2012-5045

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

WHITE BUFFALO CONSTRUCTION, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN CASE NOS. 99-CV-961, 00-CV-451, AND 07-CV-738, JUDGE LOREN A. SMITH

BRIEF FOR DEFENDANT-APPELLEE

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March 27, 2013

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STATEMENT OF COUNSEL

Pursuant to Rule 47.5, defendant-appellee's counsel states that he is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. Defendant-appellee's counsel also is unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

2012-5045

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

WHITE BUFFALO CONSTRUCTION, INC.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims
in case nos. 99-CV-961, 00-CV-415, and 07-CV-738, Judge Loren A. Smith

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BRIEF FOR DEFENDANT-APPELLEE

JURISDICTIONAL COUNTER-STATEMENT

The United States agrees with plaintiff-appellant, White Buffalo Construction, Inc. (White Buffalo), that, pursuant to former section 41 U.S.C. § 609(a)(1), now 41 U.S.C. § 7104(b)(1), of the Contract Disputes Act (CDA), the United States Court of Federal Claims (the trial court) possessed jurisdiction to entertain the part of case no. 07-738 in which White Buffalo sought relief pursuant to the "termination for convenience" clause of its contract with the Government. However, for the reasons explained in our

argument below, the trial court did not possess jurisdiction to entertain the other matters set forth in these actions.

The United States otherwise agrees with White Buffalo's statement of jurisdiction, except for its apparently inadvertent citation of the source of this Court's jurisdiction. The correct citation is 28 U.S.C. § 1295(a)(3).

COUNTER-STATEMENT OF THE ISSUES

1. Whether the trial court possessed jurisdiction to entertain more than White Buffalo's challenge to the contracting officer's decision awarding termination for convenience relief in case no. 07-738, where the Government voluntarily granted the relief sought in case nos. 99-961 and 00-415, and where the other matters raised in case no. 07-738 were either (a) not presented to the contracting officer, (b) presented to the contracting officer more than six years after the claim accrued, or (c) appealed to the trial court more than a year after receipt of the contracting officer's decision.

2. Whether the trial court's finding that the Government did not act in bad faith was clearly erroneous, where the Government terminated White Buffalo's road repair contract for performance reasons, and converted the termination to one for convenience because of questions regarding the effect that a differing site condition may have had on White Buffalo's performance.

3. Whether the Court should affirm the trial court's judgment amount, where, although the trial court found that White Buffalo was entitled to $29,528 in subcontractor "settlement expenses," White Buffalo never paid or settled with that subcontractor.

4. Whether the trial court's determination of a profit rate pursuant to the termination for convenience clause was an abuse of discretion, where, to determine that rate, the trial court compared the contract value of the work performed with the cost of performing that work.

5. Whether the trial court abused its discretion by allowing a Government witness to testify, and by not imposing adverse inferences because certain other witnesses did not provide live testimony at trial, where White Buffalo agreed that the first witness could testify about conversations with a White Buffalo witness, and agreed to the admission of the other witnesses' deposition testimony.

COUNTER-STATEMENT OF THE CASE

White Buffalo's statement of the case is incomplete and, with respect to the judgment, inaccurate. This is a CDA case involving a road repair contract that the Federal Highway Administration (FHA) awarded, and terminated, in 1998. In 2000, the trial court consolidated case nos. 99-961 and 00-415. In 2004, the contracting officer converted the default

termination to one for the convenience of the Government, released the withheld liquidated damages, and invited White Buffalo to seek relief pursuant to the contract's termination for convenience clause. In August 2007, the contracting officer awarded White Buffalo $240,178.61, pursuant to the termination for convenience clause.

In December 2007, the trial court consolidated case no. 07-738 with case nos. 99-961 and 00-415. Trial was held in 2009. The trial court entered judgment on November 10, 2011, awarding White Buffalo $422,622.23, including interest, without dismissing any of the three cases. On December 7, 2011, the trial court ordered the clerk to amend the judgment to reflect that the award be the subject only of a judgment in case no. 07-738. The clerk has not amended the judgment.

COUNTER-STATEMENT OF THE FACTS

We disagree that the characterizations and argument that White Buffalo includes in its statement of facts are facts. In other respects, the statement is incomplete or incorrect.

I. Conversion And Liquidated Damages

In case nos. 99-961 and 00-415, White Buffalo sought the conversion of the termination of its contract to one for the convenience of the Government, and the return of withheld liquidated damages, with interest.

A8113 ¶ 73; A8204. In early 2004, the Government took those actions, without any trial court order, and before the entry of judgment. A6168; A8502.

The Department of Justice had authorized those actions. A8301. The Government was concerned that, although "the contract was terminated for default because of failure of the contractor to proceed in accordance with the contract, the differing site condition may have been an unrelated factor preventing the project from being completed." A6167.

White Buffalo never presented to the contracting officer any claim challenging the conversion, or that the conversion was in bad faith. White Buffalo commenced case no. 07-738, in which it challenges the conversion, in October 2007. A8701; A8710 ¶ 52; A8711 ¶ 57; A8712 ¶ ii. That was more than three years after having received the contracting officer's conversion decision. A8403; A1550:3-7 (Clevenger, L.).

II. Contract Performance, Administration, And Termination

White Buffalo did not present its bad faith termination claim to the contracting officer until 2005. A8602; A8616-23. However, William Parsons, the contracting officer, terminated the contract for performance reasons, in December 1998, more than six years earlier. A6029-31. In November 1998, White Buffalo wrote to the Government complaining that

"*it is obvious and apparent to all involved* with the project that *there are problems and conflicts between your staff and between your staff and our staff*." A6022 (emphasis added). Specifically, White Buffalo complained that the situation "was having *a major negative impact* on the performance of this contract." *Id.* (emphasis added). White Buffalo stated that it felt that the Government's "Area Engineer [Paul Rettinger] has been intent on *not seeing this project completed as scheduled*." *Id.* (emphasis added). Indeed, White Buffalo concedes before this Court that, in its view, "Rettinger's bias against White Buffalo was seen *as soon as White Buffalo was allowed to begin work*." Brief of Appellant (Applnt. Br.) 8 (heading 2, emphasis added).

The contract provided that "all repairs up to subgrade" be completed at "MP [mile post] 46.2 to MP 46.7 and MP 47.07 to MP 47.25" by November 30, 1998. A7142 § 108.01(b). Mr. Parsons cited the failure to accomplish that as the first of his reasons for terminating the contract for default. A6029.

The contract provided that "[a] preliminary construction schedule is a written narrative with a detailed breakdown of all contract activities for the first 45 days after the notice to proceed is issued," and that, except for certain, specified work, work not begin without an accepted schedule.

A7295 § 155.02. The Government accepted White Buffalo's preliminary construction schedule on September 14, 1998. A6151a-51b; A3434:10-25 (Rettinger). The Government's Project Engineer, Sajid Aftab, had rejected earlier versions of the schedule, for formatting deficiencies, citing failure to meet contract requirements. A6011; A6150; A6151.

The contract provided that work at certain locations within the "wetted perimeter of any stream" be limited to a period no later than November 1. *See* A7142 § 108.01(a). White Buffalo requested an extension of that period (A6125), which was granted through November 6, 1998 (A6055). In its November 20, 1998 letter to the Government, White Buffalo complained about the processing of its wetted perimeter permit extension request. A6023.

The contract provided that "Davis-Bacon" wages be paid. A7058-59 § 52.222-6. Related to that issue, there appeared to be discrepancies between White Buffalo's daily reports and its certified payrolls, prompting the Government to review White Buffalo's payroll records. A2498:8-13 (Youngs). In addition, a White Buffalo employee reported something to the effect that "it would sure be nice to get the wages that we're supposed to get." *See* A2498:16-24 (Youngs). The review identified and listed a number of apparent discrepancies. A6153-58.

The contract did not provide for the issuance of a cure notice prior to termination for default. *See* A7040 § 52.249-10. Nevertheless, on November 13, 1998, the Government, through Contracting Officer Carol Jacoby, issued a cure notice to White Buffalo, warning that the failure to complete work within the wetted perimeter by November 6, 1998, endangered contract performance. A6021. The Government requested that White Buffalo provide a "written plan of the actions to be taken to assure that all repairs up to subgrade . . . will be completed by November 30, 1998." A6021.

On November 20, 1998, White Buffalo responded that "all repairs up to sub-grade *would not be complete and could not be completed until next year* . . . ." A6022; A6026 (emphasis added). Ms. Jacoby's review of White Buffalo's response included consideration of its contention that the condition at MP 46.7 excused its delay. A6027; A6070; A6073. She determined that "[t]he controlling element [at MP 46.7] is the massive, unstable overhanging rock which was created by [White Buffalo's] second [rock blasting] shot"; not the differing site condition. A6073. She further determined that "[t]his unsafe condition has precluded any further work in this area until this dangerous condition is remedied by [White Buffalo]." *Id.* In a December 9, 1998 denial of White Buffalo's request for reconsideration of the

termination decision, Mr. Parsons also determined that the MP 46.7 condition had not prevented White Buffalo from completing work at other mile post stations. A7801.

Thomas Hildreth, who, in 1998, was FHA's Division Construction Engineer, described Mr. Rettinger as "firm but fair," and "one of our premier project engineers." A2186:11-13, A2213:13-20 (Hildreth). Mr. Hildreth believed that termination was warranted, and recommended termination for default. A2218:10-15, A2229:12-19, A2251:14-22 (Hildreth). An undated draft memorandum (written for Mr. Hildreth to provide to Mr. Parsons) that recommended termination based upon White Buffalo's performance (A6019-20) was, most likely, authored by Jane Traffalis. *See* A2270:15-19 (Hildreth); A7745 ("11/9/98: Jane will do the initial write-up"). Mr. Rettinger was not the author. A4062:19-21 (Rettinger). Mr. Hildreth visited the project site and noted that the "[j]ob was in the worst shape of any I can ever remember." A7744.

Richard Youngs, who was employed by another contractor working on the project, described Mr. Rettinger as "the best field engineer I ever worked for." A2481:14-22, A2509:7-13 (Youngs). Mr. Youngs believed that Mr. Rettinger "bent over backwards" and tried to help White Buffalo "at every turn." A2509:17-20 (Youngs). He explained that Mr. Rettinger

advised Luther Clevenger, White Buffalo's president (A8603), "on tricks he could use to get the schedule in, to get it right; to help him in every way he could think of to try to get the man to do the right thing, and to not violate the contract." A2509:20-23 (Youngs).

Mr. Rettinger removed Mike Barber from the project because Mr. Barber had been directing White Buffalo's operations, which was beyond his authority. A3616:1-21 (Rettinger). Mr. Aftab had no complaints regarding how Mr. Rettinger treated him, and requested a transfer from the project because he was frustrated that White Buffalo "was not performing what [it was] supposed to perform according to the contract." A9045:19-A9046:2, A9049:21-25, A9050:12-22 (Aftab). Mr. Rettinger overrode Mr. Aftab's approval of a White Buffalo pay ticket for "riprap in the dissipator" because he determined that the material "had not been tested or proven to meet the contract specification." A3591:2-8 (Rettinger). White Buffalo admitted that the pay ticket (also known as a "pay note") was for work that was "a deviation from what was normal work they had in the [specification]." A1091:12-20 (Clevenger, L.).

During contract performance, Michael Palanuk, who worked on quality control for White Buffalo, resigned because of issues that he had with White Buffalo's work. A2378:2-A2379:7 (Palanuk). Those issues

included his belief that "White Buffalo Construction appears not to have signed the same contract I was given or isn't interpreting it correctly, or possibly is ignoring the contract![]" A7602 (exclamation point in original).

After the termination, White Buffalo's surety recommended Tidewater Construction (Tidewater) as the completion contractor, after Tidewater submitted "the low responsible bid." *See* A7901. Mr. Parsons awarded the completion contract to Tidewater in May 1999. A8001-02. White Buffalo and its surety insisted that the Government "apply the entire revised contract amount, minus agreed liquidated damages, to pay Tidewater." A7952.

With respect to its subcontractor, McBride Construction (McBride), White Buffalo explained in its 2005 claim to the contracting officer that it could not "determine with any certainty whether and to what extent McBride is entitled to payment." A8608. McBride has been "closed" since as early as 1999 (*see* A2880:17-25 (McBride)), and is, according to Mr. Clevenger, "essentially out of business" (A1509:24-1510:13 (Clevenger, L.)). White Buffalo has not paid McBride anything. *See* A1509:22-23 (Clevenger, L.). Nor has White Buffalo settled with McBride. A1509:19-23 (Clevenger, L.). White Buffalo is unaware of any lien that McBride has filed against White Buffalo's equipment. A1510:10-13 (Clevenger, L.).

III. Profit Rate

On two occasions during contract performance, White Buffalo proposed a ten percent profit rate for contract modification work. A7303; A7403. After termination, White Buffalo claimed to have spent $680,980 to perform $626,185 worth of contract work. A1556:23-25 (Clevenger, L.); A9501.

IV. Witness Testimony

White Buffalo consented to the admission of deposition testimony into evidence at trial, including that of Mr. Aftab and Ms. Jacoby. A8901; A9037, A9149 (Aftab); A9345 (Jacoby). White Buffalo also agreed that FHA Division Counsel Timothy Binder could testify regarding his conversations with Mr. Clevenger. A2310:7-24 (Kaplan). Mr. Binder testified that he did not say to Mr. Clevenger that the reason for the conversion "was so that [the Government] had no exposure for lost profits." A2358:13-18 (Binder).

Nearly a year before trial, Mr. Binder verified the Government's responses to White Buffalo's interrogatories "to Timothy Binder" concerning the conversion decision. A8801-15. In addition, in 2008, the Government provided the declaration of Mr. Binder, in which he discussed the conversion. A70 ¶ 6.

SUMMARY OF THE ARGUMENT

The Court should vacate the judgment of the trial court with respect to case nos. 99-961 and 00-415, remand with instructions to dismiss the complaints in those cases for lack of jurisdiction, and affirm the judgment of the trial court with respect to case no. 07-738, for the following five reasons.

First, the trial court possessed jurisdiction to entertain only the termination for relief claim set forth in case no. 00-738. As the trial court found (but did not reflect in its judgment), the Government mooted case nos. 99-961 and 00-415 by voluntarily granting the relief that White Buffalo sought: conversion of the termination of its contract to one for the convenience of the Government, and the release of withheld liquidated damages. With respect to case no. 00-738, contrary to the jurisdictional requirements of the CDA, White Buffalo (1) failed to present its bad faith conversion claim to the contracting officer (a claim that was, in any event, untimely because case no. 07-738 was commenced more than a year after White Buffalo received the conversion decision), and (2) presented its bad faith termination claim to the contracting officer more than six years after it was aware that, in its view, the Government was deliberately impeding its progress on the road repair contract.

Second, even if the trial court possessed jurisdiction to entertain White Buffalo's bad faith claims, the trial court's finding that White Buffalo failed to establish bad faith is not clearly erroneous. Government officials are presumed to act in good faith, and only clear and convincing evidence of a specific intent to injure a contractor will rebut that presumption. A default termination that is related to a contractor's performance is not in bad faith. The Government terminated the contract for default because of White Buffalo's performance, including the failure to meet a contract milestone, and converted the termination upon reconsideration of the effect of a differing site condition on White Buffalo's performance. Because the evidence permits the view that both decisions were performance-related, and not taken to injure White Buffalo, the trial court's finding that White Buffalo failed to establish bad faith is not clearly erroneous.

Third, the Court should affirm the judgment amount even though the trial court did not include in that amount a $29,528 subcontractor "settlement expenses" figure it had awarded. White Buffalo never paid or settled with that subcontractor, and there is no evidence that White Buffalo has a legally enforceable obligation to pay that subcontractor. Consequently, the judgment amount is not clearly erroneous, and should be affirmed.

Fourth, the trial court's calculation of a 19 percent profit rate for purposes of termination for convenience relief is not an abuse of discretion. Consistent with the Federal Acquisition Regulation (FAR)-based methodology incorporated into the contract, the trial court relied upon actual project data to compare White Buffalo's performance costs to the contract value of the work that it performed. White Buffalo does not challenge any of those cost or contract value findings.

Fifth, the trial court did not abuse its discretion in not imposing adverse inferences on the Government resulting from witnesses not being called to testify at trial. Before trial, White Buffalo and the Government agreed that those witnesses would appear through deposition transcript designations. And the trial court did not abuse its discretion in allowing an FHA attorney to testify about his conversations with White Buffalo's president. White Buffalo agreed that the trial court could hear that testimony.

ARGUMENT

I. The Trial Court Possessed Jurisdiction To Entertain Only The Claim For "Termination For Convenience" Relief

The only claim that the trial court possessed jurisdiction to entertain was the claim for termination for convenience relief that White Buffalo set forth in case no. 07-738. Jurisdiction is a question of law that the Court

reviews *de novo. James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1541 (Fed. Cir. 1996). The Government presented its jurisdictional arguments to the trial court. A254-57; A8752. Although, in its opinion, the trial court stated that it dismissed case nos. 99-961 and 00-415 as moot (Addendum (Add.) 3), its judgment does not include any such dismissal (Add. 30[1]). With respect to case no. 07-738, the trial court dismissed the Government's jurisdictional arguments as moot. Add. 2 n.3. For the reasons set forth below, the Court should vacate the judgment of the trial court with respect to case nos. 99-961 and 00-415, remand with instructions to dismiss the complaints in those cases for lack of jurisdiction, and affirm the judgment of the trial court with respect to case no. 07-738.

A. The Government Mooted Case Nos. 99-961 And 00-415 By Voluntarily Granting The Relief That White Buffalo Sought

The Government mooted case nos. 99-961 and 00-415 by voluntarily granting the relief that White Buffalo sought. In its opinion, the trial court stated that it dismissed case nos. 99-961 and 00-415 as moot. Add. 3. However, the trial court's judgment, at least ostensibly, awards money to White Buffalo in all three cases. Add. 30.

[1] At the end of this brief appears an addendum that begins, at page 30, with the judgment of the trial court.

The Court reviews judgments, not opinions. *Fromson v. Advance Offset Plate, Inc.*, 755 F.2d 1549, 1556 (Fed. Cir. 1985). And subject matter jurisdiction may be challenged at any time. *Folden v. United States*, 379 F.3d 1344, 1354 (Fed. Cir. 2004). The Court must be satisfied that a trial court properly exercised jurisdiction. *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1353 (Fed. Cir. 2006). Where a trial court improperly exercised jurisdiction, the Court vacates the trial court's judgment and remands the case with instructions to dismiss the complaint. *See id.*

Mootness is a threshold jurisdictional issue. *See Myers Investigative And Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1369 (Fed. Cir. 2002). When, during the course of litigation, it develops that the relief sought has been granted, the case should generally be dismissed. *Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 939 (Fed. Cir. 2007). Voluntary cessation of challenged conduct moots a case where it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. *See Military Order of Purple Heart of the USA v. Sec'y of Veterans Affairs*, 580 F.3d 1293, 1295 (Fed. Cir. 2009). For example, where corrective action adequately addresses the effects of a challenged procurement action, and there is no reasonable expectation that

the action would recur, a bid protest should be dismissed. *See Chapman*, 490 F.3d at 940. Moreover, the availability of fees pursuant to the Equal Access To Justice Act (EAJA), 28 U.S.C. § 2412, is not an appropriate consideration when determining how to dispose of a case. *Id.* at 939.

In 2004, without being ordered by the trial court and years before the entry of judgment, the Government converted the termination and released the liquidated damages (A6168; A8502), which were the issues in case nos. 99-961 and 00-415 (A8113 ¶ 73; A8204). (In case no. 99-961, White Buffalo also asserted entitlement to unspecified "all amounts due" and "equitable adjustments in the Contract Price" (A8113 ¶¶ 74-75); claims that it never prosecuted and had not presented to the contracting officer.) The Government granted that relief voluntarily, and, because the contract had been terminated years earlier, the termination and withholding of liquidated damages could not recur. Consequently, in 2011, when the trial court entered judgment, case nos. 99-961 and 00-415 were moot, and the trial court should have entered judgment dismissing them, as it apparently intended. Add. 3; *see also* A9601 (directing clerk to amend judgment). Although White Buffalo's discussion of this issue focuses upon eligibility pursuant to EAJA (Applnt. Br. 31), case nos. 99-961 and 00-415 should

have been dismissed regardless of the effect of that dismissal upon White Buffalo's eligibility for EAJA fees.

Although White Buffalo contends that the conversion was without authority (Applnt. Br. 30-31), the trial court found that the Department of Justice approved the conversion. Add. 15. Findings of fact made by the trial court are reviewed under the "clearly erroneous" standard, *City of El Centro v. United States*, 922 F.2d 816, 819 (Fed. Cir. 1990), and that finding is not clearly erroneous. Nine days before the contracting officer issued the conversion decision (A6168), the Department of Justice, to which the conduct of the litigation of case no. 99-961C was reserved, 28 U.S.C. § 516, authorized the conversion. A8301. Consequently, the conversion was not without authority.

B. The Trial Court Did Not Possess Jurisdiction To Entertain White Buffalo's Bad Faith Claims

The trial court did not possess jurisdiction to entertain White Buffalo's bad faith claims; consequently, even if the Court agrees with White Buffalo on the merits of those claims, the Court should reject those claims on jurisdictional grounds, for three reasons.

First, for the Court of Federal Claims to possess jurisdiction to entertain a CDA claim, a contractor must have presented the claim to a contracting officer. *See England v. The Swanson Grp.*, 353 F.3d 1375, 1379

(Fed. Cir. 2004). White Buffalo never presented to the contracting officer any claim that the conversion of the termination was in bad faith. Consequently, the trial court did not possess jurisdiction to entertain that claim.

Second, White Buffalo's challenge to the conversion decision was untimely. The deadline for bringing an action in the Court of Federal Claims challenging a contracting officer's final decision is one year from the receipt of that decision. *See Int'l Air Response v. United States*, 302 F.3d 1363, 1366 (Fed. Cir. 2002). If the contractor does not challenge the decision within that year, the decision is final and unreviewable. *See* 41 U.S.C. § 7103(g); 41 U.S.C. § 7104(b)(3). White Buffalo received the contracting officer's conversion decision on January 17, 2004. A8403; A1550:3-7 (Clevenger, L.). However, White Buffalo did not challenge the decision until October 22, 2007; more than three years later. A8701; A8710 ¶ 52; A8711 ¶ 57; A8712 ¶ ii. Because White Buffalo challenged the conversion decision more than a year after it received that decision, that challenge is untimely, and the conversion decision is final and unreviewable.

Third, White Buffalo's bad faith termination claim was untimely. Each claim by a contractor against the Government relating to a CDA contract shall be submitted within six years after the accrual of the claim.

41 U.S.C. § 7103(a)(4)(A). A claim accrues when all events necessary to fix the liability of the defendant have occurred. *See Catawba Indian Tribe of S.C. v. United States*, 982 F.2d 1564, 1570 (Fed. Cir. 1993). Where a plaintiff knows of the existence of the events fixing the Government's liability, the claim accrues. *John R. Sand & Gravel*, 457 F.3d at 1356. For example, a plaintiff's letters threatening suit against the Government are evidence that the plaintiff knew or should have known that its claim had accrued. *See id.* at 1360.

The bad faith termination claim that the Government impeded White Buffalo's progress and improperly terminated the contract accrued more than six years before White Buffalo presented it to the contracting officer. The Government terminated the contract in December 1998 (A6029), and White Buffalo believed even before then that the Government, principally in the person of Mr. Rettinger, was working against it (A6022). Indeed, White Buffalo wrote to the Government the month before termination complaining that "problems and conflicts" between Government and White Buffalo staff were having "*a major negative impact* on the performance of this contract," and that, in its view, Mr. Rettinger was "*intent on not seeing this project completed as scheduled*." A6022 (emphasis added). White Buffalo concedes that, in its view, "Rettinger's bias against White Buffalo was seen

as soon as White Buffalo was allowed to begin work." Applnt. Br. 8 (heading 2, emphasis added).

In the same 1998 letter in which it complained about Mr. Rettinger, White Buffalo also told the Government that the condition at MP 46.7 was delaying its work, and requested additional time to complete the work because of that condition. A6025; A6027. White Buffalo also complained about the Government's handling of the wetted perimeter permit extension request. A6023. Like the plaintiff in *John R. Sand & Gravel*, 457 F.3d at 1360, whose letters threatening to sue the Government evidenced that it knew or should have known that its claim had accrued, White Buffalo's cure response demonstrates that it was aware in 1998, of the issues that, in its view, fix the Government's liability (A6022-27). However, despite that awareness, White Buffalo waited more than six years, until 2005, to present its bad faith termination claim to the contracting officer. A8602; A8616-23. Because the bad faith termination claim accrued more than six years before White Buffalo presented it to the contracting officer, the bad faith termination claim is untimely. Consequently, the trial court did not possess jurisdiction to entertain that claim.

II. Even If The Trial Court Possessed Jurisdiction To Entertain White Buffalo's Bad Faith Claims, The Trial Court's Finding That White Buffalo Failed To Establish Bad Faith Is Not Clearly Erroneous

Even if the trial court possessed jurisdiction to entertain White Buffalo's bad faith claims, the trial court's finding that White Buffalo failed to establish bad faith is not clearly erroneous. On appeal from the Court of Federal Claims, this Court reviews questions of law *de novo* and questions of fact for clear error. *Bass Enters. Prod. Co. v. United States*, 133 F.3d 893, 895 (Fed. Cir. 1998). Where the trial court's view of the evidence is permissible, it is not clearly erroneous. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985).

White Buffalo seeks anticipatory profit for the termination of its contract (Applnt. Br. 4), but only if a contract termination is tainted by bad faith or improper motive is anticipatory profit available. *See Krygoski Constr. Co. v. United States*, 94 F.3d 1537, 1541, 1545 (Fed. Cir. 1996). A contractor's burden to prove that the Government acted in bad faith is very weighty. *Id.* at 1541. It is presumed that Government officials act in good faith; to rebut that presumption, a contractor must present clear and convincing evidence that the Government possessed the specific intent to injure the contractor. *See Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002).

The assertion of a legitimate contract right is not bad faith. *See Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1331 (Fed. Cir. 2003). Even an incorrect reading of a contract by Government officials is not bad faith. *See Kalvar Corp. v. United States*, 543 F.2d 1298, 1302 (Ct. Cl. 1976). The Government is prevented only from engaging in actions motivated by a specific intent to harm the contractor. *See Torncello v. United States*, 681 F.2d 756, 771 (Ct. Cl. 1982).

Where the contracting officer had a reasonable basis for terminating the contract, the termination is not a breach. *Cf. Krygoski*, 94 F.3d at 1544 (termination for convenience). Contract performance can be a reasonable basis for termination. *See McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1329 (Fed. Cir. 1999). For example, a default termination for failure to meet a contract delivery schedule is reasonable. *See id.*

Here, White Buffalo essentially blames Mr. Rettinger for the termination (Applnt. Br. 4), but the termination was motivated by a reasonable basis: White Buffalo's performance. The trial court found that White Buffalo failed to establish that the Government acted in bad faith (Add. 16), and that White Buffalo's actions provided the basis for

termination (Add. 23). Those finding are not clearly erroneous.[2] First, Mr. Rettinger did not terminate the contract, Mr. Parsons did, citing performance reasons. A6029. Among those reasons were White Buffalo's failure to complete certain repairs, including at MP 46.7, by November 30, 1998. *Id.* Mr. Parsons confirmed his decision eight days later, when he denied White Buffalo's request for reconsideration. A7801.

That reconsideration decision, too, was based upon White Buffalo's performance. *Id.* White Buffalo fails to point to any clear and convincing evidence that the reasons Mr. Parsons cited for the termination were not the real reasons, or that Mr. Parsons did not exercise his own judgment in terminating the contract and reaffirming that termination.

Moreover, White Buffalo does not dispute that it failed to complete the repairs to which Mr. Parsons referred, but contends that Mr. Rettinger was responsible for a two-week delay caused by rejection of its schedule submissions. Applnt. Br. 7. However, Mr. Aftab – not Mr. Rettinger – rejected those schedules. *Id.* In addition, Mr. Aftab rejected those schedules because he determined that their format did not meet the requirements of the

[2] White Buffalo contends that the trial court did not conduct a *de novo* review. Applnt. Br. 32. However, White Buffalo fails to identify where the trial court deferred to the contracting officer's findings, and ignores that the trial court expressly explained that it was conducting a *de novo* review. Add. 7 & n.7.

contract. A6011; A6150; A6151; *see* A7295 § 155.02. White Buffalo does not dispute that the contract specifications required an accepted preliminary construction schedule (that is, "a written narrative with a detailed breakdown of all contract activities for the first 45 days") prior to beginning all but certain, specified work. A7295 § 155.02. Nor does White Buffalo dispute that, at least until September 14, 1998, its schedule did not meet contract requirements. In any event, White Buffalo points to no evidence that demonstrates that it would have completed the repairs at MP 46.7, and on time, but for that two-week delay.

Second, although White Buffalo complains about the processing of an extension of the period to work in the wetted perimeter, that extension was granted (A6055), and White Buffalo does not contend that the extension should have been longer. Third, with respect to the differing site condition at MP 46.7, White Buffalo contends that the Government concealed that condition (Applnt. Br. 13, 42), but White Buffalo was aware of and raised that issue with the Government before the termination, as a reason to excuse its delay. A6025; A6027. Moreover, White Buffalo fails to point to any clear and convincing evidence that the Government rejected that excuse with the specific intent to injure White Buffalo.

In fact, Ms. Jacoby recommended termination after determining that a performance issue, not the MP 46.7 condition, was "controlling" with respect to completion of the work at MP 46.7. A6073. Ms. Jacoby determined that "[t]he controlling element is the massive, unstable overhanging rock which was created by [White Buffalo's] second [rock blasting] shot." *Id.* She further determined that "[t]his unsafe condition has precluded any further work in this area until this dangerous condition is remedied by [White Buffalo]." *Id.* In his reconsideration decision, Mr. Parsons also determined that the situation at MP 46.7 had not prevented White Buffalo from completing work at other mile post stations. A7801. White Buffalo points to no clear and convincing evidence that the determinations of Ms. Jacoby and Mr. Parsons regarding MP 46.7 issues were based upon a specific intent to injure White Buffalo.

White Buffalo's other complaints (Applnt. Br. 42-43) concern post-termination issues or issues unrelated to whether White Buffalo timely completed certain repairs, none of which provides clear and convincing evidence that the termination was motivated by an intent to injure White Buffalo, as opposed to its performance. For example, Mr. Rettinger removed Mr. Barber for having directed White Buffalo's operations without authority. A3616:17-21 (Rettinger). Mr. Aftab did not complain about how

Mr. Rettinger treated him, and, instead, was unhappy with White Buffalo's operations. *See* A9049:21-25; A9050:18-22 (Aftab). Although Mr. Rettinger overrode Mr. Aftab's approval of a White Buffalo pay ticket, that was, as the trial court found (Add. 19), performance-related; Mr. Rettinger had determined that the ticket was for work not shown to meet contract specifications. A3591:4-8 (Rettinger). Even White Buffalo admitted that the pay ticket was for work that deviated from the specification. A1091:12-20 (Clevenger, L.).

The Davis-Bacon review, too, was performance-related. A remark by a White Buffalo employee suggested that White Buffalo might not have been paying the wages that the contract required. *See* A2498:19-24 (Youngs); A7058-59 § 52.222-6. There also appeared to be discrepancies between White Buffalo's daily reports and its certified payrolls. A2498:11-13 (Youngs). A review identified several pages of apparent discrepancies. A6153-58. Although no criminal investigation ever resulted, the employee's remark and the apparent discrepancies provided a reasonable basis for the Government's actions.

White Buffalo contends that Ms. Jacoby's cure notice states "conditions for a cure that were a logical impossibility." Applnt. Br. 42. However, the November 13, 1998 notice did not request a cure of the failure

to complete certain work by November 6, 1998; it stated that the failure to complete that work by then endangered contract performance, and requested a plan for completion of all repairs "*by November 30, 1998*." A6021 (emphasis added). In any event, the contract did not even require the issuance of a cure notice; rather, the contract includes FAR § 52.249-10, "Default," which requires only that "written notice to the Contractor" precede a default termination. A7110 § (a).

White Buffalo points to an unsigned draft memorandum that recommends termination (Applnt. Br. 43; A6019-20), but Mr. Rettinger did not author that draft (A4062:19-21 (Rettinger)). Rather, Ms. Traffalis was probably the author. *See* A2270:15-17 (Hildreth); A7745 ("11/9/98: Jane will do the initial write-up"). Regardless, the draft discusses White Buffalo's performance, providing more evidence that the Government was motivated by performance issues. A6019-20. And concerning Mr. Rettinger and Tidewater, it was Mr. Parsons (not Mr. Rettinger) who awarded the post-termination completion contract to Tidewater (A8001), after White Buffalo's surety advised him that Tidewater had submitted the "low responsible bid" (A7901-02). Moreover, regarding payments to Tidewater, White Buffalo and its surety insisted that the Government pay Tidewater the entire contract amount. A7952.

With respect to the conversion, the trial court found that "the conversion may have reasonably been made because there were questions as to whether the differing site conditions prevented White Buffalo from completing the project on time," and that "[t]he most logical inference from the facts is that government officials were divided on the complex fact issue on this project and opted to give White Buffalo the benefit of the doubt." Add. 23. Those findings are not clearly erroneous. The FHA's pre-conversion letter to the Department of Justice states that "it has become apparent during discovery and the parties' preparation for trial that there exists substantial question as to the effects a differing site condition had on the ability of the project to be completed on time." *Id.* It further states that "[t]hough the contract was terminated for default because of failure of the contractor to proceed in accordance with the contract, *the differing site condition may have been an unrelated factor preventing the project from being completed*. *Id.* (emphasis added). Regardless of whether Mr. Binder agreed with the contents of that letter, the letter is evidence that the Government's consideration of the conversion question was based, at least in part, upon an assessment of the effect of a differing site condition on White Buffalo's performance, as well as on the termination decision. *See* A6167.

More fundamentally, White Buffalo fails to explain how the Government doing what White Buffalo wanted (that is, conversion) constitutes bad faith, even if a desire to minimize the Government's litigation exposure motivated that decision. Bad faith breach involves a party acting to destroy its counterparty's reasonable expectations regarding the fruits of a contract. *See Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). By contrast, conversion of a default termination provides a benefit of the contract, including the recovery of costs of, and a reasonable profit upon, work performed. *See* A7108-09 § (g).

Finally, with respect to Mr. Rettinger, the trial court found that he was "an effective public servant trying to do a good job fairly" (Add. 18), and that White Buffalo "failed to establish that Mr. Rettinger created a hostile working environment that hindered White Buffalo's performance of the contract" (Add. 20). Those findings are not clearly erroneous. Mr. Hildreth described Mr. Rettinger as "firm but fair," and "one of our premier project engineers." A2213:13-20 (Hildreth). Mr. Youngs described Mr. Rettinger as the best field engineer he ever worked for, and believed Mr. Rettinger tried to help White Buffalo. A2509:7-23 (Youngs).

And although Mr. Rettinger was critical of White Buffalo's performance (A6159-60), he was not alone. Mr. Parsons, Ms. Jacoby,

Mr. Hildreth, Mr. Aftab, Mr. Youngs, as well as the author of the draft default termination memorandum, all took issue with White Buffalo's performance. A6011; A6019; A6029; A6070; A7744; A7801. As the trial court found (Add. 11), even White Buffalo's quality control person had problems with White Buffalo's work (A7601-03).

The inferences that White Buffalo urges do not demonstrate that the trial court's findings were clearly erroneous. Rather, the evidence permits the view that the Government terminated the contract because of performance, and converted the termination upon reconsideration of that issue. Because the evidence permits that view, the trial court's finding that White Buffalo did not establish that the Government acted in bad faith is not clearly erroneous.

III. The Court Should Affirm The Judgment Amount Despite The Trial Court Having Omitted $29,528 In Claimed "Settlement Expenses" Related To McBride Construction, A Subcontractor

The Court should affirm the judgment amount despite the trial court's omission from that amount of $29,528 related to one of its subcontractors, McBride. The trial court awarded $29,528 in subcontractor "settlement expenses" related to McBride (Add. 28) that were not included in the total award amount (Add. 29) or the judgment amount (Add. 30). However, the Court reviews judgments, not opinions. *Fromson*, 755 F.2d at 1556. The

Court may affirm a judgment of the trial court on any ground supported by the record. *El-Sheikh v. United States*, 177 F.3d 1321, 1326 (Fed. Cir. 1999).

The trial court's judgment, even without that $29,528, is correct. White Buffalo failed to present any objective or documentary evidence that it has, must, or would ever pay McBride anything. White Buffalo presented the McBride issue to the contracting officer as a "pass-through" claim, not a claim for its own expenses, and admitted that it could not even determine "whether and to what extent McBride is entitled to payment." A8608.

White Buffalo has not paid or settled with McBride, and knows of no McBride lien against its equipment. A1506:23-24, A1509:22, A1510:10-13 (Clevenger, L.). McBride has been "closed" since as early as 1999 (*see* A2880:17-25 (McBride)), and, as far as White Buffalo knows, McBride is "essentially out of business" (A1510:4 (Clevenger, L.)). Therefore, White Buffalo failed to demonstrate that McBride was an extant entity that could even accept a payment from White Buffalo. Because White Buffalo never demonstrated that it paid or continued to owe McBride anything, the trial court's judgment amount is correct, and not clearly erroneous. Consequently, the Court should affirm the trial court's judgment amount.

IV. The Trial Court's Calculation Of Profit Upon Work Performed Was Not An Abuse Of Discretion

The trial court did not abuse its discretion in calculating profit upon work that White Buffalo performed. The abuse of discretion standard applies to decisions about methodology for calculating rates and amounts. *Home Savs. of Am. v. United States*, 399 F.3d 1341, 1347 (Fed. Cir. 2005). As part of determining relief pursuant to the termination for convenience clause, the trial court applied a 19 percent profit rate. Add. 26. The trial court arrived at that rate by "[t]aking the $440,017.11 of contract work that White Buffalo performed and comparing it to the $370,233 cost of performance that the Court has awarded." Add. 27 & n.13.

That profit rate calculation was not an abuse of discretion. The trial court relied on actual data from the terminated contract and White Buffalo's performance of that contract. Add. 26. That was consistent with the termination for convenience clause. A7107-10. Pursuant to that clause, a contractor is entitled to a fair and reasonable profit in accordance with FAR 49.202. *See* A7108-09 § (g)(1)(iii) (citing FAR 49.202 (48 C.F.R. § 49.202)). Any reasonable method to arrive at a fair profit may be used. *See* 48 C.F.R. § 49.202(a). Among the factors to be considered in determining profit are the rate of profit that the contractor would have earned had the contract been completed. 48 C.F.R. § 49.202(b)(7). First, as

the trial court found (Add. 26), according to White Buffalo, it spent $680,980 performing $626,185 worth of contract work. A1556:22-25 (Clevenger, L.); A9501. If that is accurate, at the time of termination, White Buffalo was operating at a loss, not a profit.

Second, White Buffalo does not challenge the trial court's findings (Add. 27) that it spent $370,233 performing $440,017.11 worth of work. Nor does White Buffalo challenge a single line of the nearly page-long spreadsheet that the trial court found comprised the value of the work performed, or the mathematical equation that the trial court performed to calculate the 19 percent rate. Add. 26-27 & n.13. Contrary to White Buffalo's implication (Applnt. Br. 34-35), the trial court relied upon evidence for its profit calculation: footnote 11 of the trial court's opinion cites several exhibits (Add. 26). Those include the contract's bid schedule showing the contract value of the work by line item. A7013-16. They also include evidence of how much work White Buffalo actually performed, such as a page (A7754) from an invoice that White Buffalo submitted for work performed in September and October 1998 (A7751; A7753).

Third, the trial court's profit calculation results in an amount ($440,577.27) that is slightly higher than the amount that the trial court found was the value of the work ($440,017.11). Add. 27 & n.13. That close

equivalence makes particular sense in a case like this, in which the contract line items include the contractor's bid prices (A7013-16), which, presumably, incorporate the profit that the contractor expected to make on those activities. Finally, the trial court's 19 percent profit rate is nearly double the ten percent profit rate that White Buffalo twice proposed for contract modification work. A7303; A7403. For all these reasons, the trial court did not abuse its discretion by applying a 19 percent profit rate to determine relief pursuant to the termination for convenience clause.

V. The Court Should Reject White Buffalo's Evidentiary Challenges Because White Buffalo Agreed To Using Deposition Testimony At Trial, And That Timothy Binder Could Testify

The Court should reject White Buffalo's evidentiary challenges to the trial court's judgment – having to do with the use of deposition testimony at trial instead of live testimony for some witnesses, and allowing Mr. Binder to testify – because White Buffalo agreed to both. The Court reviews a decision of the Court of Federal Claims in an evidentiary matter under an abuse of discretion standard, and will only disturb that court's ruling if it prejudiced substantial rights. *Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338, 1341 (Fed. Cir. 1999). An abuse of discretion is found when: (1) the trial court's decision is clearly unreasonable, arbitrary or fanciful; (2) the decision is based on an erroneous construction of the law;

(3) the trial court's factual findings are clearly erroneous; or (4) the record contains no evidence upon which the trial court rationally could have based its decision. *See id.*

White Buffalo does not meet that standard. The trial court's handling of the issues regarding depositions and Mr. Binder is not clearly unreasonable, arbitrary or fanciful, and the record contains the evidence upon which the trial court rationally could have based its decisions. White Buffalo contends that the trial court should have imposed adverse inferences upon the Government because certain witnesses (including Mr. Aftab and Ms. Jacoby, the only witnesses whom White Buffalo identifies by name) did not appear in person at trial. Applnt. Br. 36-39. However, the month before trial, White Buffalo consented to the Government's deposition designations. A8901.

With respect to Mr. Binder, White Buffalo complains that he was allowed to testify regarding an alleged conversation with Mr. Clevenger. Applnt. Br. 46. However, White Buffalo agreed that Mr. Binder could provide such testimony:

> If the testimony is only for the purpose of impeachment . . . well, Mr. Clevenger said this, did you say it or not, yes or no? That's fine. *We have no objection to that.*

A2310:21-24 (Kaplan) (emphasis added); *see also* A2354:19-21 (Kaplan).

White Buffalo also implies that the trial court erred because it had issued a protective order against Mr. Binder's deposition and that, therefore, it "had no opportunity to prepare" for Mr. Binder's testimony. Applnt. Br. 45-46. In addition, White Buffalo contends that Mr. Binder testified that he "disagreed with the conversion," and that his testimony was critical on the issue of bad faith. Applnt. Br. 46. However, White Buffalo had some pre-trial indication of how Mr. Binder might testify. Nearly a year before Mr. Binder testified at trial, the Government served its responses to White Buffalo's interrogatories "to Timothy Binder," to which the United States responded with answers that Mr. Binder verified. A8801-15.

One of those interrogatories asked "Why did the FHA, in your understanding, convert White Buffalo's default termination . . . ?" A8802. The response was "Because [FHA] was directed by the Department of Justice to convert the termination . . . ." *Id.* In addition, since 2008, White Buffalo had the declaration of Mr. Binder, in which he addressed the events that resulted in the conversion. A70 ¶ 6. Moreover, White Buffalo fails to demonstrate how a Government attorney's testimony reflecting disagreement with the conversion – precisely the relief that White Buffalo sought – prejudiced its substantial rights.

CONCLUSION

For these reasons, the Court should vacate the judgment of the trial court with respect to case nos. 99-961 and 00-415, remand with instructions to dismiss the complaints in those cases for lack of jurisdiction, and affirm the judgment of the trial court with respect to case no. 07-738.

Respectfully submitted,

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ADDENDUM

INDEX TO ADDENDUM

In the United States Court of Federal Claims

Nos. 99-961 C, 00-415 C and 07-738 C
(consolidated)

WHITE BUFFALO CONSTRUCTION, INC.

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed September 7, 2011, and the Final Order, filed November 8, 2011,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the plaintiff recover of and from the United States the sum of $352,237.36, plus $70,384.87 in interest for a total award of $422,622.23.

Hazel C. Keahey
Clerk of Court

November 10, 2011 By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $455.00.

28 U.S.C. § 516

Conduct of litigation reserved to Department of Justice

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

41 U.S.C. § 7103

Decision by contracting officer

(a) Claims generally.--

. . .

(4) Time for submitting claims.--

(A) In general.--Each claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim.

. . .

(g) Finality of decision unless appealed.--The contracting officer's decision on a claim is final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or action is timely commenced as authorized by this chapter. This chapter does not prohibit an executive agency from including a clause in a Federal Government contract requiring that, pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

41 U.S.C. § 7104

Contractor's right of appeal from decision by contracting officer

. . .

(b) Bringing an action de novo in Federal Court.--

(1) In general.--Except as provided in paragraph (2), and in lieu of appealing the decision of a contracting officer under section 7103 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) Tennessee Valley Authority.--In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a district court of the United States pursuant to section 1337 of title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Time for filing.--A contractor shall file any action under paragraph (1) or (2) within 12 months from the date of receipt of a contracting officer's decision under section 7103 of this title.

48 C.F.R. § 49.202

Profit.

(a) The TCO shall allow profit on preparations made and work done by the contractor for the terminated portion of the contract but not on the settlement expenses. Anticipatory profits and consequential damages shall not be allowed (but see 49.108–5). Profit for the contractor's efforts in settling subcontractor proposals shall not be based on the dollar amount of the subcontract settlement agreements but the contractor's efforts will be considered in determining the overall rate of profit allowed the contractor. Profit shall not be allowed the contractor for material or services that, as of the effective date of termination, have not been delivered by a subcontractor, regardless of the percentage of completion. The TCO may use any reasonable method to arrive at a fair profit.

(b) In negotiating or determining profit, factors to be considered include--

(1) Extent and difficulty of the work done by the contractor as compared with the total work required by the contract (engineering estimates of the percentage of completion ordinarily should not be required, but if available should be considered);

(2) Engineering work, production scheduling, planning, technical study and supervision, and other necessary services;

(3) Efficiency of the contractor, with particular regard to--

(i) Attainment of quantity and quality production;

(ii) Reduction of costs;

(iii) Economic use of materials, facilities, and manpower; and

(iv) Disposition of termination inventory;

(4) Amount and source of capital and extent of risk assumed;

(5) Inventive and developmental contributions, and cooperation with the Government and other contractors in supplying technical assistance;

(6) Character of the business, including the source and nature of materials and the complexity of manufacturing techniques;

(7) The rate of profit that the contractor would have earned had the contract been completed;

(8) The rate of profit both parties contemplated at the time the contract was negotiated; and

(9) Character and difficulty of subcontracting, including selection, placement, and management of subcontracts, and effort in negotiating settlements of terminated subcontracts.

(c) When computing profit on the terminated portion of a construction contract, the contracting officer shall--

(1) Comply with paragraphs (a) and (b) above;

(2) Allow profit on the prime contractor's settlements with construction subcontractors for actual work in place at the job site; and

(3) Exclude profit on the prime contractor's settlements with construction subcontractors for materials on hand and for preparations made to complete the work.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 27th day of March, 2013, a copy of the foregoing BRIEF FOR DEFENDANT-APPELLEE was filed electronically.

X This filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/Timothy P. McIlmail

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. Procedure 32(a)(7)(B), this brief complies with the type-volume limitation. This brief was prepared using Microsoft Word Times New Roman 14-point font. In making this certification, I have relied upon the word count function of the Microsoft Word processing system used to prepare this brief. According to the word count, this brief contains 8,038 words.

/s/Timothy P. McIlmail
Timothy P. McIlmail
Senior Trial Counsel
March 27, 2013