No. 21-781

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The government evidently aims to preserve the unfettered ability of a government agency to walk away from its contractual obligations,[1] effectively the result of the proceedings below. According to the government, an agency can abandon a contract with no liability for damages because an official "chang[ed] his mind" about whether that contract "remains within the agency's mission." BIO 15.

While that proposition itself warrants the Court's attention, the arguments defending it underscore the need for the Court's review by exposing the confused precedents encumbering government contract law, and perpetuate fundamental distortions of important legal principles.

1. The government favors the view, represented by *Krygoski Constr. Co. v. U.S.*, 94 F.3d 1537 (Fed.Cir. 1996), that the only bounds on the government's termination-for-convenience power are a contracting officer's bad faith or clear abuse of discretion. The government claims that *Krygoski* has severely limited the application of competing precedents like *Maxima Corp. v. United States*, 847 F.2d 1549 (Fed.Cir. 1988) and *Torncello v. United States*, 681 F.2d 756 (Ct.Cl. 1982)(*en banc*) – which insist that some fundamental change in the circumstances or the

[1] Here, those obligations concern the allocation of available funds to an intermittently funded contract, the common vehicle for vital research and development projects. *See* Pet. 29-30 ($47.8 billion for such contracts in 2020).

parties' expectations is a necessary precondition of the termination-for-convenience power, Pet. 19-21 – to only contracts which the government "enters with no intention of fulfilling its promises." BIO 18(quoting *Krygoski*, 94 F.3d at 1545). The government never explains what role a change of circumstances is supposed to play if the government never intended to perform *ab initio*.

Moreover, *Krygoski* was a panel opinion without the authority to trim other Federal Circuit opinions, especially an *en banc* decision like *Torncello*, as the government argues. *See Fall Line Pats., LLC v. Unified Pats.*, 818 F. App'x 1014, 1019 (Fed.Cir. 2020), *vacated on other grounds sub nom. Iancu v. Fall Line Pats., LLC*, 141 S.Ct. 2843 (2021); *Bernklau v. Principi*, 291 F.3d 795, 802 (Fed.Cir. 2002). So it is not surprising that *Krygoski* has not settled the law against the change-of-circumstances requirement. *See*, *e.g.*, *ACLR, LLC v. United States*, 147 Fed. Cl. 548, 558 (2020)("[T]he termination for convenience clause may only be invoked 'in the event of some kind of change from the circumstances of the bargain or in the expectations of the parties.'" (quoting *Maxima*, 847 F.2d at 1553)).

Thus, contrary to the government's claim, the disarray in Federal Circuit precedents governing the termination-for-convenience power remains. *See* Pet. 19-22. Bad enough as it is, more than just this disarray justifies the Court's intervention in this case. Under the *Krygoski* wing of these precedents, the termination-for-convenience power becomes "an open

license to dishonor contractual obligations," *Maxima*, 847 F.2d at 1553, because the bad faith needed to challenge a termination must be established by "well-nigh irrefragable proof," that is, "incontrovertible, incontestable, indisputable, irrefutable, [or] undeniable" evidence showing that the termination was motivated solely by malice toward the contractor. *Am-Pro Protective Agency, Inc. v. U.S.*, 281 F.3d 1234, 1239-40 (Fed.Cir. 2002).

At the same time, *Krygoski* agrees with *Torncello* that it is bad faith for a contract to be terminated for the "convenience" of the government getting "a better bargain from another source." *Krygoski*, 94 F.3d at 1541. Whether the better-deal motivation is a manifestation of the required malice towards a contractor is not clear.

At bottom, the breathtakingly high bar to establish bad faith makes a joke of any notion that the termination-for-convenience power has any limits. Rather than an extraordinary, limited power arising from distinctive government responsibilities, termination for convenience under the *Krygoski* line of cases leaves the government's contract performance subject to its "own future will" so that the government's "contract" promises promise nothing. *Ridge Runner Forestry v. Veneman*, 287 F.3d 1058, 1061 (Fed.Cir. 2002). The conflicting morass that termination-for-convenience law has become is untenable and long overdue for this Court's attention.

2. The need for the Court's review is underscored by the Board's and the government's divergent, but equally flawed, understanding of the limitation-of-funds ("LOF") clause, 48 C.F.R. §52.232-22, commonly used in an incrementally funded contract.

a. The Board claimed that the authority of the acting Director of the Chemical and Biological Defense Division ("CBD"), Donald Woodbury, to discontinue contract funding came from the LOF clause. Pet.App. 31a, 41a. But the text bestows no such authority. It simply provides that the government need not reimburse a contractor for expenses incurred in excess of the amount allotted to the contract. §52.232-22(f)(1). The issue here is whether the government in certain circumstances can be obligated under traditional contract principles to allot available funds to the contract. There is no dispute that Petitioner did *not* incur costs in excess of the allotted amount. The Board admitted that what was at issue was "the expenditure of an additional $7 million included in the current, unfunded ceiling." Pet.App. 39a. The Board's unexplained transformation of the LOF clause into a universal instrument to halt contract funding generally, notwithstanding other principles of contract law, exposes how far the Board has gone astray, calling for a course correction from the Court.

b. Contrary to the Board's approach, the government argues that the fact that the LOF clause does not give an agency an "absolute right" to stop contract funding does not mean it is always obligated to

continue funding. BIO 10. But that is not Petitioner's argument.

According to the LOF clause, "[t]he parties contemplate that the Government will allot additional funds incrementally to the contract up to the full estimated cost to the Government." §52.232-22(b). The government demurs, arguing that this passage "reflects only the parties' mutual expectations or predictions – not a binding obligation." BIO 9-10. But the clearly expressed "mutual expectations" of contracting parties – under the terms officially promulgated in the Code of Federal Regulations – cannot be idle whistling in the wind, either.

As the Court pointed out in the case cited by the government, such language might not "prescribe" actions, but "it guides and constrains actions." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 71 (2004). Further,

> "[g]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." RESTATEMENT (SECOND) OF CONTRACTS § 205, Comment a, p. 100 (1981). Questions of good-faith performance thus necessarily are related to the application of terms of the contractual agreement.

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 217 n.11 (1985).

Here, the contract was designed to have four phases, each with tasks to be performed and milestones to be achieved set out in the Statement of Work. *See* C.A. Appx113-14; Pet.App. 72a; Pet.App. 91a(chart of "NVS Milestone Reviews and Performance Demonstrations"). As the government points out, BIO 10, the government had the option to proceed to the next phase after determining whether Petitioner had met the agreed-upon milestones. Woodbury discontinued funding near the end of phase three (six months away from completing a working prototype), after the government had already exercised its option to proceed with the work of that phase. Pet. 5.

In this posture – past milestones having been met and the current phase of work approved by the government – the abrupt halt of funding surely ran afoul of the expressed "justified expectations" of the parties. If the LOF clause is to be applied according to its text, not divorced from elementary norms of good-faith contracting, the Court must take this opportunity to administer a course correction to the Board and the government.

3. The fundamental duty of good faith and fair dealing implied in every contractual relationship poses a major roadblock to any unfettered ability of the government to jettison contractual obligations, for it requires contract performance that is faithful to the "agreed common purpose" of a contract and consistent with "the justified expectations" of the parties. *Allis-Chalmers*, 471 U.S. at 217 n.11. The Board rejected our good-faith-and-fair-dealing claim by excusing the

decision of Woodbury to halt funding of the contract primarily because it concluded that Woodbury did not act in bad faith. BIO 7, 9. But bad faith has never been a required element of a breach of the duty of good faith and fair dealing, which can occur "even though the actor believes his conduct to be justified." RESTATEMENT (SECOND) OF CONTRACTS § 205, cmt. d. *See also K.M.C. Co. v. Irving Tr. Co.*, 757 F.2d 752, 760 (6th Cir. 1985) (contractual discretion to advance funds limited by obligation of good faith performance); Pet. 17-18.

Nothing could violate the duty of good faith and fair dealing more starkly than Woodbury's actions in this case. His "number one" reason for halting funding was his belief, after nearly four years of work on the contract, that the "objectives of the contract . . . were inconsistent with the DHS mission." Hearing Tr. 333-34 (Sept. 13, 2018). The government argues that no authority precludes an official from concluding that a contract "*no longer* aligns with an agency's purpose or mission." BIO 13(emphasis in original).

That argument runs headlong into the duty of good faith and fair dealing. Woodbury did not claim that some external event had changed his agency's mission, like the end of World War II curtailing the mission of the Army to get as many tanks into battle as soon as possible. So the government's "no longer" is a deceptive, make-weight.

Woodbury, a mid-level bureaucrat, was in no position to unilaterally re-define the agency's mission. Contrary to Woodbury's idiosyncratic, rogue view that

DHS did not have "a mission for clinical biodiagnostics," Hearing Tr. 333-34 (Sept. 13, 2018), one of the "focus areas" of his own division is "detection and diagnosis," which includes "developing tools to rapidly detect . . . biological and chemical threat agents," Pet. 23-24, precisely the purpose of the contract with Petitioner. Pet.App. 70a-71a. *See also* Pet.App. 103a-104a (Statement of Work, June 29, 2013)("The ability to identify and quantitate the pathogen responsible for an infection in near real time is essential to avoid the spread of disease through rapid intervention.").

Woodbury also justified the funding halt by claiming that continuing the contract was not the best use of the agency's money, "given the availability of more mature platforms in the commercial market." Pet. 6. *See also* Pet.App. 60a-61a (Woodbury claimed that "the Government could leverage matured commercial technology available in the marketplace.").[2] Discontinuing funding to get a better deal elsewhere is indisputably not good faith performance or dealing fairly with a contracting party. *See JKB Solutions and Services, LLC v. U.S.*, 18 F.4th 704, 709 (Fed.Cir. 2021); *Krygoski*, 94 F.3d at 1541.

By holding a good-faith-and-fair-dealing claim to the higher malice/bad faith standard, the Board and the government attempt to dodge such clear breaches of the duty of good faith and fair dealing. In doing so,

[2] These statements clearly express Woodbury's purported intent to get a better bargain, notwithstanding the government's apparent puzzlement. BIO 13-14. Such commercial alternatives were never found. Pet. 24.

they at best scrambled the law, or at worst effectively eviscerated that duty. Other Federal Circuit precedents serve only to magnify the muddle. In the Federal Circuit proceedings in this case, for example, the government relied on cases holding that the good-faith-and-fair-dealing duty could not be violated when a party asserts "a legitimate contract right," Pet. 17, a view that betrays a profound misunderstanding of the duty, which applies to all aspects of contract performance. The Court's intervention is needed to stop this erosion of the government's duty of good faith and fair dealing, a duty that is a bedrock of contract performance under our law from which the government should not get a pass.

4. The Board relied almost exclusively on Woodbury's testimony to reject Petitioner's challenge to the failure to allot available funds to its contract and, as a result, its termination for convenience.[3] Both in the Federal Circuit and here, Petitioner has contended that Woodbury's conclusory statements had *no* support in the record. Pet. 22-28. The government has never pushed back directly against this rather bold argument, instead it simply recites Woodbury's unsupported claims, often grounded in lies or the slander of respected agency professionals, and parrots the Board's confidence in his testimony, while ignoring the contradictory evidence in the record. All this falls far short of the reasoned evaluation of all the evidence

[3] As the contracting officer put it, "[T]his determination [to allot no more funds to the contract], in essence, cancels this project." C.A. Appx175.

needed to determine whether the Board's decision is supported by substantial evidence. *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 523 (1981). "Conclusory evidence" and "testimony that's clearly wrong as a matter of fact" cannot be substantial evidence. *Biestek v. Berryhill*, 139 S.Ct. 1148, 1159 (2019)(Gorsuch, J., dissenting).

a. This dynamic is strikingly seen in the government's claim, quoting the Board, that a contract modification had "'completely eliminated' the 'task requiring the delivery of a prototype.'" BIO 3. The Board cited Woodbury's testimony in support. Pet.App. 9a. But the transcript shows that Woodbury said no such thing. Pet.App. 131a-132a. To the contrary, Woodbury says the exact opposite: "I did hear that there was a requirement to have a device to be delivered by February of 2014 for test." Pet.App. 130a.

The Board went on to quote Woodbury's testimony that modification 13 "eliminated all prior tasks . . . but failed to add a requirement to add a working device." Pet.App. 10a. All this to suggest that the government was paying more for less.

Woodbury lied. Under modification 13 and its statement of work (the last modification before funding was discontinued, executed on June 28, 2013), "NVS will build *three* prototype instruments for government use and evaluation and deliver them to DHS in April of 2014." Pet.App. 106a(emphasis added). The extensive tasks, deliverables, and performance specifications in modification 13 and its statement of work

hardly reduced Petitioner's work or the value to be delivered to the agency. *See* Pet.App. 98a-127a.

Nevertheless, according to Woodbury, this was "'one of the most irregular contracts he had seen' in light of the number of modifications," BIO 3, by which it had evolved into something "very different" from the original proposal. Pet.App. 10a. Just so. But the evolving performance specifications which drove the modifications of the contract were a function of "the advice and opinions . . . of subject matter experts from Federal end user groups and senior science advisors at CDC, HHS, USDA, FDA, and DHS." Pet.App. 106a. A June 2013 MAMPT[4] Project Review explained that the requirements for the project were a creation of a "collaborative effort with multiple federal partners," (called the Interagency Program/Project Team ("IPT")) Pet.App. 77a, and documented the subsequent changes that were made to "accommodate the government (DHS S&T and IPT members) preference and recommendations as the project evolved." Pet.App. 80a.

So if the contract was "irregular," or had "evolved," it is the federal actors with fingers in this pie, not Petitioner, that are responsible. Indeed, the OIG's audit faulted the agency for not properly managing the contract. Pet.App. 59a.

b. The government refers to a couple of generalized concerns regarding control over and spending on the contract to buttress Woodbury's decision to cut

[4] "MAMPT" stands for Multi-Application, Multiplex Technology Platform, the goal of Petitioner's contract.

off funding. BIO 3-4, 15. But, like the Board, the government ignores the extensive, detailed responses of better-informed officials showing that every expenditure had been properly approved and that the federal stakeholders were pleased with Petitioner's performance. Pet. 25.

The government urges that we should not "second-guess" Woodbury's "extensive investigation," BIO 11, but the record contains nothing beyond Woodbury's bare conclusions and certainly no explanation why he rejected the advice of the agency's most informed scientists and experts to continue funding of the contract. Pet. 26.

Most devastating to the government's position, the OIG audit showed Woodbury's complaints about Petitioner's performance to be baseless. Pet.App. 60a, 65a-66a. The Board and the government dismiss the audit for reasons wholly unrelated to the merits of its substance. Pet. 27-28; BIO 16-17. The contracting officer took issue with none of OIG's findings. Pet. 27. The agency itself agreed with OIG's conclusion that Woodbury did not have sufficient information to halt funding, and so trigger a termination for convenience, and with OIG's recommendation that the agency should implement procedures to document such actions. Pet.App. 61a-63a.

c. The Board's loose treatment of the record is captured by its claim that Petitioner's CEO said that it would take an additional $10 million to produce a working prototype. BIO 17. This was an estimate of the

cost of rebuilding Petitioner's infrastructure after the termination had shut down its operations, and had nothing to do with performance while the contract was alive.

The Board's singular reliance on Woodbury's unsupported assertions produced a grossly arbitrary decision, unsupported by substantial evidence. Petitioner seeks review not of a "factbound" but a fact*blind* record that has escaped appellate review thanks to the Federal Circuit's summary affirmance, and which marks an erosion of an essential safeguard against arbitrary executive decisionmaking.

5. Petitioner does not contend, as the government would have it, that "due process requires a court of appeals to issue a written opinion in every case." BIO 18. We do contend that the generous boundary due process may set for Rule 36 summary affirmances was exceeded here, where the Board decision never truly addressed the merits of our good-faith-and-fair-dealing claim because it adjudicated that claim under a bad-faith standard. Pet. 17, 28-29. The Federal Circuit's excessive use of Rule 36 affirmances has gone too far here, not only depriving Petitioner of its day in court on its good-faith-and-fair-dealing claim, but depriving the Court of the Federal Circuit's analysis of it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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