No. 21-781

In the Supreme Court of the United States

NVS TECHNOLOGIES, INC., PETITIONER

v.

DEPARTMENT OF HOMELAND SECURITY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
PATRICIA M. MCCARTHY
GEOFFREY M. LONG
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Department of Homeland Security breached an implied contractual duty of good faith and fair dealing when it exercised its contractual option not to allot additional funds to petitioner's contract, and accordingly invoked the contract's "termination for convenience" clause.

2. Whether due process required the court of appeals to issue a written opinion, instead of a summary order, when it affirmed the decision of the Civilian Board of Contract Appeals.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is available at 844 Fed. Appx. 367. The opinion of the Civilian Board of Contract Appeals (Pet. App. 3a-49a) is reported at 20-1 BCA ¶ 37,541. Previous opinions of the Board are reported at 20-1 BCA ¶ 37,499, 18-1 BCA ¶ 37,071, and 18-1 BCA ¶ 37,070.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2021. A petition for rehearing was denied on June 25, 2021 (Pet. App. 50a-51a). By orders dated March 19, 2020, and July 19, 2021, this Court extended the time within which to file any petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower-court judgment, order deny-

ing discretionary review, or order denying a timely petition for rehearing, as long as that judgment or order was issued before July 19, 2021. The petition for a writ of certiorari was filed on November 22, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner appealed the cancellation of its contract by a Department of Homeland Security (DHS) contracting officer to the Civilian Board of Contract Appeals (Board). The Board denied petitioner's claims in part and dismissed the appeal in part. Pet. App. 3a-49a. The court of appeals affirmed. *Id.* at 1a-2a.

1. This dispute arises from an April 21, 2010 contract between petitioner and DHS. The contract was a "cost-plus-fixed-fee" contract—a type of cost-reimbursement contract that "provides for payment to the contractor of a negotiated fee that is fixed at the inception of the contract," plus allowable costs incurred by the contractor within limits prescribed in the contract. 48 C.F.R. 16.306(a); see 48 C.F.R. 16.301-1. A cost-plus-fixed-fee contract "establish[es] an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer." 48 C.F.R. 16.301-1; see 48 C.F.R. 16.306(a).

DHS's contract with petitioner called for petitioner to research and develop "a system to detect bio-threats" by "extracting, replicating, amplifying, and identifying their genetic material." Pet. App. 4a, 6a. The contract initially allotted (*i.e.*, obligated) approximately $5 million in funding for a specified set of tasks, with options for additional work that were unilaterally exercisable by DHS. See *id.* at 6a. If DHS chose to exercise all of

the options, the estimated contract ceiling would have been slightly over $18 million. *Ibid.* Over the years, petitioner and DHS agreed to modify the contract more than a dozen times. *Id.* at 6a-8a. Some of the modifications had "reduced tasks and deliverables" required by the contract, even as they had "increased the contract ceiling." *Id.* at 8a-9a. All told, the modifications "increased the obligated funding to [approximately $23 million] and [the] total estimated cost value (contract ceiling) to [approximately $30 million]." *Id.* at 8a.

Beginning in 2011, the agency "experienced significant budget cuts resulting in numerous program terminations." Pet. App. 8a. By late 2012, an agency official "became aware that the contract's spending rate was significantly higher than the planned rate." *Ibid.* In March 2013, another agency official stated that "as far as I can tell this program is out of control and spending funds at a rate that has not been authorized." *Ibid.* (citation omitted). Because of those "funding concerns," the agency issued two stop-work orders to petitioner in 2013 "to allow a government assessment of program direction." *Id.* at 8a n.6.

In late 2013, the newly appointed acting director of the relevant DHS division, Donald Woodbury, "began reviewing all [division] programs to familiarize himself with the [division's] portfolio and to manage the Division finances." Pet. App. 9a. In conducting that review, he developed "concerns about the performance and administration of [petitioner's] contract." *Ibid.* Woodbury "described the contract as one of the most 'irregular' contracts he had seen" in light of the number of modifications, including one that had "completely eliminated" the "task requiring the delivery of a prototype." *Id.* at 9a-10a. He also "believed that the 'spend rate'

seemed extremely high, inconsistent with the amount of money that the [division] had in the budget for the contract." *Id.* at 10a.

Woodbury thus "decided not to allot additional funds to the contract." Pet. App. 14a. He provided several reasons: (1) "the objectives of the contract were inconsistent with the agency's mission"; (2) "there was lack of a clear path for commercialization of the system"; (3) "the project manager and the science advisor had been less than forthright with him as to the description of the progress on the project"; (4) he "believed that [petitioner] had been invoicing for amounts in excess of the obligated funds"; and (5) "continuing to fund the contract did not represent the best use of the limited funds of the [division]," given "'the value received versus the anticipated cost of going forward.'" *Id.* at 15a (citation omitted). Woodbury further observed that "[n]o working prototype had been produced," that petitioner's CEO had "estimated that at least an additional $10 million would be needed to produce a beta prototype," and that "production of a testable prototype would not guarantee a workable device." *Id.* at 15a-16a.

Following Woodbury's decision, the DHS contracting officer issued petitioner a notice of non-allotment of additional funds, indicating that "the Government will not reimburse [petitioner] for costs incurred in excess of th[e]" amount (approximately $23 million) that had been allotted. Pet. App. 17a; see *id.* at 16a-17a. The notice cited the contract's "limitation of funds" clause, which incorporates language contained in the Federal Acquisition Regulation. See 48 C.F.R. 52.232-22. The limitation-of-funds clause provides that although "[t]he parties contemplate that the Government will allot additional funds incrementally to the contract up to the

full estimated cost," the "Contractor agrees to perform * * * work on the contract up to the point at which the total amount paid and payable by the Government * * * does not exceed the total amount actually allotted." 48 C.F.R. 52.232-22(b). The clause emphasizes that "[t]he Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted." 48 C.F.R. 52.232-22(f)(1).

Approximately a month after notifying petitioner of the non-allotment of additional funds, the contracting officer notified petitioner that he was terminating the contract for convenience. Pet. App. 18a. The contract's termination clause, which incorporates language from 48 C.F.R. 52.249-6, states that "[t]he Government may terminate performance of work under this contract" if the "Contracting Officer determines that a termination is in the Government's interest." 48 C.F.R. 52.249-6(a)(1). The contracting officer explained that "the contract would expire with no additional funding," and that a "termination for convenience gave [petitioner] the opportunity to submit a termination settlement proposal to be compensated for termination costs." Pet. App. 17a-18a; see 48 C.F.R. 52.249-6(f).

The contracting officer allotted approximately $1 million in additional funds for payment of termination costs under the contract. Pet. App. 18a-19a. Petitioner initially submitted a termination settlement proposal of nearly $4 million, *id.* at 23a, and eventually added an uncertified claim for an additional $10.3 million in "[l]ost opportunity costs" and "[b]ad credit," *id.* at 24a. The contracting officer denied that claim, *id.* at 25a, as well as petitioner's subsequent certified claims, *id.* at 26a-28a. Petitioner filed three appeals with the Board. See *ibid.*; 41 U.S.C. 7104(a) ("A contractor, within 90 days

from the date of receipt of a contracting officer's decision * * * , may appeal the decision to an agency board."). The appeals were eventually consolidated, see Pet. App. 30a, and the parties resolved their dispute over termination costs in binding arbitration, *id.* at 28a. The Board thus dismissed petitioner's appeal with respect to termination costs, which are no longer at issue in this case. See *id.* at 5a, 49a. In addition to termination costs, petitioner has received the full amount (approximately $23 million) that had been allotted to the contract. *Id.* at 40a.

Meanwhile, petitioner increased its demand for additional payment from $10.3 million to more than $282 million, allegedly for lost profits and bad debts and obligations based on what petitioner viewed as the government's "bad faith in terminating the contract." Pet. App. 27a (citation omitted). Specifically, petitioner alleged that "the agency's discontinuing funding and terminating the contract was a breach of the implied duty of good faith and fair dealing." *Id.* at 32a.

2. The Board denied petitioner's appeal with respect to its claim for breach of the implied duty of good faith and fair dealing. Pet. App. 30a-49a. The Board acknowledged that "[i]mplied in every contract is a duty of good faith and fair dealing." *Id.* at 34a (citing *Lakeshore Engineering Services, Inc.* v. *United States*, 748 F.3d 1341 (Fed. Cir. 2014), and *Metcalf Construction Co.* v. *United States*, 742 F.3d 984 (Fed. Cir. 2014)). The Board explained, however, that petitioner "ha[d] not presented any evidence to overcome the presumption that" Woodbury and other DHS officials "acted conscientiously in the discharge of their duties." *Id.* at 35a.

The Board first determined that Woodbury did not breach the duty of good faith and fair dealing in decid-

ing not to allot further funds to the contract. Pet. App. 33a-41a. The Board found that Woodbury and his superior "were very credible witnesses, and their actions did not demonstrate unfair dealing, intent to harm [petitioner], or bad faith by them or other government personnel." *Id.* at 35a. The Board observed that "[t]he agency's funding concerns arose before Mr. Woodbury's appointment," *ibid.*, and the Board reviewed in detail the extensive concerns raised by Woodbury and other agency officials regarding the contract, *id.* at 35a-39a. The Board also explained that petitioner had presented "no evidence" that "Woodbury had 'bad faith animus' against [petitioner] or any specific intent to harm the company." *Id.* at 39a. And the Board found that petitioner had "failed to prove" the allegations in its post-trial brief that "'Woodbury enacted his scheme to attack [petitioner] by attempting to transfer funds planned for [petitioner's] contract to other agencies, attempting to disclose [petitioner's] proprietary information to third parties, and lying to other Government stakeholders concerning the progress and validity of [petitioner's] technology.'" *Id.* at 40a (citation omitted). The Board thus concluded that "[t]he agency did not breach the implied duty of good faith and fair dealing or act in bad faith," and that Woodbury had "persuasively and credibly explained the basis of his decision" to discontinue funding of the contract. *Id.* at 41a.

The Board also determined that the agency did not breach the duty of good faith and fair dealing in deciding to terminate the contract for convenience. Pet. App. 41a-45a. The Board explained that once Woodbury had decided not to allot additional funds to the contract, the contracting officer "had the discretion to either allow the contract to expire on its own terms, without com-

pensating [petitioner] for its termination costs, or to terminate the contract for convenience to allow termination costs." *Id.* at 43a-44a. The Board observed that the contracting officer testified that "he did not have a professional opinion as to whether funding should be discontinued, but once that decision was made, he decided to use his discretion to terminate the contract for convenience," which would give petitioner the "benefit" of "submit[ting] a proposal to recover allowable termination costs"—a benefit to which petitioner "would not have been entitled * * * unless the contract w[ere] terminated." *Id.* at 44a. Accordingly, the Board concluded that "rather than harming [petitioner], * * * the decision to terminate for convenience clearly benefitted [petitioner]." *Ibid.* The Board thus rejected petitioner's contention that the contracting officer "abdicated his authority to administer the contract by failing to exercise his own discretion," explaining that "there was a reasonable, contract-related basis for the decision to terminate for convenience," which was "within [the contracting officer's] discretion" and "clearly within the parameters of the [limitation-of-funds] clause." *Id.* at 43a-44a.

3. Petitioner appealed to the Court of Appeals for the Federal Circuit. Following briefing and oral argument, the court affirmed the Board's decision in an unpublished per curiam order. Pet. App. 1a-2a; see Fed. Cir. R. 36(a).

ARGUMENT

Petitioner renews its contention (Pet. 13-28) that the agency breached the duty of good faith and fair dealing by deciding not to allot additional funds to the contract and deciding to terminate the contract for convenience. The court of appeals correctly rejected that contention,

and its factbound decision does not conflict with any decision of this Court or another court of appeals. Petitioner further contends (Pet. 28-29) that the court of appeals' affirmance without a written opinion violates due process. That contention lacks merit, and petitioner identifies no precedent holding that due process requires an appellate court to issue a written opinion in every case. Further review is unwarranted.

1. a. The court of appeals correctly affirmed the Board's determination that Woodbury's decision not to allot further funds to the contract was made in good faith. As a threshold matter, petitioner does not dispute that it received the full amount (approximately $23 million) that the government allotted to the contract, plus termination costs. Nor does petitioner assert that it incurred any allowable costs under the contract for which it was not reimbursed. Instead, petitioner argues that the government was obligated to allot additional funds to the contract so that petitioner could perform additional work. That argument lacks merit.

Petitioner appears to recognize (Pet. 14) that the government was entitled to cease allotting additional funds to the contract under at least some circumstances—such as "if the research at any point turn[ed] out to be unproductive." And petitioner does not identify any contractual provision requiring the government to make an unconditional allotment of additional funds. Although petitioner emphasizes the language in the limitation-of-funds clause stating that "the parties contemplate that the Government will allot additional funds incrementally to the contract up to the full estimated cost," Pet. 13 (quoting 48 C.F.R. 52.232-22(b)) (brackets omitted); see Pet. 18, that language reflects only the parties' mutual expectations or

predictions—not a binding obligation. Cf. *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 71-72 (2004). Indeed, treating that language as a binding obligation for the government to allot funds up to the contract ceiling would conflict with express contractual text making clear that "[t]he Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted." 48 C.F.R. 52.232-22(f)(1).

Petitioner also relies on the contract's Statement of Work, which petitioner says provided that "DHS will provide funding to [petitioner] in accordance with DHS'[s] appropriations and available funds." Pet. 13-14 (citation omitted); see Pet. 18; Pet. App. 75a. That reliance is misplaced because the parties had agreed, in one of their contract amendments, to delete that language from the contract. See C.A. App. 163-164. And even before that deletion, the language had been clarified by an earlier amendment to read "DHS will provide funding to [petitioner] in accordance with DHS's appropriations and available funds *pursuant to the allocation outlined below*," followed by tables showing an initial allotment of $5 million and allotments for additional phases totaling $14.5 million to be funded at the government's "[o]ption." *Id.* at 113 (emphasis added); see *id.* at 113-114.

Petitioner contends (Pet. 14) that the government was obligated to continue to allot funds to the contract because the limitation-of-funds clause did not "give the Government an absolute right to stop funding an intermittently funded contract at any time." The conclusion does not follow from the premise. That the government might have lacked an "absolute right to stop funding" does not mean it was obligated to continue funding under any and all circumstances. Moreover, the only lim-

itation that petitioner has identified on the government's ability to decline to allot additional funds is the implied duty of good faith and fair dealing. The Board expressly agreed that the contract contains such a duty. *E.g.*, Pet. App. 34a. But the Board found that the government did not breach that duty in declining to allot additional funds to the contract under the circumstances here.

As the Board found, Woodbury provided several legitimate reasons for discontinuing funding: (1) "the objectives of the contract were inconsistent with the agency's mission"; (2) "there was lack of a clear path for commercialization of the system"; (3) "the project manager and the science advisor had been less than forthright with him as to the description of the progress on the project"; (4) he "believed that [petitioner] had been invoicing for amounts in excess of the obligated funds"; and (5) "continuing to fund the contract did not represent the best use of the limited funds of the [division]," given "'the value received versus the anticipated cost of going forward.'" Pet. App. 15a (citation omitted). Those conclusions were amply supported by Woodbury's extensive investigation into the contract. See *id.* at 9a-12a, 14a (describing those efforts). Moreover, the Board found that Woodbury was a "very credible witness[], and [his] actions did not demonstrate unfair dealing, intent to harm [petitioner], or bad faith by [him] or other government personnel." *Id.* at 35a. Petitioner provides no sound basis for this Court to second-guess those factual determinations, which the court of appeals did not disturb. Cf. *United States* v. *Doe*, 465 U.S. 605, 613-614 (1984) ("The District Court's finding essentially rests on its determination of factual issues. Therefore, we will not overturn that finding un-

less it has no support in the record. Traditionally, we also have been reluctant to disturb findings of fact in which two courts below have concurred.") (citations omitted).

Petitioner's reliance (Pet. 15-16) on this Court's decisions in *Cherokee Nation of Oklahoma* v. *Leavitt*, 543 U.S. 631 (2005), and *Salazar* v. *Ramah Navajo Chapter*, 567 U.S. 182 (2012), is misplaced. *Cherokee Nation* involved tribal contracts in which the government had "promise[d] to pay contract support costs," but then "refused to pay the full amount promised" on the ground that "Congress did not appropriate sufficient funds." 543 U.S. at 635. The Court held that the government was liable for breach of contract, explaining that "as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of 'insufficient appropriations.'" *Id.* at 637. *Ramah Navajo* reiterated that holding, 567 U.S. at 192, and explained that it applies even when "Congress appropriates sufficient funds to pay in full any individual contractor's contract support costs, but not enough funds to cover the aggregate amount due every contractor." *Id.* at 185; see *id.* at 195 ("[W]hen an agency makes competing contractual commitments with legally available funds and then fails to pay, it is the Government that must bear the fiscal consequences, not the contractor.").

Here, by contrast, the government did not promise to pay petitioner any amount above the funds actually allocated to the contract. 48 C.F.R. 52.232-22(f)(1); see 48 C.F.R. 52.232-22(b) (requiring petitioner to refrain from performing any work for "which the total amount paid and payable by the Government" would "exceed

the total amount actually allotted"). And it is undisputed that petitioner has received the full amount (approximately $23 million) that the government actually allotted to the contract, plus termination costs. *Cherokee Nation* and *Ramah Navajo* are thus inapposite.

To the extent petitioner contends (Pet. 16-19) that the Board misapplied the implied duty of good faith and fair dealing to the circumstances of this case, that fact-bound contention would not merit this Court's review. And in any event, petitioner's contention lacks merit. Petitioner alleges (Pet. 18) that Woodbury's statement that he "did not believe the objectives of the contract were consistent with DHS's mission" violated the duty of good faith and fair dealing because it supposedly "contradict[ed] the agreed common purpose of the contract" and thereby implied that "the contract was in some sense * * * illicit from the start." But there is nothing inconsistent about concluding that a contract *no longer* aligns with an agency's purpose or mission, even if it did at one time. Nor does petitioner cite any authority to suggest that an agency official is precluded from reaching such a conclusion. Moreover, petitioner overlooks the several other reasons that Woodbury gave for deciding not to allot additional funds to the contract, including that the contract did not require petitioner to produce a working prototype and that "continuing to fund the contract did not represent the best use of the limited funds of the [division]," given "'the value received versus the anticipated cost of going forward.'" Pet. App. 15a (citation omitted).

Petitioner also alleges that Woodbury declined to allot further funds "because the Government supposedly could get a better bargain elsewhere." Pet. 18; see Pet. 21, 24. Petitioner does not explain the basis for that al-

legation, cf. Pet. 6, but before the Board petitioner relied on an interagency announcement (by DHS and the Department of the Interior) that supposedly sought to pursue "the same technology," Pet. App. 44a; see *id.* at 23a. Yet as the Board found, petitioner produced "no persuasive evidence that the requirements sought by the [interagency announcement] were the same or even similar to those of [petitioner's] contract or that the agency was seeking a 'better bargain.'" *Id.* at 45a; see *id.* at 23a (recounting the project manager's statement that "there is no connection whatsoever between [petitioner's] contract performance and [the interagency announcement]") (citation omitted).

b. The contracting officer's decision to terminate the contract for convenience likewise did not breach the duty of good faith and fair dealing. As the Board explained, once additional funding had been discontinued, the contracting officer either could have "allow[ed] the contract to expire on its own terms, without compensating [petitioner] for its termination costs," or decided to "terminate the contract for convenience to allow termination costs." Pet. App. 43a-44a. The contracting officer reasonably exercised his discretion to choose the latter, which inured to *petitioner's* benefit. See *id.* at 44a. Indeed, petitioner submitted a proposal to recover nearly $4 million in termination costs, and ultimately received an award of termination costs as determined in binding arbitration. See *id.* at 27a-28a.

Petitioner contends that termination for convenience is appropriate "only in the event of some kind of change from the circumstances of the bargain or in the expectations of the parties," Pet. 20 (citation omitted), and that the termination of its contract was unjustified because "[t]he only change of circumstances here was the

entrance of Woodbury," who "disagreed with the contract's purpose and thought he could get a better deal elsewhere," Pet. 21. As noted, petitioner cites no authority for the proposition that an agency official is precluded from changing his mind about whether a particular contract remains within the agency's mission, and petitioner identifies no persuasive evidence supporting its allegation that Woodbury was seeking a "better deal." Even setting that aside, and assuming for the sake of argument that a change of circumstance was required to support a termination for convenience (but see pp. 17-18, *infra*), petitioner is incorrect to suggest that "the entrance of Woodbury" was the only change that had occurred. Instead, as the Board explained, the agency began to have concerns about the funding of petitioner's contract and its "spending rate" as early as 2011, two years before Woodbury's appointment. Pet. App. 8a. And in March 2013, many months before Woodbury arrived, an agency official expressed his view that "this program is out of control and spending funds at a rate that has not been authorized." *Ibid.* (citation omitted). Those concerns only "increased" when the contract had to be modified to "reduce[] tasks and deliverables" while "increas[ing] the contract ceiling" in June 2013. *Id.* at 8a-9a. Those facts—especially in conjunction with the concerns Woodbury identified following his own investigation into the contract—qualify as a "change from the circumstances of the bargain or in the expectations of the parties." Pet. 20 (citation omitted).

c. Nor is there any merit to petitioner's contention (Pet. 22-28) that substantial evidence did not support the Board's decision. As noted, Woodbury and other agency officials had legitimate and good-faith concerns about the contract and its spending rate, in light of the

large number of modifications to the contract, the steadily increasing contract ceiling, the diminishing number of deliverables, and the lack of a working prototype. Petitioner emphasizes that the program manager thought that the program "'[wa]s not out of control'" and the science advisor "supported continued funding of [petitioner's] contract." Pet. 25-26 (citation omitted). But as the Board explained, "Woodbury was not required to accept the advice" of those subordinates, who "had no responsibility for or authority to determine funding." Pet. App. 36a-37a; see *id.* at 48a. Indeed, Woodbury "was concerned that the agency's project manager did not have an arm's length relationship with [petitioner], and that the project manager and the science advisor were not being forthright with him as to the status and goals of the project." *Id.* at 36a. As a result, Woodbury even "felt it necessary to conduct an independent, third-party review of the contract," although that review ultimately "did not occur." *Ibid.*

Petitioner incorrectly asserts (Pet. 21, 27-28) that the Board overlooked an audit of the contract by the DHS Office of Inspector General (OIG), which stated that OIG "did not identify evidence to substantiate any of the concerns" raised by Woodbury, Pet. App. 60a. The Board addressed the OIG audit at length, see *id.* at 45a-49a, and ultimately concluded that it was entitled to little weight because it was not "a reliable or accurate representation or critique of Mr. Woodbury's decision to discontinue funding and [the contracting officer's] decision to terminate the contract for convenience." *Id.* at 48a-49a. For example, the Board found that the audit team member on whose testimony petitioner principally relied "was not a credible witness, as his testimony contained many erroneous statements." *Id.* at 46a. And

the Board observed that the audit report itself contained repeated misstatements of the contractual provisions and unsupported factual assertions about the viability of a working prototype, which petitioner's own CEO had said would require at least another $10 million to produce. See *id.* at 47a-48a. And to the extent petitioner relies on the statements of subordinate OIG personnel to suggest that Woodbury was operating under a conflict of interest related to "former associates," Pet. 27; see Pet. App. 68a-69a, the OIG audit report itself contains no such suggestion, see Pet. App. 58a-66a. Moreover, the "auditor in charge" testified that "there was no evidence of a conflict of interest or disqualifying personal relationship between Mr. Woodbury and other individuals." *Id.* at 46a-47a. Petitioner provides no sound basis for this Court to disturb the Board's fact-bound determination that the OIG audit merited little weight.

d. Petitioner asserts (Pet. 19) that Federal Circuit precedents are in "disarray" regarding terminations for convenience. That assertion is incorrect. Petitioner relies (Pet. 20-21) on supposed tension between *Maxima Corp.* v. *United States*, 847 F.2d 1549 (Fed. Cir. 1988), which petitioner says established the change-of-circumstances requirement, and *T & M Distributors, Inc.* v. *United States*, 185 F.3d 1279 (Fed. Cir. 1999), which stated that "[i]n the absence of bad faith or clear abuse of discretion, the contracting officer's election to terminate for the government's convenience is conclusive," *id.* at 1283.

Petitioner overlooks that the Federal Circuit resolved any supposed tension more than 25 years ago in *Krygoski Construction Co.* v. *United States*, 94 F.3d 1537 (1996), cert. denied, 520 U.S. 1210 (1997). There,

the court of appeals explained that the change-of-circumstances requirement set forth in *Maxima* and in the plurality opinion in *Torncello* v. *United States*, 681 F.2d 756 (Ct. Cl. 1982) (en banc), on which *Maxima* relied, "applies only when the Government enters a contract with no intention of fulfilling its promises." *Krygoski*, 94 F.3d at 1545; see *id.* at 1542 & n.2. *Krygoski* otherwise confirmed the general rule, still applicable today, that "[a] contracting officer may not terminate for convenience in bad faith." *Id.* at 1541; see *JKB Solutions & Services, LLC* v. *United States*, 18 F.4th 704, 709 (Fed. Cir. 2021) ("A contracting officer's decision to terminate for convenience is only conclusive in the absence of bad faith or clear abuse of discretion."). This case, of course, does not involve any allegation that when the government entered into the contract with petitioner in 2010, it had no intention of fulfilling its promises. Nor does petitioner directly challenge in this Court the Board's finding that the agency did not operate in bad faith. Cf. Pet. 11, 17. Accordingly, not only is there no tension in Federal Circuit case law, but even if there were such tension, this case would be a poor vehicle in which to address it.

2. Petitioner's contention (Pet. 28-29) that the court of appeals violated due process when it issued a summary affirmance under Federal Circuit Rule 36 does not merit further review. Petitioner identifies no precedent of this Court or another court of appeals holding that due process requires a court of appeals to issue a written opinion in every case. Cf. *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam) ("We, of course, agree that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary

affirmances."); *United States* v. *Pajooh*, 143 F.3d 203, 204 (5th Cir. 1998) (rejecting due process challenge based on an attempt to "equate meaningful review" with the issuance of "a full written opinion," which wrongly "fails to distinguish between the review process and the manner in which the Court announces its decision"). Petitioner's reliance (Pet. 29) on *Lewis* v. *Casey*, 518 U.S. 343 (1996), is misplaced because that case simply reiterated that prisoners must have "'meaningful access to the courts'"—and that a "subpar" prison law library, standing alone, does not impede such access. *Id.* at 351 (citation omitted).

Here, petitioner did have meaningful access to the courts: it filed its appeal and briefs in the Federal Circuit, which heard oral argument and issued a binding decision. As the Federal Circuit "ha[s] explained on several occasions, 'appeals whose judgments are entered under Rule 36 receive the full consideration of the court, and are no less carefully decided than the cases in which [it] issue[s] full opinions.'" *Phil-Insul Corp.* v. *Airlite Plastics Co.*, 854 F.3d 1344, 1354 (2017) (brackets and citation omitted). Contrary to petitioner's contention (Pet. 29), therefore, petitioner did "hav[e] its day in court"—not just figuratively, but also literally, see C.A. Doc. 32 (Apr. 5, 2021) (noting oral argument).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
PATRICIA M. MCCARTHY
GEOFFREY M. LONG
Attorneys

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