

No. 25-1372

IN THE
Supreme Court of the United States

ASG SOLUTIONS CORP., DBA AMERICAN
SYSTEMS GROUP,

Petitioner,

v.

UNITED STATES,

Respondent.

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

**REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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TABLE OF CONTENTS

INTRODUCTION	1
I. The Government Does Not Dispute That Erasing The Discretion Requirement Is an Issue of Exceptional National Importance	1
II. This Case Presents A Pure Question of Law.....	3
III. The Government Cannot Use the CDA's <i>De Novo</i> Standard to Retroactively Cure the Contracting Officer's Failure to Exercise Contemporaneous Discretion.....	5
IV. The Lower Courts' Reliance on an Eleventh-Hour Unauthenticated Memorandum Admitted "Not for the Truth" Does Not Shield the Decision from Review.....	6
V. Conclusion	7

TABLE OF AUTHORITIES

Cases

<i>Darwin Constr. Co. v. United States</i> , 811 F.2d 593 (Fed. Cir. 1987)	3
<i>Dep’t of Transp. v. Eagle Peak Rock & Paving, Inc.</i> , 69 F.4th 1367 (Fed. Cir. 2023).....	1, 3
<i>Lisbon Contractors, Inc. v. United States</i> , 828 F.2d 759 (Fed. Cir. 1987)	2
<i>Schlesinger v. United States</i> , 390 F.2d 702 (Ct. Cl. 1968)	3, 4, 5

Statutes and Regulations

28 U.S.C. § 1295(a)(3)	2
28 U.S.C. § 1295(a)(10)	2
FAR 49.402-3(f)	1, 2, 3

**REPLY IN SUPPORT OF
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INTRODUCTION

Termination for default (“T4D”) is a discretionary act, not a mandatory penalty. The standard default clause provides that the Government “may” terminate for default, and the Government’s Brief In Opposition (“Opp.”) cites no authority to the contrary. For over 50 years, courts have held that this discretion must actually be exercised. The contracting officer must weigh the alternatives to termination, the impacts on the project, the impact on other agencies, and other vital considerations—a duty now codified at FAR 49.402-3(f). The Federal Circuit has eroded this requirement for discretion over the last 30 years. Culminating in *Dep’t of Transp. v. Eagle Peak Rock & Paving, Inc.*, 69 F.4th 1367 (Fed. Cir. 2023)(“*Eagle Peak*”) and the case below, the Federal Circuit has now entirely eradicated this procedural safeguard, removing judicial oversight of the contracting officer’s discretion so long as an alleged failure of performance appears in the record.

**I. The Government Does Not Dispute That
Erasing The Discretion Requirement Is
an Issue of Exceptional National
Importance**

The Government does not dispute a single word of ASG’s showing that this issue is of exceptional national importance. Instead, it treats this case as routine. It is not. Congress vested the Federal Circuit with exclusive appellate jurisdiction over Contract

Disputes Act cases. 28 U.S.C. § 1295(a)(3), (10). Because no other circuit can ever hear these appeals, no circuit split will ever develop. When the Federal Circuit alters the fundamental architecture of federal contracting, it establishes the permanent, nationwide rule.

The Government makes no attempt to challenge the importance of this shift. It offers no rebuttal to the Petition's showing that a T4D is a "drastic sanction," *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987), carrying devastating financial consequences because, among other things, a T4D requires mandatory reporting to federal responsibility databases (FAPIS) and routinely results in the destruction of a contractor's business. Nor does the Government offer any policy justification for why federal agencies should suddenly be permitted to impose this sanction mechanically, without the independent, contemporaneous judgment of the contracting officer that the law and FAR 49.402-3(f) have long required.

The Government's silence on the national importance of this issue is telling. It makes no attempt to argue the point likely because it cannot deny that erasing the discretion requirement ultimately harms the United States. A failure of performance does not automatically make termination advantageous for the public treasury. Discretionary review ensures the Government acts as a rational commercial actor, weighing whether to permit a cure or incur massive reprocurement delays and costs, rather than acting as an unthinking

“automaton.” *Schlesinger v. United States*, 390 F.2d 702, 707-708 (Ct. Cl. 1968). The requirement for independent administrative discretion serves as a vital safeguard against a contracting officer’s “abdication of responsibility” to external duress, administrative dictate, or political interference. See *Darwin Constr. Co. v. United States*, 811 F.2d 593, 596 (Fed. Cir. 1987) (condemning a termination dictated by motivation to “rid the Navy of having to further deal with” the contractor); *Schlesinger*, 390 F.2d at 707-708 (condemning a termination driven by congressional pressure).

By quietly extinguishing a half-century of administrative protection, the Federal Circuit has left government contractors defenseless and opened the door for arbitrary and pretextual terminations that ultimately harm the United States. Only this Court can restore those protections.

II. This Case Presents A Pure Question of Law

The Petition presents a pure question of law: whether the Government must actually exercise independent administrative discretion before executing a T4D, or whether a post-hoc finding of default cures the failure to do so. Although the lower courts did not cite *Eagle Peak* by name, they faithfully applied its fatal loophole. The trial court held that “even without the Navy’s analysis of the FAR 49.40[2]-3(f) factors, the termination for default would not be an abuse of the Navy’s discretion because ASG failed to perform the contract.” Pet. App.

61a. The Federal Circuit affirmed, holding that the termination was valid because ASG had defaulted and the termination “was not simply a ruse designed to enable the Navy to escape an improvident contract.” Pet. App. 7a.

This is a profound departure from *Schlesinger*. The lower courts ruled – as a matter of law—that finding a breach retroactively excuses the agency’s failure to exercise administrative discretion.

The Government attempts to hide this legal shift by attacking a straw man. Relying on the Federal Circuit’s “ruse” language, the Government argues that ASG “does not and could not plausibly contend that the contract here was terminated for reasons unrelated to performance.” Opp. 10. But ASG is not asking this Court to reweigh the facts to find bad faith or a pretextual ruse. The legal error is far more fundamental.

Schlesinger and its progeny do not merely prohibit terminations that are “ruses”; they demand the affirmative exercise of independent administrative discretion. By holding that a T4D is valid simply because a default occurred that supports termination, the Federal Circuit transformed a mandatory procedural duty into a suggestion. If the trial court is correct that the Government can skip the discretion analysis provided there is a breach, *Schlesinger* no longer exists.

The Government’s attempt to distinguish *Schlesinger* does not pass inspection. In *Schlesinger*,

the contractor was undeniably late on delivery immediately preceding the T4D, yet the termination was struck down because: “[t]here was no indication of any concern for the contractor or whether a default would be excusable, no consideration of a possible waiver or an extension, no weighing of a convenience-termination instead of a default-termination.” *Schlesinger*, 390 F.2d at 708. Under the Federal Circuit’s new rule—where a breach and the absence of a “ruse” automatically validates a termination—*Schlesinger* would have been decided for the Government.

III. The Government Cannot Use the Contract Disputes Act’s *De Novo* Standard to Retroactively Cure the Contracting Officer’s Failure to Exercise Contemporaneous Discretion

The Government seeks to use *de novo* review under the Contract Disputes Act (CDA) as a complete shield to the agency’s failure to exercise discretion. (Opp. 7-8.) The fatal flaw in this analysis is that *de novo* is a standard of judicial review; it describes the level of deference a court owes to the agency’s factual findings of breach. It does not delete mandatory elements of the Government’s claim. A T4D is a Government claim on which the Government bears the burden of proof. For over 50 years, sustaining that claim required the Government to demonstrate the exercise of administrative discretion by the contracting officer. A court’s *de novo* review of the objective breach of contract does not excuse the

agency's failure to exercise that discretion in the first instance.

The Government provides no legal support or explanation for why this long-standing abuse of discretion concept is incompatible with the CDA. It cites nothing because there is nothing to cite.

IV. The Lower Courts' Reliance on an Eleventh-Hour Unauthenticated Memorandum Admitted "Not for the Truth" Does Not Shield the Decision from Review

The Government contends that certiorari is unwarranted because the trial court made an alternate finding that a March 17, 2023 memorandum established that the contracting officer considered the FAR factors. Opp. 10-11. That argument fails because the primary holding below was pure law, and the alternate holding rests on an evidentiary nullity.

First, the trial court's primary ruling did not turn on the memorandum at all. As demonstrated in Section II, the trial court explicitly ruled that ASG's alleged breach excused any failure by the Navy to consider the FAR factors—a ruling the Federal Circuit affirmed based solely on default and the absence of a "ruse". Pet. App. 7a, 61a. That pure legal holding governs the decision below and is squarely presented here.

Second, the alternate holding cannot insulate the judgment because it rests on a legal impossibility. The

Government produced the unauthenticated memorandum (bearing a digital signature without a date and time stamp) just five days before the oral argument. Both lower courts restricted its admission: it was admitted not for the truth of its contents, but only to show that the piece of paper existed before termination. Pet. App. 8a n.3, 61a n.8. As a matter of basic evidentiary law, a document admitted not for its truth cannot prove that an agency official in fact exercised reasoned administrative discretion. An agency cannot satisfy its substantive legal burden of proving contemporaneous, independent discretion through evidence whose factual assertions cannot be credited as true.

The Government attempts to dismiss this failure of proof as a “factbound disagreement with the lower courts’ evidentiary rulings.” Opp. 11. It is not. It presents the pure question of law raised in Question 2 of the Petition: whether the Government can satisfy its legal burden of establishing contemporaneous administrative discretion through an unauthenticated document admitted solely for non-truth. This Court’s review is urgently needed to close that loophole.

V. Conclusion

For the foregoing reasons, and those stated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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