july-9-2009-mre-dairy-shakes-may-contain-salmonella/

[4] https://www.npr.org/sections/thesalt/2015/09/21/442335132/peanut-exec-gets-28-years-in-prison-for-deadly-salmonella

compliant sample sizes for Aflatoxin and Salmonella poses a substantial and specific danger to the Military food supply. All of the above renders the Board's conclusion that Kurkjian's concerns were just an "annoyance" and that she was not "holding out "for the best interests of the Troops. as an erroneous finding of fact. On July 18, 2012, the Contractor was informed from USDA that Nuts were becoming increasingly contaminated with the pathogens. She pulled back the document from approval. Kurkjian would not forward her documents until the issues were resolved. The information was never provided. Returning QA Specialist Mr. Moody stated: *"There are some complicated issues here, some that are delicate with regard to turf with political volatility.* The reason why Contractor Kurkjian thought it best for a full-time government employee to take on that responsibility. On Dec 28, 2012: Kurkjian wrote: *I will put aside the document until I am provided with the information that I need to complete it.* The requirements were never provided.

2. Violations of the American Disabilities Act, Title I/ Retaliation and Interference (Addendum). The Contractor disclosed information about the hostile work environment and violations of the American with Disabilities Act that she, and others believe contributed to the death of Mr. Raymond Valvano, a dedicated and long tenured government employee. The government employee was a handicapped person within the meaning of M.G.L.c.151B because of a condition that substantially limited his major life activity. Mr. Valvano utilized a handicap parking space and was granted a Work at Home (WAH) schedule to enable him to

fill his oxygen tank and attend Physical Therapy (PT) appointments. E-mail September 22, 2009 is evidence of Supervisor Caniff's awareness of Mr. Valvano's need to refill his oxygen tank.

> *Sept 22, 2009 (10:29AM) Valvano, RE Final approval for Southwest Beef, Mary, I say go with the original NDI version only. What do you say? Cathy, I am working in the morning session which starts at 8 am thru 1pm. I was not planning on going into work afterwards since I would have to go home to refill my tank. And by the time I get back to Natick it would be around 230-3pm. I was going to work from home the last 1.5 hours.*

Sometime in 2010/2011, Mr. Valvano was denied the previously granted accommodation. Kurkjian and other Co-workers encouraged him to exercise his rights under the law. Mr. Valvano died on July 12, 2011. Kurkjian believes that the denial of these rights contributed to his death. It is also unlawful to retaliate against an individual who discloses the treatment as Kurkjian did. She continued to draw attention to herself about the violations of law.

4) Prima Facia for Retaliation

The Court stated:

> *"Mrs. Kurkjian's brief never quite crystallizes the argument implicit in this appeal, which is that she can prove bad faith or arbitrary and capricious action by demonstrating that the agency retaliated against her for her compliance with proper procedures regarding Salmonella and Aflatoxin testing. While we agree that such a motivation would be improper and call into question the government's decision-making, that is not what happened here.*

Omitted case law: *an agency cannot ignore evidence that undercuts its judgement or discount evidence without adequate explanation. See Morall v. DEA, 412 F. 3d 165, 179-180 (D. C. Cir. (2005);*

The Court did not provide an adequate explanation why the following neglected evidence was not sufficient to establish a prima facia for retaliation

Disclosures:
Bates's testimony:
5 Q Did Ms. Kurkjian ever talk to you and express
to you her concerns based upon conversations she had
2 with people at the Department of Agriculture about the
3 shakes being recalled and their concerns and need for
4 additional testing because of concerns about salmonella
5 poisoning?
6 She talked to you about that, didn't she?
7 A She talked to everyone about that.

Q The reason she told you that she was
9 concerned about the other issues is because they
10 contained undisclosed information regarding salmonella
11 and aflatoxin, right?
12 A Yes, from her perspective.

December 28, 2012 (9:35am): Kurkjian to Winter halter (HR

"I want to thank you so much for listening to me yesterday. Now, of course, I am afraid of the consequences that I could suffer as a result.

January 3, 2012: After COR Bates and Supervisor Carter attempted to force Contractor Kurkjian to change the date on a 2011 document to 2013 (Kurkjian offered 2 other options that were rejected) the Contractor drafted a letter to the Commander of the base.

January 4, 2013 (2:12pm): E-mail to Human Resources: This is the letter that I was going to send.".

January 5, 2013 (4:06 PM): Human Resources to Kurkjian,

Do not send this letter. It will only get you in trouble.

Knowledge of disclosures:
Carter testified:
And before that, she had gone over -- I don't
know if she tried to tell -- if she went to the office
1 of the director over at Natick, and I think a lot of
2 this stuff got back to Gerry. I think she went to HR
3 and talked so someone and pretty much anything that

4 would happen at Natick is going to get back to Gerry.
5 So there was this -- it was happening in the
6 building; it was starting to go out of the building, so
7 it was just escalating. It just didn't seem like there
8 was a way that this was going to calm down.

Adverse Employment Action: -January 9, 2013. The Contractor was ordered to stop work immediately, turn in her computer, and leave the base. *Id*

The temporal proximity between the disclosures and the stop work order further supports the Contractor's claim of retaliation.

Natick Labs denied her request for a termination notice. a turn in receipt for the government furnished equipment (GFE) which included the computer that was seized and confiscated. Natick Labs attempted to coerce her into submitting a final voucher for hours that she did not work which is in violation of federal and state laws) so that the base year could be completed, the contract could be closed, and the government could be free from liability for the wrongful termination.

Natick Labs refused to provide her with reassurance that she had nothing to fear in regard to the threat" "You don't want to do that. Things could get messy. Think about your family." when she asked for a termination notice.

Requests for the turn in receipt for her government furnished computer was denied.

Request for the chain of custody for her common access card was denied

Request for the bag that Evangelos took from her was denied

Return of her Personally identifiable Information was denied

Request for the Minutes of the Meeting was denied.

Kurkjian v Sec of the Army will produce Unintended Consequences. The appeals court neglected the legal and statutory obligations to review the case in terms of the signed contract and the written documentation containedin the contract file; not an employer/employee relationship based on undocumented, unsubstantiated "hearsay". The decision was not only decided wrongly but will wrought to the Military and the future of civilian government contractors at least two deleterious, unintended consequences, either, of which augurs for corrective overruling

1) Increases the risk of Military personnel being sickened by contaminated food. Kurkjian v. Secretary of the Army condones the refusal of Natick Labs to adhere to USDA FDA BAM regulations to ensure the statistical probability that the food is safe for human consumption. Documents sent to the procurement center continue to cite non-compliant sample sizes for Salmonella testing which increases the risk of food poisoning and even the death of Military personnel.

2) Renders the terms of a signed contract and the referenced laws meaningless. Kurkjian v Secretary of the Army will establish case precedent that will allow government Supervisors to unlawfully interfere and make decisions about government contracts without having the appropriate qualifications and in defiance of well-established contract law. The Court's rationalization that the

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The United States Court of Federal Claims No. 02-796C (Filed: May 6, 2008): **Covenant of Good Faith and Fair Dealing**

"Because it is an implied term of every contract that each party will act in good faith towards the other," the Federal Circuit has stated, "a party may breach a contract by acting in bad faith." *Link v. Dept. of the Treasury*, 51 F.3d 1577, 1582 (Fed. Cir. 1995); *see also Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). As an aspect of these duties, "[e]very contract . . . imposes an implied obligation 'that neither party will do anything that will hinder or delay the other party in performance of the contract.'" *Essex Electro Eng'rs, Inc. v. Danzig*, 224 F.3d 1283, 1291 (Fed. Cir. 2000) (quoting *Luria Bros. v. United States*, 369 F.2d 701, 708 (Ct. Cl. 1966)); *see also H & S Mfg., Inc. v. United States*, 66 Fed. Cl. 301, 310 (2005), *aff'd*, 192 Fed. Appx. 965 (Fed. Cir. 2006). Such covenants require each party "not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Centex Corp.*, 395 F.3d at 1304; *see also Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988), *modified on other grounds by*, 857 F.2d 787 (Fed. Cir. 1988). A breach of the covenant occurs when, in the words of Judge Posner, there has been "sharp dealing," defined as taking "deliberate advantage of an oversight by your contract partner concerning his rights under the contract." *Mkt. St. Assocs. L.P. v. Frey*, 941 F.2d 588, 594 (7th Cir. 1991); *see also Centex Corp.*, 395 F.3d at 1304; *Moreland Corp. v. United States*, 76 Fed. Cl. 268, 291 (2007); *North Star Alaska Hous. Corp. v. United States*, 76 Fed. Cl. 158, 187 (2007). In short, "the covenant may be breached if, in ways unenvisioned by the contract, a party proceeds in a fashion calculated to frustrate or hinder performance by its contracting partner." *North Star*, 76 Fed. Cl. at 188; *see also Centex Corp.*, 395 F.3d at 1306.

In Information Systems & Networks, Corp. v. United States, the court acknowledged that because the duty to act in good faith is an implied term in every contract, "a party may breach a contract by acting in bad faith." However, the court reverted to the traditional formulation of the duty of good faith by advising that parties must abide by covenants requiring them "not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." The court then attempted to soften the bad faith standard, stating: "When a contractor alleges bad faith, in order to overcome the presumption of good faith [on behalf of the government], the proof must be almost irrefragable. Translated into more common parlance, "well-nigh irrefragable proof" has been described as "clear and convincing evidence." In the cases where the court has considered allegations of bad faith, the necessary "irrefragable proof" has been equated with evidence of some specific intent to injure the plaintiff. Courts have found bad faith when confronted by a course of government conduct that was "designedly oppressive," Struck Const. Co v. United States, 96 Ct. Cl. 186, 222 (1942), *or that "initiated a conspiracy" to "get rid" of a contractor. Knotts v. United States*, 121 F. Supp. 630, 636 (Ct. Cl. 1954). *See also C. Sanchez & Son, Inc.*, 6 F.3d at 1542; *North Star*, 76 Fed. Cl. at 291.*As these cases illustrate, the irrefragable proof standard, though daunting, is not intended to be impenetrable, that is, it does not insulate government action from any review by courts Id.* at 291 (quoting *The Libertatia Assocs., Inc. v. United States*, 46 Fed. Cl. 702, 707 (2000)); *see also L.P. Consulting Group, Inc. v. United States*,

D. Question 5. Whether this Court erred in its conclusion that bad faith does not entitle a contractor to the Lost Profits of the Option years

> *The Court wrote: "The Board found that, even if the government had terminated the contract, and had done so in bad faith, the most Kurkjian would be entitled to would be the lost profits in the amount of $1,702 for the base year."*

The Court's decision conflicts with the following case law discounted by the Court in Plantiff's Brief, Reply Brief, and 15 Page Memo.

a. In Brian Bowles v. United States, 144 Fed. Cl. 240 (2019), the plaintiff was not limited to damages in accordance with the convenience termination clause, but rather, his foreseeable damages if he had completed the contract, and for the likely renewal contract because of a bad faith termination

b. A termination tainted by bad faith or abuse of discretion opens the door to breach damages such as anticipatory profits. *Krygoski Constr. Co. v. United States, 94 F. 3d 1537, 1541 (Fed. Cir. 1996).*

c. These "expectation damages" are recoverable if they are (1) foreseen or reasonably foreseeable, (2) caused by the breach of the promisor, and (3) proved with reasonable certainty. *Bluebonnet Sav. Bank, F.S.B. v. United States, 266 F.3d 1348, 1355 (Fed. Cir. 2001).*

d. "[a] contractor can recover for the government's failure to exercise an option if the government's failure was in bad faith." *Bannum, Inc. v. United States, 80 Fed. Cl. 239, 7 249 (2008) (citing Hi-Shear Tech. Corp. v. United States, 53 Fed. Cl. 420, 436 (2002); Ho v. United States, 49 Fed. Cl. 96, 107 (2001)).* 3

e. Government officials enjoy a presumption of good faith in the performance of their duties. See id. In order to show that the government acted in bad faith, a plaintiff must demonstrate that the government acted with a "specific intent to injure the plaintiff.". *Am-Pro Protective Agency, Inc. v. United States, 281 F.Sd 1234, 1239-40 (Fed. Cir. 2002). (Citing Kalvar Corp. v. United States, 543 F.2d 1298, 1302 (Ct. Cl. 1976).* Bad faith has been found when a contracting officer representative acts with specific intent to injure or the contracting officer fails to exercise independent judgment See *Libertatia Assocs., Inc. v. United States, 46 Fed. Cl. 702, 711-12 (2000).*

f. In Information Systems & Networks, Corp. v. United States, the court acknowledged that because the duty to act in good faith is an implied term in every contract, "a party may breach a contract by acting in bad faith 7^ However, the court reverted to the traditional formulation of the duty of good faith by advising that parties must abide by covenants requiring them "not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract. " The court then attempted to soften the bad faith standard, stating: "for breach of contract, a plaintiff is entitled to recover lost profits only if he can establish both the existence and amount of such damages with reasonable certainty."" Schonfeld v. Hilliard, 218 F.3d 164, 172 (2d Cir. 2000) (emphasis added). Finally, if sought on breach of contract claims.

Plaintiff must additionally eventually prove that "lost profit damages" specifically "were within the contemplation of the parties when the contract was made" Schonfeld, 218 F. 3d at 172, Robin Bay, 2008WL 2275902, at #7.

US Army Soldier Systems Center, Procurement Directive Form PR20123 144959 (discounted evidence contained in the record) states:

1L Items to Be Funded
25AD5F 2516 $38110.00
2 9011 Option year 1 $37000.00
3 9012 Option year 2 $37000.00
4 9013 Option year 3 $37000.00
5 9014 Please note 1 base year and up to 3 Option years for a total of $149,110.00
Grand Total: $149110.00

The conflicting case law requires resolution with consideration of the of the discounted evidence

Kurkjian v Sec of the Army will produce Unintended Consequences. The appeals court neglected the legal and statutory obligations to review the case in terms of the signed contract and the written documentation containedin the contract file; not an employer/employee relationship based on undocumented, unsubstantiated "hearsay". The decision was not only decided wrongly but will wrought to the Military and the future of civilian government contractors at least two deleterious, unintended consequences, either, of which augurs for corrective overruling

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contract was "effectively completed" has no legal merit in defending the failure of the Agency to adhere to the terms of the contract, well established contract law, the Covenant of Good Faith and fair dealings, Whistle blower laws, and the basic right to Fair Notice and due process.

Conclusion: Whereof, this Decision should be vacated and the lost profits of the option years should be awarded to the Contractor for the government's bad faith breach of the contract.

I respectfully ask that this Writ of Certiorari be accepted.

Catherine V
1/31/22