No. _____

In the Supreme Court of the United States

NVS TECHNOLOGIES, INC.,
Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After nearly four years of work on an incrementally funded research and development contract, and six months away from Petitioner's working prototype of a revolutionary pathogen detection system, the Department of Homeland Security ("DHS") refused to allot any of the available funds to complete the project based on the internally contradictory conclusions of a new agency official that it was not within DHS's mission, yet the agency could get a better deal elsewhere. As a result, the contract was terminated for convenience. DHS claimed unfettered discretion to "decide to no longer perform the contract" under the purported authority of a Limitation of Funds ("LOF") clause that simply protects an agency from liability for contract costs in excess of allotted funds. The Civilian Board of Contract Appeals ("Board") agreed, and the Court of Appeals for the Federal Circuit summarily affirmed.

1. Can a federal agency refuse to allot available funds to an incrementally funded contract for any reason or no reason, and so terminate that contract, unconstrained by the duty of good faith and fair dealing, and still maintain an enforceable contract supported by consideration?

2. Can a federal agency repudiate its contractual obligations when its justifications for doing so are arbitrary, and unsupported by any evidence, and no reasoned analysis is offered for its supposed redefinition of its mission?

3. Does a summary affirmance of a Board decision that acknowledged, but did not adjudicate, Petitioner's good-faith-and-fair-dealing claim violate due process?

CORPORATE DISCLOSURE STATEMENT

NVS Technologies, Inc. is a privately held corporation and none of its shares is held by a publicly traded company.

RELATED PROCEEDINGS

NVS Technologies, Inc. v. Department of Homeland Security, CBCA Nos, 4775, 5360, 6334, United States Civilian Board of Contract Appeals. Decision entered March 5, 2020.

NVS Technologies, Inc. v. Department of Homeland Security, No. 2020-2046, United States Court of Appeals for the Federal Circuit. Judgment entered April 9, 2021. Petition for Panel Rehearing and Rehearing *En Banc* denied on June 25, 2021.

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RULINGS BELOW

The decision of the Board is reported at 20-1 BCA P 37541 (Civilian B.C.A.) and is electronically reported at 2020 WL 1228456. It is reproduced at App.3a-49a. The summary affirmance of the Federal Circuit is reported at 844 Fed.Appx. 367 (2021) and is reproduced at App.1a-2a. The order of the Federal Circuit denying panel rehearing and rehearing *en banc* is not reported, and is reproduced at App.50a-51a.

JURISDICTION

The Federal Circuit's summary affirmance was entered on April 9, 2021. The Federal Circuit denied panel rehearing and rehearing *en banc* on June 25, 2021. On July 19, 2021, the Court issued an Order that the previous extension of the deadline to file a petition for a writ of certiorari to 150 days from a denial of a petition for rehearing issued prior to July 19, 2021 remains in effect. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part: "No person shall … be deprived of life, liberty, or property, without due process of law."

The Contract Disputes Act, 41 U.S.C. §7107(b)(2), provides in pertinent part that a decision of the Board may be set aside if it is "(A) fraudulent, arbitrary or capricious; (B) so grossly

erroneous as to imply bad faith; or (C) not supported by substantial evidence."

The limitation of funds clause, promulgated at 48 C.F.R. §52.232-22, provides in pertinent part:

> (b) … The parties contemplate that the Government will allot additional funds incrementally to the contract up to the full estimated cost to the Government specified in the schedule, exclusive of any fee.
>
> …
>
> (f)(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted by the Government to this contract.

The termination for convenience clause, promulgated at 48 C.F.R. §52.249-6, provides in pertinent part:

> (a) The Government may terminate performance of work under this contract in whole or … in part, if –
>
> (1) The Contracting Officer determines that a termination is in the Government's interest.

Federal Circuit Rule 36 provides in pertinent part:

> (a) Judgment of Affirmance Without Opinion. The court may enter a judgment of affirmance without opinion … when it determines that any of the following conditions exist and an opinion would have no precedential value:

> (1) the judgment, decision, or order of the trial court is based on findings that are not clearly erroneous;
>
> …
>
> (4) the decision of the administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or
>
> (5) a judgment or decision has been entered without an error of law.

Internal Operating Procedure #9 of the Federal Circuit provides in pertinent part: "Rule 36 judgments shall not be employed as binding precedent by this court, except in relation to a claim of res judicata, collateral estoppel, or law of the case."

STATEMENT

"The United States are as much bound by their contracts as are individuals." *Lynch v. United States,* 292 U.S. 571, 580 (1934). This proposition is not simply a matter of justice, but reflects a practical recognition of "the Government's own long-run interest as a reliable contracting party in the myriad workaday transactions of its agencies." *United States v. Winstar Corp.*, 518 U.S. 839, 883 (1996). Yet reality does not match this ideal. Government contractors have been confronted by disparate decisions from Boards of Contract Appeals and from the judges of the Federal Circuit and the Court of Federal Claims, spurred by the extreme positions taken by federal agencies and the Justice Department on their behalf, that construe contracts to give the Government "the legal right to disregard its contractual promises."

Cherokee Nation of Oklahoma v. Leavitt, 543 U.S. 631, 644 (2005). And agencies are not blocked from exercising this discretion for arbitrary and unsupported reasons. This whole exercise in "contractual abrogation," *Winstar,* 518 U.S. at 884, is often then cloaked from further scrutiny by the Federal Circuit's profligate use of summary affirmance under its Rule 36.

This case contains all these elements, put in sharp relief, and brings to the Court an excellent opportunity to restore the legal principles that ensure that the Government will be a reliable contracting partner.

A. Factual Background

1. On April 21, 2010, DHS's Science and Technology Directorate ("S&T") awarded a research and development contract to Petitioner to develop a system that could simultaneously detect at least 100 pathogens – including bacteria, viruses, and biological and chemical agents – in one analysis within 90 minutes. MAMPT Project Review at 1-2 (June 4, 2013) ("MAMPT Review"); App. 68a. This system– called a Multi-Application, Multiplex Technology Platform ("MAMTP") – was to be deployed to hospitals, clinics, laboratories, first responders, and other governmental agencies as an essential biosecurity measure to "reliably identif[y] potential pathogens at the point of outbreak/point of entry into the country." App. 68a. *See also* Statement of Work, App. 70a-71a. An Interagency Program/Project Team ("IPT"), including the CDC, the FDA, the Agriculture Department, and the Secret Service, partnered with DHS in the MAMPT Project.

The contract was an incrementally funded, cost-reimbursement contract that initially obligated

$5,021,006.00, which included three additional option periods, which, if all were exercised by S&T, would result in a total estimated cost of $18,307,266.00 with a total period of performance from April 21, 2010 to October 20, 2013. The contract included the standard LOF and termination for convenience clauses. *See supra,* at 2. The contract was administered by S&T's Chemical and Biological Defense Division ("CBD").

Over the following months, the contract was somewhat chaotically managed as the various members of the IPT weighed in to be sure that the new pathogen detection platform met their particular needs, resulting in modifications that extended the contract to July 31, 2014, and increased the total contract ceiling to $30,214,760.00. As S&T's Chief Medical and Science Officer, Dr. Segaran Pillai put it, the contract was "necessarily ambitious," establishing performance requirements for a platform "that cannot be met by any existing technology." MAMPT Review at 1. In a June 2013 report on Petitioner's performance, Dr. Pillai observed, "NVS has done a tremendous job in fulfilling our requirements…. [t]hey have gone out of their way to accommodate DHS S&T and IPT member's preferences and suggestions." *Id.,* at 7.

By late 2013, Petitioner was six months away from completing the working prototype that was the goal of the contract. Petitioner needed the remaining approximately $7 million to complete that work. Importantly, Petitioner had not incurred costs above either the funds already allotted or above the contract ceiling.

2. In September 2013, Donald Woodbury became Acting Director of CBD. In November, Woodbury –

who had not been involved in the project and was neither a scientist nor a subject-matter expert -- expressed "concerns" to the Contracting Officer, Shelby Buford, relating to the "spend rate" for the contract. Hearing Tr. 325 (Sept. 13, 2018). Ignoring Dr. Pillai's June review, in December Woodbury initially indicated he wanted to launch yet another review of Petitioner's performance, but instead later that month abruptly advised the Contracting Officer that he was not going to allot any of the remaining available funds to the contract. Statement of Shelly Buford, Jr. ¶ 20 (Sept. 29, 2016) ("Buford Stmt."). As a result, the Contracting Officer advised Petitioner that the contract was terminated for convenience effective February 6, 2014. Letter, C. Byrd to H. Feurnkranz (Feb. 6, 2014).

Woodbury's "number one" reason for halting funding for the contract was his belief that "the objectives of the contract … were inconsistent with the DHS mission." Specifically, that "DHS does not have a mission for clinical biodiagnostics." Hearing Tr. 333-34 (Sept. 13, 2018). In light of that conclusion, Woodbury's other major reason to halt funding was puzzling at best, for he did not believe "that the cost of completing the current contract, combined with the additional cost of maturing the platform and taking it to regulatory approval, is the best use of our funding given the availability of more mature platforms in the commercial market." Memorandum, D. Woodbury to C. Byrd (Jan. 15, 2014). That is, after Petitioner's nearly four years of work, Woodbury believed DHS could get a better deal elsewhere.

S&T's experts and experts from the IPT opposed the decision to stop funding because Petitioner was

meeting its contract "milestones to provide a very promising piece of equipment." App. 69a.

To further cloud matters, shortly after the termination, Woodbury redirected $5 million made available by the termination to Jason Paragas at Lawrence Livermore National Laboratory to develop the requirements for a pathogen detection technology and to evaluate available commercial technology. Hearing Tr. 252-53 (Sept. 12, 2018). Paragas was a long-time associate of Woodbury and a former colleague from the Defense Department. Hearing Tr. 476 (Sept. 13, 2018).

Later in 2014, Woodbury was removed from his position as Acting Director of CBD, and left the Government in January 2015.

3. After the termination for convenience, the Deputy Under Secretary of S&T asked the DHS Office of the Inspector General ("OIG") to conduct an audit of the award and management of the NVS contract. Appx516. As an initial step, the OIG asked S&T to suspend the redirection of funding to Paragas until their audit was completed because Woodbury "had the ability to unilaterally terminate the contract despite objections from staff" and he had "redirected funds to the IAA … that would benefit his associates." DHS OIG, *OIG Determination re: Request to Place Hold on IAAs*, at 5 (Aug. 12, 2014). *See also* OIG Procedures Rept. (Feb. 27, 2015) ("The testimony of S&T personnel indicated that the Acting Director of … CBD was steering contracts and interagency agreements … to individuals with whom he had connections. … The internal control structure … is weak. … [O]ne individual can control programs or

direct funding and there is no record of outside oversight.").

In the end, the OIG for Audits made a referral for potential fraud to the OIG for Investigations, explaining, "we believe Mr. Donald Woodbury … used his position to attempt to steal NVS proprietary information and deliver it to individuals without need to know outside the federal government." App. 67a-68a. In this scheme, "Mr. Woodbury colluded" with several individuals, including "Dr. Jason Paragas." *Id.* Ultimately no action was taken.

The OIG's Audit Report was released on February 27, 2015. The OIG concluded that S&T did not properly manage the contract, and "[t]he lack of adequate policies and procedures enabled the former Acting Director of the [CBD] to direct termination of the contract against S&T subject matter experts' advice." App. 59a-60a. The OIG found no evidence to substantiate any of Woodbury's "concerns," including in the Report a side-by-side table of each concern and the OIG's analysis. *See* App. 65a-66a.

The OIG noted that Woodbury never specified what other commercial technology was available that might be a better deal, and it found no other documentation supporting that claim. App. 61a. The OIG underscored that "S&T subject matter experts monitored the development of other technologies and concluded none of the technologies met program goals. S&T subject matter experts recommended continuation of the contract." *Id.*

The OIG pointed out that "S&T did not have adequate standards for documenting its review and oversight of contracts by the program office. S&T's contract files contained NVS-provided meeting

minutes, progress reports showing milestones met, and records of S&T site visits. There was no evidence that S&T reviewed the documentation provided by NVS." Appx S&T did not have adequate standards for documenting its review and oversight of contracts by the program office. S&T's contract files contained NVS-provided meeting minutes, progress reports showing milestones met, and records of S&T site visits. There was no evidence that S&T reviewed the documentation provided by NVS." App. 61a.

The result was, in the OIG's opinion, anything but a termination that operated for the "convenience" of the Government:

> As recently as January 2014, an S&T program review revealed there was substantial data showing the NVS technology worked, and S&T personnel also acknowledged a continued need for the technology. Therefore, by terminating the NVS contract for convenience, S&T may have wasted $23 million in incurred costs plus additional cost associated with the termination. Additionally, the lack of standard operating procedures … may hinder S&T's ability to make well-informed decisions on all its contracts.

App. 61a-62a.

The Contracting Officer testified that he had no basis for disputing any of the OIG's findings. Hearing Tr. 663 (Sept. 14, 2018).

B. Proceedings Below

1. Petitioner appealed the termination of its contract to the Board under 48 U.S.C. §7105(e)(1)(B). This appeal initially proceeded under three docket

numbers for reasons that are unique to the termination-for-convenience process that are not relevant here. The Board held evidentiary hearings on the appeal from September 12 through 14, 2018.

Following Federal Circuit precedent that a termination for convenience may breach a contract if the termination is motivated by bad faith or constitutes an abuse of discretion, *e.g., T&M Distribs. Inc. v. United States,* 185 F.3d 1279, 1283 (Fed.Cir. 1999), Petitioner's lead claim before the Board was that the decision to halt funding was motivated by Woodbury's bad faith – indeed corruption – in trying to financially benefit his friends, as reported by the OIG. A claim of bad-faith termination requires clear and convincing evidence that the termination was made with malice, that is, with the intent to injure the contractor. *Am-Pro Protective Agency, Inc. v. United States,* 281 F.3d 1234, 1239-40 (Fed.Cir. 2002).

In post-trial briefs, Petitioner also claimed that the funding halt and resulting termination was a breach of the implied duty of good faith and fair dealing, which does not require a showing of "bad faith" or malice. *Centex Corp. v. United States,* 395 F.3d 1283, 1304-06 (Fed.Cir. 2005). The Board acknowledged that Petitioner had raised this additional claim, and confirmed that "we address that issue in this decision." App. 4a n.1.

However, the Board offered only a sporadic, confusing reference to good faith and fair dealing, and certainly did not address the good-faith-and-fair-dealing claim made by Petitioner. The Board framed the claim as whether the duty of good faith and fair dealing could "overcome" the constraints of the LOF clause, citing *Ebasco Services, Inc. v. United States,*

37 Fed.Cl. 370 (1997) as authority to reject Petitioner's claim. App. 34a-35a. In *Ebasco,* the contractor *had* exceeded the funding ceiling, and *was* trying to "overcome" the LOF clause. Here, Petitioner had not exceeded the amount allotted to the contract, much less the contract's ceiling. The Board never addressed Petitioner's actual claim: that the failure to allot the approximately $7 million remaining under the contract's funding ceiling violated the duty of good faith and fair dealing. Far from trying to "overcome" the LOF clause, Petitioner's claim *relied* on the LOF clause provision that "[t]he parties contemplate that the Government will allot additional funds incrementally to the contract up to the full estimated cost to the Government specified." 48 C.F.R. §52.323-22(b).

Compounding the error, the Board went on to conflate the bad-faith termination and good-faith-and-fair-dealing claims. The Board concluded that the agency neither acted in bad faith nor breached the duty of good faith and fair dealing because Woodbury properly exercised his contractual authority under the LOF clause, and found no evidence that agency personnel had any intent to harm the Petitioner. App. 41a. *See also id.* 49a. The Board did not address whether the funding halt violated the duty of good faith and fair dealing, that is, whether it was faithful to the "agreed common purpose" of the contract and consistent with "the justified expectations of the other party." *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 217 n.11 (1985). Finally, the Board dismissed the OIG Audit Report for what it called its "many factual and legal inaccuracies." *Id.* 48a.

2. On appeal to the Federal Circuit, Petitioner focused on its good-faith-and-fair-dealing claim.

Petitioner argued that the Board had recast its claim and then applied the wrong legal standard by conflating it with the bad-faith termination claim. Further, Petitioner argued that the Board's decision was arbitrary and unsupported by substantial evidence in large measure because it credited Woodbury's bald assertions, which were internally inconsistent and for which there was *no* supporting evidence in the record.

DHS adopted the aggressive posture that "DHS had the right to discontinue funding at any time." Response Br. at 18. In oral argument, DHS's counsel did not mince words: "DHS was entitled to simply decide to no longer perform the contract." App. 53a. By asserting that DHS had absolute discretion under the contract to stop its performance, DHS had no reason to address the utter lack of justification for stopping funding, much less the more corrupt motivations for Woodbury's conduct. So confident was DHS about invocation of the LOF clause that it never attempted to explain how a binding contract could exist if the Government's contractual "promises" were so dependent on the Government's unaccountable whim.

The Federal Circuit panel summarily affirmed four days after oral argument under the Circuit's Rule 36.

Petitioner raised the Board's fundamental errors yet again in a combined petition for rehearing and rehearing *en banc,* which was denied without comment on June 5, 2021.

REASONS FOR GRANTING THE PETITION

I. The Decisions Below Cannot Be Reconciled with This Court's Precedents Because They Distort the LOF Clause to Create an Unfettered Mechanism for the Government to Disregard its Contractual Promises.

A. The text of the LOF clause does not give the Government "the right to discontinue funding the contract at any time."

The notion, advanced by the decisions below and by DHS, that an agency has some unfettered right to refuse to allot more funds to an intermittently funded contract under the standard LOF clause cannot be found in the text of that clause, which simply provides: "The Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted by the Government to this contract." 48 C.F.R. §52.232-22(f)(1). All this says is that if the contractor incurs costs beyond the funds allotted to the contract, the Government is not on the hook to reimburse those costs. This text says nothing about any broad right of the Government to refuse to allot funds to the contract.

Moreover, that subsection is only part of the LOF clause. Neither DHS nor the decisions below address what contractual obligation arises from the LOF provision that "[t]he parties contemplate that the Government will allot additional funds incrementally to the contract up to the full estimated cost to the Government specified in the schedule, exclusive of any fee." 48 C.F.R. §52.232-22(b). The Statement of Work made the Government's funding promise unequivocal: "DHS will provide funding to NVS in accordance with DHS' appropriations and available

funds." App. 75a. At a minimum, these contract provisions must defeat any Government claim that the LOF clause gives it discretion to refuse to allot additional funds to a contract whenever it suits the Government to do so.

B. This Court's decisions do not allow the LOF clause to be construed to give the Government an absolute right to stop funding an intermittently funded contract at any time.

Neither the Board, the Federal Circuit, nor DHS explained how they teased out of the text of the LOF clause absolute Government discretion to stop funding of a contract. As described above, the Board erroneously framed Petitioner's claim as an effort to "recover costs in excess of the total allotted amount of an incrementally funded contract." App. 32a. Again, Petitioner had incurred no costs in excess of allotted funds. Petitioner's claim was that DHS had a contractual obligation to allot the remaining available funds to the contract so the work could be completed.

DHS's argument to the Board began with the conclusion that under the LOF clause the government has no duty to fully fund an incrementally-funded contract. Respondent's Post-Hearing Br. at 19. In the Federal Circuit, DHS simply posited that it "had the right to discontinue funding the contract at any time." Response Br. at 18. These conclusions do not reflect the actual terms of the contract, as we noted above. Research and development contracts like Petitioner's are commonly incrementally funded to avoid wasting money if the research at any point turns to be unproductive. Then, as we will discuss at greater length below, the premises of the contract have

changed – the hoped-for goal has turned out to be impossible to achieve – and the contract can be terminated for convenience. But failing such a change of circumstances, the government *is* obligated to fully fund the contract, as the contract clearly provides.

Furthermore, this absolute-discretion-to-stop-funding interpretation of the LOF clause cannot be squared with this Court's precedents in analogous circumstances. In *Cherokee Nation of Okla. v. Leavitt,* 543 U.S. 631 (2005), for example, a contract made the Government's contractual obligation "subject to the availability of appropriations." The Government interpreted that clause as relieving the agency from its obligation to pay a contractor when the appropriated funds were insufficient to pay the contractor and fund the agency's other priorities. The Court rejected that interpretation because it "would undo a binding governmental contractual promise." *Id.* at 646.

More recently, the Court has underscored the "well-established principle[] of Government contracting law … that the Government is responsible to the contractor for the full amount due under the contract, even if the agency exhausts the appropriation in service of other permissible ends." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 190 (2012). Importantly, "[t]hat is so even if an agency's total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made." *Id.,* at 190-91 (internal quotation omitted; emphasis in original). "Although the agency itself cannot disburse funds beyond those appropriated to it, the Government's "valid obligations will remain enforceable in the courts." *Id.,* at 191 (internal quotations omitted). At bottom, "so long as Congress

appropriates adequate funds to cover a prospective contract, contractors need not keep track of agencies' shifting priorities and competing obligations; rather, they may trust that the Government will honor its contractual promises." *Id.,* at 191.

Here, Petitioner contends that DHS had a contractual obligation to allot the remaining *available* funds to the contract. DHS's manipulation of the LOF clause to stop funding goes far beyond *Cherokee Nation* and *Salazar,* for it does not rest on the unavailability of appropriated funds because that money had been spent elsewhere, but on a claim to an unlimited right to decide the extent of its contract performance. Such a right, approved by the decisions below, in effect "destroys" the Government's contract promise, and with it the contract itself. 1 Richard A. Lord, WILLISTON ON CONTRACTS § 4.27 (4th ed. 1999).

C. The decisions below undermine the duty of good faith and fair dealing that this Court has long recognized is an implied, essential part of the performance of every contract.

This Court's precedents are clear that the duty of good faith and fair dealing is an implied, essential part of the performance and enforcement of every contract. This duty requires each party to a contract, including the Government, to act faithfully "to an agreed common purpose and consistency with the justified expectations of the other party." *Allis-Chalmers Corp.*, 471 U.S. at 217 n. 11 (1985) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205, Comment *a* (1981)). *See also Alabama v. North Carolina,* 560 U.S. 330, 351 (2010).

Here, the Board mischaracterized Petitioner's good-faith-and-fair-dealing claim, but more significantly injected proof of bad faith or malice as a required element of the claim. In the Federal Circuit, DHS relied on authorities asserting that the duty of good faith and fair dealing cannot be violated in asserting "a legitimate contract right." Response Br. at 28-29 (citing *Scott Timber Co. v. United States,* 692 F.3d 1365, 1375 (Fed.Cir. 2012) and *TigerSwan Inc. v. United States,* 110 Fed.Cl. 336, 346 (2013)).

This inaccurate portrayal of the law is fundamentally at odds with the implied duty of good faith and fair dealing, which qualifies all aspects of contract performance and enforcement. *Dobyns v. United States*, 915 F.3d 733, 739 (Fed. Cir. 2019). *See also* RESTATEMENT (SECOND) OF CONTRACTS §205. The duty "prevents a party's acts or omissions that, though not proscribed by the contract expressly, are inconsistent with the contract's purpose and deprive the other party of the contemplated value." *Metcalf Const. Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014). So, by definition, the duty *applies* to the exercise of every contract right. *See, e.g., CITGO Asphalt Ref. Co. v. Frescati Shipping Co., Ltd.*, 140 S. Ct. 1081, 1094 (2020).

The exercise of a contract right can violate the duty of good faith and fair dealing "even though the actor believes his conduct to be justified." RESTATEMENT (SECOND) OF CONTRACTS §205 cmt.d. "[B]ad faith may be overt or may consist of inaction, and fair dealing may require more than honesty." *Id.* The duty can be violated by "dealing which is candid but unfair, such as taking advantage of the necessitous circumstances of the other party to extort a modification of a contract for the sale of goods

without legitimate commercial reason." *Id.* cmt.e. The duty extends to the "abuse of a power to determine compliance or to terminate the contract." *Id.* Indeed, "courts have found that an express power to terminate a contract at will was modified by a duty of good faith." *Id.*, Reporter's Note. A party's contractual discretion whether or not to advance funds is limited by the obligation of good faith and fair dealing. *K.M.C. Co. v. Irving Tr. Co.*, 757 F.2d 752, 760 (6th Cir. 1985). The Government violates the duty when it terminates a contract to get a better bargain. *JKB Solutions & Services, LLC v. United States,* 2021 WL 5348537, *3 (Nov. 17, 2021).

The decision to stop funding Petitioner's contract because Woodbury did not believe the objectives of the contract were consistent with DHS's mission and that DHS could get a better deal elsewhere was a gross violation of the duty of good faith and fair dealing. Woodbury's rationale certainly contradicts the agreed common purpose of the contract since he believed that his agency could not share that purpose so that the contract was in some sense was illicit from the start.

His abrupt termination of funding could not more directly contradict the expectations of the parties as expressly set out in the contract. They "contemplate[d] that the Government will allot additional funds incrementally to the contract up to the full estimated cost to the Government estimated [in the contract]." 48 C.F.R. §52.232-22(b). And DHS's Statement of Work committed DHS to "provide funding to NVS in accordance with DHS' appropriations and available funds." App. 75a. And stopping this funding because the Government supposedly could get a better bargain elsewhere only

amplifies the violation of the duty of good faith and fair dealing.

DHS's behavior was indefensible when measured by the duty of good faith and fair dealing, and so it tried to dodge the duty by claiming the duty did not apply to "legitimate contract rights." The Board, by concluding that Woodbury lawfully exercised his authority under the contract, appears to have accepted that proposition, and the Federal Circuit has summarily affirmed. But when every contract right is no longer harnessed to the duty of good faith and fair dealing, the duty has no purpose and vanishes. If left to stand, these decisions below, and especially the Government's embrace of them, are poised to undermine a long-standing bulwark of integrity in the performance of contracts.

II. The Disarray of Federal Circuit Precedents Has Confused the Law Governing the Proper Application of the Termination-for-Convenience Power.

The record unequivocally shows that the Contracting Officer terminated Petitioner's contract for convenience solely because Woodbury stopped funding it. Email from S. Buford to D. Woodbury (Jan. 7, 2014); Statement of Shelly Buford, Jr. ¶ 22 (Sept. 29, 2016). The OIG confirmed that the "decision to stop funding the project forced the contracting officer to terminate the contract." App. 61a.

The power to terminate a contract for the "convenience" of the Government dates back to the need to stop performance of military procurement contracts, and settle with the contractors, at the close of the Civil War. *Torncello v. United States,* 681 F.2d 756, 764 (Ct.Cl. 1982). *See also United States v.*

Corliss Steam-Engine Co., 91 U.S. 321 (1876) (approving the Navy's termination and settlement of a Civil-War procurement contract).

Over the years, the scope of the termination-for-convenience power expanded beyond military contracts. *See Torncello,* 681 F.2d at 764-68. The modern contract clause authorizing a termination for convenience simply permits termination if "[t]he Contracting Officer determines that a termination is in the Government's interest." 48 C.F.R. §52.249-6(a)(1). However, courts recognized that if this power could be exercised as written in this broad formulation, the Government's contractual promises would be subject to its "own future will" and actually promise nothing. *Ridge Runner Forestry v. Veneman,* 681 F.2d 756, 769 (Ct.Cl. 1982). As a result, the contract would fail for lack of consideration and mutuality. *Willard, Sutherland & Co. v. United States,* 262 U.S. 489, 493 (1923). The remedy was that the termination for convenience clause "was not to be applied as broadly as an untutored reading of the words might suggest." *Torncello,* 681 F.2d at 766. The termination for convenience clause could "be invoked only in the event of some kind of change from the circumstances of the bargain or in the expectations of the parties." *Maxima Corp. v. United States,* 847 F.2d 1549, 1553 (Fed. Cir. 1988) (quoting *Municipal Leasing Corp. v. United States,* 7 Cl.Ct. 43, 47 (1984)). *See also Torncello,* 681 F.2d at 766 (collecting cases allowing termination for convenience "only when the expectations of the parties had been subjected to a substantial change"). With such constraints, courts sought to ensure that the termination-for-convenience power did not become "an open license to

dishonor contractual obligations." *Maxima,* 847 F.2d at 1553.

The only change of circumstances here was the entrance of Woodbury as the Acting CBD Director, late in the performance of the contract, who refused to allot more funds because he disagreed with the contract's purpose and thought he could get a better deal elsewhere. He did so alone, as the OIG report confirmed, against the opinion of the agency's professional personnel and the contracting officer. App. 59a-60a. Moreover, the OIG's analysis showed that Woodbury acted without sufficient information because of deficiencies in the agency's standards and procedures. App. 61a-62a. This event does not come close to the kind of unexpected change of circumstances that can justify a termination for convenience.

The Board utterly failed to consider whether the termination for convenience passed muster under the change-of-circumstances threshold. This failure highlights another reason why this Court's review is needed here. The Board followed a line of Federal Circuit precedents that hold: "'In the absence of bad faith or clear abuse of discretion, the contracting officer's election to terminate for the government's convenience is conclusive.' *T&M Distributors, Inc.,* 185 F.3d at 1283." App. 42a. And that standard is further armored by a presumption that government officials act in good faith, a presumption that can be overcome only "though 'well-nigh irrefragable proof' that the government had specific intent to injure it." *JKB Solutions and Services,* 2021 WL 5348537, *3.

So is the change-of-circumstances threshold – which has nothing to do with bad faith or an abuse of

discretion – now a dead letter? And if a contracting officer's "election" on behalf of the Government is now paramount, and practically unassailable, how could the Government's contractual promises be anything but illusory? This jurisprudential disarray reduces a contractor to the status of a supplicant dependent on the good graces of the Government rather than a party with the Government in a binding, mutually beneficial, contractual relationship. Thus contractors confront a landscape far removed from the "punctilious fulfillment of contractual obligations" by the Government that this Court has long expected. *Lynch,* 292 U.S. at 580. This Court's intervention is needed to restore a clear and effective jurisprudence ensuring that the Government cannot unilaterally walk away from its contractual obligations.

III. The Federal Circuit's Decision Endorses a Board Decision That Is Patently Arbitrary and Unsupported by Any, Much Less Substantial, Evidence.

The Contract Disputes Act authorizes the Federal Circuit to set aside a Board decision that is arbitrary, capricious, or not supported by substantial evidence. 41 U.S.C.§ 7107(b)(2)(A) & (C). These are familiar concepts in judicial review of agency action that require agencies to engage in "reasoned decisionmaking." *Michigan v. EPA,* 576 U.S. 743, 750 (2015).

Agency action is arbitrary or capricious if it is "not rational and based on consideration of the relevant factors." *F.C.C. v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 803 (1978). Furthermore, agency action is "arbitrary and capricious if the agency … offered an explanation for its decision that runs counter to the

evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.,* 463 U.S. 29, 43 (1983).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 522–23 (1981) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). In evaluating the evidence, "[t]he reviewing court must take into account contradictory evidence in the record." *Id.*

In this case, the Federal Circuit summarily affirmed the Board's gross misapplication of these standards. Indeed, the Board credited and almost exclusively relied on Woodbury's utterly unsupported explanations for his decision to discontinue funding of Petitioner's contract in the face of an overwhelming record of testimony and other evidence directly contradicting Woodbury's conclusions. The Board simply misrepresents or ignores the record to achieve its preferred outcome.

A. Woodbury's main reason for stopping the contract's funding – his claim that the agency did not have a mission for clinical biodiagnostics -- was accepted by the Board without question. App. 15a. But this claim was obviously and outrageously wrong. For S&T, "Detection and Diagnostics" is one of its "Focus Areas" for chemical and biological defense ("CBD"). As S&T explains

> Detection and Diagnostics focuses on developing tools to rapidly detect and diagnose high-priority and emerging

> biological and chemical threat agents both in the field and medical practitioner's office…. Significant contributions in the field include developing and validating environmental assays for use by first responders, [and] multiplex assay panels for incident response…. First responders and public health officials need validated detection assays so they can rapidly analyze samples and take appropriate defensive actions for public safety and public health

Science and Technology Directorate, *CBD Focus Areas – Detection and Diagnostics*, https://www.dhs.gov/science-and-technology/detection-and-diagnostics. Developing such a tool to detect biothreat agents was precisely what Petitioner contracted to do. App. 70a-71a. A contract could not have been more squarely within an agency's wheelhouse.

Underscoring the truly incredible implausibility of Woodbury's justifications for his conduct was his claim that the agency could get a better deal by buying "more mature" commercially available platforms. If the whole project was not part of DHS's mission, how could it go buy a commercial substitute for Petitioner's platform? Moreover, there is nothing in the record indicating that Woodbury, or anyone else in the CBD, knew of any "more mature platforms in the commercial market" that were available, or that CBD ever found one.

Further compounding the implausibility of Woodbury's justifications was his testimony that he saw no "clear path for commercialization of the system." Hearing Tr. 334 (Sept. 13, 2018). If that were

so, how could he genuinely believe that "more mature" platforms were commercially available? Yet the Board recognized no internal inconsistencies in such testimony and found it "credible." App. 48a.

B. The Board purports to recount "funding concerns" regarding the contract by selective, tendentious references to the record. For example, it quotes without qualification the remark of Paul Benda, a DHS official, that "[a]s far as I can tell this program is out of control and spending funds at a rate that has not been authorized." App. 8a.

The Board does not relate the extensive response of the Government Program Manager, Dr. David Hodge, a person far more informed than Benda, who concluded that "[the program] is not out of control, every expenditure has been authorized by current contractual agreement with NVS, and approved by all in the [CBD] chain of command and [the Office of the Procurement Officer]." Email, D. Hodge to R. Long, *et al.* (March 27, 2013) ("Hodge Email"). Dr. S. Randolph Long, the Deputy Director of CBD, on April 1, 2013 also produced a chart for Benda showing the original and final budgets for the Program for FY10 to FY13, and concluded, "it appears that, while there have been realignments into and out of the MAMPT project it is largely a wash." Email, R. Long to D. Hodge, *et al.* (April 1, 2013). Dr. Long reported that he "did not receive any information that NVS's performance was subpar. NVS performed to the terms of the contract and the scientists and stakeholders were pleased with NVS progress." OIG Combined Procedures Rept. (Feb. 27, 2015).

C. According to the Board, Woodbury "persuasively and credibly explained the basis of his

decision." App. 41a. But the Board never points to anything in the record that supports such a conclusion, simply offering its own general conclusions in the place of any evidence in the record. *See Biestek v. Berryhill,* 139 S.Ct. 1148, 1162 (2019) (Gorsuch, J. dissenting) ("The principle that the government must support its allegations with substantial evidence, not conclusions and secret evidence, guards against arbitrary executive decisionmaking."). An agency's mere conclusion does not constitute substantial evidence. *Id.*, at 1159.

For example, there is no dispute that the scientists and subject-matter experts at S&T supported continued funding of the NVS contract. The Board says Woodbury talked to them all, and the fact that he did not accept their advice does not mean he ignored their advice. App. 38a-39a. The Board patronizingly states that "[i]t is understandable that the science advisor would prefer the contract to proceed," App. 38a, as if this was all a matter of subjective inclination. But the record sets out the very specific analyses of Dr. Pillai and Dr. Hodge describing the successful performance of NVS, confirmed by the OIG. Hodge Email; Summary of MAMPT Project Review, at 7 (June 4, 2013) ("MAMPT Review"); App. 61a-62a. The Board points to no substantive discussion of why Woodbury did not accept the advice of the S&T staff most informed about the facts of Petitioner's performance. One can only come away from the record with the conclusion that Woodbury did in fact simply ignore the advice of every knowledgeable person at S&T.

D. In another example of the Board's misrepresentation of the record, it states that "modifications 11 and 13 reduced tasks and

deliverables and increased the contract ceiling, App. 8a-9a, suggesting that S&T was getting less for more cost. Yet, as noted above, Dr. Pillai did a review of Petitioner's activities, and discovered that members of the IPT through informal requests had been expanding and changing Petitioner's work, and modifications 11 and 13 were an effort to catch up with that reality. MAMPT Review at 7. Dr. Pillai also prepared a "Summary of Contract Modifications and Funding Increases" that fully, and in detail, rebutted any notion that S&T was paying more for less. The OIG auditors also found that modification 13 did not reduce the contract requirements. App. 65a.

E. Most striking, the Board never acknowledges, much less addresses, the devastating results of the OIG investigation, including the descriptions of Woodbury's actions to terminate Petitioner's contract and then steer the money left over to his former associates at Lawrence Livermore and Sandia. OIG Combined Procedures Rept. (Feb. 27, 2015). The Contracting Officer took issue with none of the OIG findings. Hearing Tr. 663 (Sept. 14, 2018). And S&T itself agreed with OIG that it needed to put in place procedures to ensure that the rationale for future terminations for convenience was clearly articulated and documented to prevent one person, like Woodbury, unilaterally terminating contracts for reasons of his own. App. 62a-63a.

The Board dismisses the OIG audit report as unreliable because of what it calls "significant legal and factual inaccuracies." App. 47a. But the Board here plays an extended word game, criticizing as legally incorrect OIG's reference to Woodbury "directing" the termination of Petitioner's contract, which only the Contracting Officer could do. App. 48a.

All this is a dodge to ignore the import of the OIG findings – made by auditors, not lawyers – which even the Contracting Officer did not dispute. The Board "finds" the OIG Report to be unreliable, App. 48a-49a, but it points to nothing in the record contradicting the OIG's analysis, because there is none.

F. We do not have the space here to address each unsupported statement by the Board. At bottom, the Board's decision was not just unsupported by substantial evidence, it was supported by *no* evidence.

IV. The Federal Circuit's Summary Affirmance of the Board's Decision Violates Due Process.

The Federal Circuit's summary affirmance practices under its Rule 36 have been the target of much criticism, *see, e.g.,* A. Hoffman, *The Federal Circuit's Summary Affirmance Habit,* 2018 B.Y.U. L. REV. 419, and a number of efforts, all unsuccessful, to secure this Court's review of those practices. Petitioner does not challenge Rule 36 on its face, but brings to the Court what may be its most extreme application to date.

As we described above, the Board recognized, but not really address, Petitioner's claim that DHS's refusal to allot more of the available funds to the contract constituted a breach of the duty of good faith and fair dealing. Yet the Federal Circuit's summary affirmance of the Board's rejection of Petitioner's challenge to the termination of its contract is, by definition, a blanket action. For all intents and purposes, Petitioner's good-faith-and-fair-dealing claim has been rejected by the summary affirmance. As a result, Petitioner is precluded from "relitigating" this claim by the doctrines of "res judicata, collateral

estoppel, or the law of the case" under Federal Circuit Internal Operating Procedure No. 9.

Thus the application of Rule 36 here creates the extraordinary dilemma that Petitioner has effectively lost its good-faith-and-fair-dealing claim on appeal without having its day in court. This dilemma deprives Petitioner of due process. *See Lewis v. Casey,* 518 U.S. 343, 351 (1996); A. Barrett, *Stare Decisis and Due Process,* 74 COLO.L.REV. 1011, 1026 (2003) ("Due process includes the right to an opportunity to be heard on the merits of one's claims or defenses.").

This cannot be an acceptable result of a summary affirmance. Accordingly, this case gives the Court the opportunity to set the outer bounds of the summary affirmance procedure without depriving the courts of appeals of its flexibility for the management of their dockets.

V. This Case Is a Good Vehicle by Which the Court Can Clarify Critically Important Legal Principles Governing the Government's Obligation to Honor Its Contracts.

A. The Government's sweeping claim that agencies have an unfettered right to discontinue funding of an intermittently funded contract at any time is of obvious exceptional importance. As noted above, such a power to decide not to honor a contractual obligation goes to the heart of whether a contract giving an agency such a power is legally binding at all. And the Government's claim affects no small category of contracts. Research and development contracts alone, which are commonly intermittently funded, totaled $47.8 billion in 2020. *How much did the federal government invest in Research & Development with FY 2020*

Contract Funding? available at https://datalab.usaspending.gov/rd-in-contracting/.

Related to that issue is the Government's claim that if it is exercising a contract right, the duty of good faith and fair dealing does not apply. This proposition is completely at odds with the established legal understanding of the duty of good faith and fair dealing. If allowed to stand, this proposition would make that duty a dead letter, with serious implications for ensuring integrity in the performance of contracts.

The Board's decision and the Federal Circuit's affirmance effectively endorses the notion that a new acting director can take change of an agency component late in the performance of a contract, and refuse to allot more funds to that contract based on inadequate information and against the opinion of the agency's professional personnel and the contracting officer. App. 59a-61a. It is an exceedingly important question whether government contracts can be terminated as a result of a mere change of personnel, with their idiosyncratic perspective, perhaps political (resulting from a change of Administration), their self-interest, or otherwise.

These important issues are framed simply and clearly in this case.

B. It is worth noting the real-world consequences of these important principles of contract law. The Covid-19 virus was squarely within the capabilities of the revolutionary pathogen detection system being completed by Petitioner. It is now clear that the unavailability of reliable tests for the virus and bureaucratic hampering of efforts to develop such tests were major impediments to the effectiveness of

the response to the pandemic. *See* Niall Ferguson, DOOM: THE POLITICS OF CATASTROPHE, at 299, 311-12 (2021). While one cannot predict how many lives Petitioner's system could have saved, there is little doubt it would have made a major contribution to the fight against Covid-19.

It is important that the bureaucracies that were stumbling blocks to the development of pathogen tests be held accountable, not simply as a punitive gesture, but so they will improve their processes for the future. Indeed, the OIG report concluded that Woodbury did not have sufficient information to halt funding of Petitioner's contract because the agency did not have adequate processes and procedures to ensure management could make well-informed decisions in their oversight of the agency's contracts. App. 60a-62a. As far as we know, S&T has not adopted any of the procedural reforms recommended by the IG. This Court is the last hope for effective judicial review in this case to hold DHS accountable for its part in hampering the development of effective Covid-19 tests.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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