UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED WITH PREJUDICE IN PART; DENIED IN PART: March 5, 2020

CBCA 4775, 5360, 6334

NVS TECHNOLOGIES, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Cheryl Cathey, Chief Operating Officer of NVS Technologies, Inc., Menlo Park, CA, appearing for Appellant.

Marion Cordova, Office of the General Counsel, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Judges **SOMERS** (Chair), **GOODMAN**, and **ZISCHKAU**.

GOODMAN, Board Judge.

Appellant, NVS Technologies, Inc. (NVS), has filed these three appeals from two final decisions issued by a contracting officer of the Department of Homeland Security (DHS or respondent) in response to an uncertified and certified claim, docketed as CBCA 4775 and 5360, and a deemed denial of a certified claim, docketed as CBCA 6334.

The incrementally-funded, cost-reimbursement contract required appellant to research and develop (R&D) a system to detect bio-threats. Funded at $5,021,006 for the first phase, the contract had a total estimated cost value (contract ceiling) of $18,307,266 for all four phases. During contract performance, contract modifications increased the allotted funds to $23,426,988.41 and the total estimated cost value to $30,214,760. Once funding had reached this level, respondent's acting director of its Chemical and Biological Defense Division

elected to discontinue funding pursuant to the contract's Limitations of Funds (LOF) clause. Thereafter, although appellant did not request that the contract be terminated for convenience, as was its right pursuant to the LOF clause, the contracting officer elected to do so, which enabled appellant to submit a termination for convenience settlement proposal and be compensated for its termination costs. Appellant has been paid its costs of performance in the amount of the allotted funds, $23,426,988.41, and its termination costs.

Appellant's claims sought additional costs, in excess of the total it has received, for contract performance and termination costs, alleging that respondent terminated the contract for convenience in bad faith and that appellant is owed additional termination costs.[1] On September 12-14, 2018, the Board held a hearing on the merits in CBCA 4775 and 5360 on the claim for bad faith termination for convenience.[2] Thereafter, the parties agreed to consolidate CBCA 6334 with the other appeals for a decision on the merits, and the Board ordered consolidation of the three appeals.

We dismiss with prejudice the claim for additional termination costs, as it has been resolved through a binding alternative dispute resolution (ADR) proceeding. We deny the claims for bad faith termination for convenience.

Background

The Contract, Contract Modifications, and Contract Performance

The Department of Homeland Security's Science and Technology (S&T) Directorate, through its Homeland Security Advanced Research Projects (HSARPA) Chemical and Biological Defense Division (CBD), issued a long range broad agency announcement (BAA),[3] BAA 09-05, which remained open for proposed R&D projects through December 31, 2009. The BAA listed numerous "Topical Areas of strategic interest" and allowed for

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[1] In its post-hearing briefs, appellant asserts that respondent breached the implied duty of good faith and fair dealing, and we address that issue in this decision. We do not address quantum, as appellant has not proved entitlement to additional costs or damages.

[2] Hearing testimony is designated by "Transcript."

[3] Federal Acquisition Regulation (FAR) 35.016 states: "BAA's (sic) may be used by agencies to fulfill their requirements for scientific study and experimentation directed toward advancing the state-of-the-art or increasing knowledge or understanding rather than focusing on a specific system or hardware solution."

multiple awards of research and R&D contracts under any topic. Offerors were requested to propose their own statement of work "detailing the scope and objectives of the effort, the technical approach, and the performance goals." BAA 09-05 at 2.

On April 21, 2010, DHS S&T entered into contract no. HSHQDC-10-C-00053 (the contract) with New Venture Strategies LLC. The contract's statement of work was titled, a "Highly Multiplexed, Fully Integrated Quantitative Nucleic Acid Detection System" pursuant to which appellant would attempt to develop a Multi-Application Multiplex Technology Platform (MAMPT or the system) intended to detect organisms that could pose bio-threats by extracting, replicating, amplifying, and identifying their genetic material. Exhibit 1.

After contract award, New Venture Strategies LLC changed its name to NVS Technologies, Inc. Exhibit 2. The contract, a cost-reimbursable, incrementally funded R&D contract awarded under FAR part 35 and the BAA, contained various FAR clauses, including: FAR 52.227-14–RIGHTS IN DATA, Exhibit 1 at 11-12[4]; FAR 52.227-16–ADDITIONAL DATA RIGHTS, *Id.*; FAR 52.232-20–LIMITATION OF COST, *Id.*; FAR 52.249-6–TERMINATION (Cost Reimbursable), *Id.*; and FAR 52.232-22–LIMITATION OF FUNDS, Exhibit 7 at 3.

The contract obligated funding in the amount of $5,021,006, and contained additional options for work and performance periods that could be exercised unilaterally by respondent. If all options were exercised, the total estimated cost value, or contract ceiling, would be $18,307,266, along with a total period of performance from April 21, 2010, to October 20, 2013. Exhibit 1. Between July 21, 2010, and March 11, 2013, modifications[5] 1 through 10 resulted in the obligation of additional funds, the extension of the contract's performance period, and changes to the statement of work. Exhibits 2-10.

After the obligated funding reached the initial estimated contract cost value of $18,307,266, the agency executed modification 11, extending the contract's performance period to February 28, 2014, increasing the obligated funding to $18,918,988.41, and increasing the total estimated cost value to $21,098,624. Modification 11 stated: "[The contract] shall be incrementally funded per FAR 52.232-22 Limitation of Funds," renamed tasks 10 through 13, changed due dates, and deleted task 14 ("Support pilot testing in selected laboratories) and task 15 ("Perform appropriate data analysis"). Exhibit 12.

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[4] Exhibits are in the appeal file unless otherwise noted.

[5] The contract designated the modifications with the prefix P000 plus a number. In this opinion, we refer to the modifications solely by the number.

Subsequently, the agency issued modifications 12 and 13, which increased obligated funding and extended the performance period. Exhibits 13, 14. Initially, the contract called for NVS to"[d]emonstrate performance of breadboard detection system" in step C of phase I (twelve months after award), and "[d]emonstrate performance of prototype systems" in Phase III (thirty-six months after award). Exhibit 1 at 30. A breadboard is connected working components, while a prototype is a fully-assembled working unit. Transcript at 757. Modification 13 changed this requirement, stating that "[t]he task list and deliverables is entirely deleted and replaced with [other tasks]." *Id*. at 3. Task 18 of modification 13 required appellant to "[b]uild units and consumables for government testing," setting a completion date nearly one year later than the original performance due date. Deliverables under modification 13 included "Prototype Design Review." Task 19 of this same modification called for NVS to "[t]est Prototype Systems in-house (May-July 2014)." *Id.* Modification 13 increased the obligated funding to $23,426,988.41 and the the total estimated cost value (contract ceiling) to $30,214,760.

Funding Concerns

From 2011 onward, respondent's CBD experienced significant budget cuts resulting in numerous program terminations. Transcript at 586.[6] By late 2012, Adam Cox, deputy director of HSARPA, became aware that the contract's spending rate was significantly higher than the planned rate. He brought it to the attention of the director of HSARPA, Paul Benda, who asked Dr. Alan Rudolph, director of the CBD, to review the spending on the contract.

By March 2013, Mr. Benda, concerned about the funding of the contract, stated in an email to various DHS personnel that, "as far as I can tell this program is out of control and spending funds at a rate that has not been authorized." Exhibit 70 at 6. By June 2013, these concerns increased after the initial $18 million contract ceiling was reached, when modifications 11 and 13 reduced tasks and deliverables and increased the contract ceiling to $30,214,760. Transcript at 628-30.

[6] These funding concerns resulted in CBD issuing stop work orders for appellant's contract to allow a government assessment of program direction. The first, issued on May 16, 2013, was later lifted after a site visit and contract restructuring. Exhibit 18. The second stop work order, issued November 11, 2013, after Mr. Woodbury's appointment, was lifted November 19, 2013. Exhibit 19.

Review of Contract Performance

Mr. Donald Woodbury was appointed the acting director of CBD in September 2013. Transcript at 312. He testified that during a transition meeting with DHS personnel, the previous director, Dr. Rudolph, expressed concerns about the execution of the contract, the government oversight of the contract, and a possible improper relationship between the government personnel in CBD and the contractor. Dr. Rudoph told Mr. Woodbury that he believed that he was not being accurately informed as to the progress of the contract. Transcript at 314.

Mr. Woodbury began reviewing all CBD programs to familiarize himself with the CBD portfolio and to manage the Division finances. Transcript at 316-17. He had concerns about the performance and administration of the NVS contract. He felt that the project manager did not have an arm's length relationship with appellant. *Id*. at 315. He did not see a clear "path forward" on the contract, in light of the various modifications impacting the scope of the contract. *Id*. at 317.

Mr. Woodbury described the contract as one of the most "irregular" contracts he had seen, "with the changes that had been made to the contract over time," emphasizing that modifications 11 and 13 raised particular concerns. Modification 11 contained a "substitution of task in which . . . important, meaningful tasks were replaced using the same task numbers with tasks that I felt were incidental." Transcript at 318. In particular, Mr. Woodbury discovered that the task requiring the delivery of a prototype had been completely eliminated. *Id*. Mr. Woodbury found modification 13 "even more unusual," as it eliminated all prior tasks, after more than twenty million dollars had been spent, and extended performance milestones into the future, but failed to add a requirement to deliver a working device. *Id*. at 319. During cross-examination, Mr. Woodbury clarified that pursuant to modification 13, "the device was not a deliverable, so . . . while the company might have volunteered to provide devices to be tested in other labs, the government was not being given a device as a deliverable under the contract, and, hence, did not have, in essence, a unilateral right to take it and do independent testing on it." *Id*. at 385.

Mr. Woodbury described the evolution of the contract "from what was initially proposed into something that appeared very different. The scope, the tasks appeared different, the deliverables appeared different." Transcript at 319. Additionally, he believed that the "spend rate" seemed extremely high, inconsistent with the amount of money that the CBD had in the budget for the contract.

To understand the program status and goals, Mr. Woodbury discussed the contract performance with the project manager, who was also the contracting officer's representative,

and the S&T science advisor. He became convinced that he was not receiving accurate information about the status of the NVS project and decided to seek an independent review of the program. Transcript at 322-23.[7] Upon inquiring, he found that his predecessor, Dr. Rudolph, also had found the spend rate excessive and had directed that it be lowered. *Id*. at 325-26.

Mr. Woodbury was concerned that appellant invoiced the respondent for amounts above the total that was obligated to the contract. Transcript at 328, 372.[8] He also took issue with restrictive intellectual property markings on the deliverable documentation which he believed was inconsistent with the Government's data rights in the R&D performed pursuant to the contract, as appellant's proposal did not identify any pre-existing data rights. *Id*. at 321-22.[9] Ultimately, the issue of restrictive intellectual property markings on the deliverable impeded the agency's ability to obtain a third-party review of contract performance, which he believed was necessary to assess contract performance.[10] Mr. Woodbury testified that he did not provide any information to third parties concerning appellant's contract performance, and the agency was never able to have an uninvolved third party perform an independent review. *Id*. at 323-24.

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[7] The project manager and the science advisor disagreed with Mr. Woodbury about the need for an independent review and about funding for the NVS project. Transcript at 148, 241-42, 320.

[8] Appellant was not paid for amounts in excess of obligated funding.

[9] The contract deliverables were placed in five binders, and the project manager marked each binder cover with a restrictive legend. Transcript at 81, 103, 151. Appellant's CEO testified that in his opinion this restrictive legend accurately reflected NVS's data restriction "demands." *Id*. at 81. Adam Cox, senior advisor to the Deputy Undersecretary for Science and Technology, testified that respondent attempted to have two National Labs, Lawrence Livermore National Laboratory (LLNL), and the Pacific Northwest National Laboratory (PNNL), conduct an independent assessment of appellant's contract performance and deliverables. *Id*. at 653-54. Both LLNL and PNNL are Department of Energy-owned federally-funded research and development centers (FFRDCs). An independent review was not performed, as the result of the restrictive legends on the contract deliverables. *Id*.

[10] The contracting officer, Mr. Buford, testified that appellant was uncooperative with the agency's efforts to get corrected markings on the deliverables or to obtain a third-party review. Transcript at 653, 656.

Mr. Woodbury asked the S&T science advisor to review commercial technology similar to that being procured by the contract. Mr. Woodbury stated that in his opinion he found the science advisor's review "misleading and incomplete" because it did not mention existing systems developed by the Defense Threat Reduction Agency (DTRA) and other commercial systems reviewed by the Pacific Northwest National Laboratory (PNNL). Again, Mr. Woodbury concluded that he was not receiving accurate, reliable information. Transcript at 324-25, 360-61.

Mr. Woodbury also believed the business model described to him by the project manager did not make sense, because it was "outside the mission of DHS, from a financial perspective, meaning the U.S. healthcare system was not [going to] resource the biothreat mission of DHS." Transcript at 380.

Appellant's Allegations of Respondent's Intent to Harm Appellant and Transfer Funds Allocated to Appellant's Contract to An Other Procurement

The science advisor testified that he was only a technical advisor, without funding authority. Transcript at 239. When questioned as to whether he ever heard anybody at DHS express a desire to harm NVS, he stated that "Mr. Woodbury had actually funded a similar project when he was in DARPA [the Defense Advanced Research Projects Agency], and he made a statement to me by saying that we need to eliminate our competition. I don't know what he meant by that." *Id*. at 297. The science advisor also testified "[that he heard Adam Cox say] [w]e're going to kill the contract. That's what he said. But I don't know what he meant by that." *Id*. at 298.

Mr. Woodbury testified that he

> had no prior knowledge of NVS, its existence, its principles or employees . . . prior to coming to DHS S&T. I had very little interaction with NVS. I have had, and have, no reason for any hard feelings, never taken any action that's personal. I've only done what I feel was appropriate professionally and in the best interest of the government.

Transcript at 344-46. Mr. Woodbury also testified, in response to appellant's allegation that he intended to transfer funds allotted to the contract to another procurement, that "NVS had spent all the money on their contract. There was no money to remove." *Id*. at 343. Mr. Cox recalled a conversation with the project manager and the science advisor after receiving a Congressional inquiry about discontinuation of funding, but denied that he expressed a desire to "kill the contract." *Id*. at 634. When cross-examined, Mr. Cox testified further, "nor would I ever kill a contract based on a congressional inquiry." *Id*. at 635. Mr. Buford, the

contracting officer, testified that he never heard anyone at DHS express an intent to harm appellant, that the contract termination was not intended to harm appellant, and that no one at DHS expressed an intent to receive a better bargain by awarding another contract. *Id*. at 657.

Decision to Discontinue Funding

Mr. Woodbury, as acting director of CBD, had funding authority, and he was aware that the contract contained the contractual provisions that allowed incremental funding. Transcript at 387-88.[11] He described his decision-making process to discontinue funds:

> I spoke to everybody who I thought had information that could be helpful in a decision. I spoke extensively to [the project manager and the science advisor]; I spoke with Anne Hultgren, the . . . Chem/Bio R&D Branch Chief; I spoke with Dr. Randy Long, who was the deputy director of the Chemical and Biological Defense Division; I spoke with other subject matter experts in the division; I spoke with subject matter experts from the Defense Production Agency; I spoke with a senior advisor in the in CBD, Dr. Jason Paragas; I spoke with Dr. Adam Cox; I spoke with the acting undersecretary for science and technology; I spoke with Shelby Buford, . . . the contracting officer; I spoke with Mike Green, the lawyer. And there are probably others. I read literature, I gathered data. In other words, I reviewed the contract file. I did everything I could to inform myself. I tried to get everybody's perspective and opinion, and then make a decision based on the aggregate information I collected.

Id. at 338-39.

Mr. Woodbury decided not to allot additional funds to the contract for a variety of reasons, which mirrored his initial concerns when he reviewed contract performance. He felt that the objectives of the contract were inconsistent with the agency's mission, as DHS does not have a mission for clinical diagnostics; rather, he believed that would be within the mission of the Department of Health and Human Services. He described his belief that there was lack of a clear path for commercialization of the system. He also believed that the project manager and the science advisor had been less than forthright with him as to the

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[11] Mr. Buford, the contracting officer, did not have the authority to determine funding, except to authorize additional funds for termination costs if the contract was terminated for convenience. Transcript at 675.

description of the progress on the project. He had issues with the intellectual property markings dispute, and believed that appellant had been invoicing for amounts in excess of the obligated funds. Ultimately, he concluded that continuing to fund the contract did not represent the best use of the limited funds of the CBD. He described his conclusion as an analysis of "the value received versus the anticipated cost of going forward." Transcript at 333-36.

When the decision to discontinue funding was made, the incremental funding had increased from $5,021,006 to $23,426,988, and the total estimated costs or ceiling value had increased from $18,307,266 to $30,214,760. Mr. Woodbury was concerned that the difference between the current ceiling value and the funds previously allotted and spent did not justify going forward, i.e., the fact that more than $23 million had been spent did not justify continued spending. Transcript at 384. No working prototype had been produced, and according to Mr. Woodbury, it was difficult to estimate future costs. *Id*. at 421. According to the requirements of modification 13, the production of a testable prototype would not guarantee a workable device. *Id*. at 337-38. When the decision was made to discontinue funding, appellant's CEO, Mr. Fuerkranz, estimated that at least an additional $10 million would be needed to produce a beta prototype. *Id*. at 53.

Mr. Woodbury did not have the authority to terminate the contract for convenience. He did not terminate the contract for convenience or order the contracting officer to do so. He did not believe termination was necessary. His intent was to let the contract expire, as no additional funds would be allotted to it. Transcript at 401, 652.[12]

Once the decision to discontinue funding occurred, the contracting officer issued a notice of non-allotment of additional funds, dated January 2, 2014, pursuant to the LOF clause of the contract. Exhibit 20. That notice read in relevant part:

> Pursuant to Federal Acquisition Regulation (FAR) 52.232-22 Limitation of Funds (Apr 1984), the Government has decided to not allot any additional funds under contract number HSFIQDC-10-C-00053. As a result of this decision, NVS is again reminded that they shall not incur any costs in excess

[12] Mr. Woodbury was aware that the contracting officer believed that the contract should continue to receive additional allotted funds. *Id*. at 388-89. The contracting officer testified that he had no personal or professional opinion as to the decision to discontinue funding. *Id*. at 675. He did recommend additional funding after the decision to discontinue funding, in response to another agency's request to evaluate the existing technology. *Id*. at 671-72. However, no additional funds were allotted for this purpose.

> of the current allotment amount of $23,426,988 . . . . Due to the fact that the Contracting Officer did not issue any form of notice or communication, including a funded modification allotting additional funds to the contract authorizing NVS to incur costs in excess of $23,426,988 and considering the fact that NVS was not obligated to continue performance in excess of the allotment amount under the contract, the Government will not reimburse NVS for costs incurred in excess of that $23,426,988. . . Please be mindful that this is not a termination notice in accordance with FAR 52.249-6 Termination (Cost Reimbursement) (May 2004). With the issuance of this notification, the Government's right to terminate the contract still applies, as well as the right of NVS to request a termination. If this contract is terminated, the Government and NVS shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each party.

Termination for Convenience

As stated in the notice of discontinuance of funds, appellant had the right to request a termination for convenience, pursuant to provision (e) of the LOF clause. However, appellant did not do so. Transcript at 692. Mr. Woodbury testified that pursuant to the LOF clause, if the contractor did not request termination for convenience, the contracting officer had the option to terminate the contract for convenience, to allow additional funding for termination costs. *Id*. at 389. Otherwise, the contract would expire with no additional funding ("die on the vine," as stated by Mr. Buford.) *Id*. at 692-93.

Mr. Buford, in consultation with supervisors at the DHS Office of Procurement Operations (OPO) and legal counsel, "decided the best direction would be to terminate for convenience." Transcript at 653. He testified that he terminated the contract because CBD declined to provide additional incremental funding, and no other agencies funded the contract through an interagency or intra-agency agreement. Exhibits 21, 85 at 5, ¶22; Transcript at 652-53. He also stated that the termination for convenience gave appellant the opportunity to submit a termination settlement proposal to be compensated for termination costs. Transcript at 692-93.

By letter dated February 6, 2014, Mr. Buford, in his capacity as contracting officer, terminated the contract for convenience pursuant to FAR clause 52-249-6—Termination,

notifying appellant that it shall not incur total costs in excess of the amount obligated.[13] The termination notice also stated: "Please be aware that any additional funds allotted . . . under this contract shall be done for the sole purpose of funding termination activities related to this notice." Exhibit 23.

Sometime before September 25, 2014, appellant sent respondent a proposal to reinstate the contract. Mr. Buford responded that no action could take place with regard to the proposal until the termination for convenience settlement proposal was resolved. Exhibit 54. The contract was not reinstated.

On September 30, 2014, the contracting officer issued modification 16, which added $1,139,729 to the contract to be used solely for termination activities, with the condition that "[i]f the total of partial payments exceeds the amount finally determined due on the settlement proposal, the contractor shall repay the excess to the Government on demand, together with interest." Exhibit 17.

OIG Audit

Because Mr. Woodbury believed there might be an improper relationship between DHS personnel administering the contract and appellant, he attempted to initiate a fraud, waste and abuse investigation referral to the DHS Office of the Inspector General (OIG). Transcript at 339-41, 402-03. He was so concerned that he requested the initiation of the investigation on three occasions. *Id*. at 404. Rather than conduct a fraud, waste, and abuse investigation, the OIG conducted a contract audit that focused on contract performance. The result of the audit was the issuance of a document on February 27, 2015, entitled OIG-15-38 (OIG audit report). Exhibit 44; Transcript at 403.

The OIG audit report read in part:

> S&T may have wasted $23 million in incurred costs plus additional cost associated with the termination of the contract. . . .
>
> . . . The lack of adequate policies and procedures enabled the former Acting Director of the Chemical and Biological Defense Division (Acting Director) to direct the termination of the contract against S&T subject matter experts' advice.

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[13] The termination notice incorrectly referred to the previous amount of obligated funds, $21,098,624, rather than the correct amount of $23,426,988.

> In December 2013, the Acting Director presented a list of concerns about the NVS contract to the Acting Under Secretary of S&T. We did not identify evidence to substantiate any of the concerns. See appendix B for our analysis of the Acting Director's concerns. [Appendix B listed what the auditors considered to be Mr. Woodbury's concerns and the audit analysis of these concerns.]
>
> In a January 2014 memorandum, the contracting officer documented that S&T's decision not to provide additional funding was "against the better judgment" of S&T subject matter experts. In February 2014, the Acting Director unilaterally directed the termination of the contract with NVS for convenience of the Government, against the recommendation of those experts. . . .
>
> According to the termination clause included in the NVS contract, Federal Acquisition Regulation 52.249-6, the Government may terminate a contract for convenience only when the contracting officer determines it is in the Government's interest. The decision to stop funding the project forced the contracting officer to terminate the contract. . . .
>
> As recently as January 2014, an S&T program review revealed there was substantial data showing the NVS technology worked, and S&T personnel also acknowledged a continued need for the technology. . . .

Exhibit 44.

Auditors' Testimony

Respondent presented, as a hearing witness, Karen Gardner, the OIG auditor in charge, a member of the audit team for the entire duration of the audit. She testified that the final OIG audit report made no finding of bad faith or an improper termination for convenience, nor did it find a conflict of interest or disqualifying personal relationship with regard to any individual. Transcript at 710; Exhibit 44.

Appellant presented, as a hearing witness, Andrew Smith, an OIG audit manager who was removed from the audit team while the audit was ongoing, in response to complaints from Anne Hultgren, the CBD branch chief, and Mr. Buford, the contracting officer, because they believed he lacked objectivity. Transcript at 449-50, 704-05. Mr. Buford testified that Mr. Smith called him multiple times, encouraging him to "reinstate the contract." Mr. Buford thought these actions were inappropriate and demonstrated a lack of objectivity. *Id*.

at 657. Mr. Smith testified that he attempted to get the contract reinstated because the purpose of the audit was that he was "trying to get the product and/or the contract completed." *Id*. at 515.

Mr. Smith testified that it was Mr. Woodbury who decided to terminate the contract for convenience. Transcript at 497. He further alleged that Mr. Woodbury signed a letter terminating the contract. *Id*. at 504. Mr. Smith alleged that there was an improper conflict of interest between Mr. Woodbury and an employee of a federal testing laboratory, and that he discovered this improper conflict of interest within an hour of making a wager with a colleague. *Id*. at 453-54, 476. Mr. Smith provided no documentary evidence of this allegation, other than his own notes that he characterized as "hearsay within hearsay." Appellant's Supplemental Appeal File, Exhibit 55; Transcript at 485. Ms. Gardiner testified that other members of the audit team disagreed with Mr. Smith, and found no evidence of a conflict of interest or disqualifying personal relationship between Mr. Woodbury and any individual. *Id*. at 707.

Mr. Smith testified that he had viewed a video of appellant's working prototype "on the internet," contradicting appellant's chief executive officer, Mr. Fuernkranz, who testified that a working prototype had not been produced during contract performance. Transcript at 427. No evidence of this video was submitted. *Id*. at 552.

Subsequent Referral for Audit Investigation

During the contract audit, the OIG audit team was "shadowed" by an OIG investigations team, and therefore both the audit and investigations branches of the OIG were aware of the contract issues. Transcript at 697-98. After the OIG audit report was issued, the OIG Assistant Inspector General for Audits made a referral to the OIG Assistant Inspector General for Investigations, stating that "some actions taken by some S&T staff might be questionable." Exhibit 88. Ms. Gardiner testified that the referral did not refer to the actions of any specific individual, nor did it mention a conflict of interest or disqualifying personal relationship. Transcript at 731. The Investigations branch that shadowed the audit team throughout the NVS audit took no action on this referral. Transcript at 697, 738.

Broad Agency Announcement after Termination

On April 17, 2015, the Agricultural Defense branch of CBD, via an Economy Act (31 U.S.C. §1535 (2012)) Interagency Announcement (IAA) with the Department of the Interior (DOI), issued BAA15DHS-002 seeking R&D proposals for detection systems to prevent the spread of foreign animal, emerging, or zoonotic diseases. Exhibit 67. BAA 15DHS-002 was initiated in mid-2013 by the Agriculture Defense branch of CBD (separate from the Chemical

and Biological Defense branch that awarded the NVS contract), but published by DOI in 2015. Exhibit 84, ¶5. The S&T science advisor reviewed and commented on the draft BAA 15DHS-0002 on July 18, 2013. Transcript at 289. He raised no concern during his review as to whether this BAA was duplicative of, or a replacement for, the requirements of appellant's contract. *Id*. at 291.

The Agricultural Defense branch made two awards from BAA 15DHS-002. Exhibit 84, ¶¶12-13. Dr. Angela M. Ervin, the project manager, stated that the total amount of funding for the entire BAA was $1 million of fiscal year (FY) 2013 funds, and that the BAA "was not issued to find a less expensive alternative to the same technological approach as that provided by the NVS solution. To the best of my knowledge there is no connection whatsoever between the NVS contract performance and BAA 15DHS-002." *Id.* ¶16.

Appellant's Claims and Procedural History of the Consolidated Appeals

On March 27, 2014, appellant submitted an initial termination settlement proposal in the amount of $3,790,149.20. Exhibit 24. The parties were not able to agree on a resolution of the amount of appellant's termination settlement proposal. On May 22, 2014, respondent issued a letter stating that its previous advanced payment of termination costs had resulted in an overpayment to appellant in the amount of $606,771, demanding repayment of the overpayment. Exhibit 49.

On February 1, 2015, appellant submitted an uncertified claim, characterized as a "counteroffer" to respondent's claim for overpayment of termination costs, in the amount of $12,816,468.22, which was calculated on an included spreadsheet as follows:

$3,656,197.82	Termination costs
(1,139,729.60)	Advanced payment of termination costs
2,516,468.22	Termination costs after advanced payment
10,000,000.00	Lost opportunity costs
300,000.00	Bad credit
$12,816,468.22	Total

Exhibit 38.

The amount of $10,000,000 for lost opportunity costs [14] was described on the spreadsheet in the column entitled "Justification" as follows:

> Because of DHS's sudden, unanticipated and unwarranted contract termination, NVS has been unable to raise private funding due to the severe damage done to its reputation. Because it is now obvious that the MAMPT contract has been terminated under false pretenses, it no longer makes sense to limit the fair settlement amount and further hold up the process based on procedural objections that are only relevant under the no longer applicable "termination for convenience rules." Since October 2013, DHS's delaying actions have been deliberate and punitive. The contract has been terminated in bad faith and it is now time for DHS to take full responsibility for its wrongdoing and resolve the contract in a fair manner that reflects the wrong doing done to the company through the termination.

Id. at 3. The amount of $300,000 for cost of bad credit was described on the spreadsheet in the column entitled "Justification" as follows:

> NVS's bad credit, a direct result of the sudden and unannounced contract termination, has greatly increased NVS's cost of doing business. Going forward, because of this bad credit NVS must now pay signing bonuses in order to rehire critically important former employees and attract new ones, will be forced to pay higher interest rates for financing, and will need to pay for all material and services up front.

Id.

On May 22, 2015, the contracting officer issued a final decision in response to appellant's "counteroffer," denying the claim and reasserting respondent's right to payment of $606,771. On June 8, 2015, appellant filed a notice of appeal, which was docketed as CBCA 4775. Appellant's complaint, filed on July 2, 2015, alleged two counts, relating to its termination settlement proposal and bad faith termination claim. In March 2016, the Board *sua sponte* raised the issue of lack of certification of appellant's claim.

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[14] Appellant's CEO, Mr. Fuernkranz, testified that when funds were discontinued, he estimated that an additional $10 million would be needed to produce a beta prototype, and this was the basis of appellant's lost opportunity costs claim amount. Transcript at 53. When asked about the current progress of developing the product, appellant's CEO alluded to the fact that private venture capital had been secured and that it was licensed in China. *Id*. at 65.

Appellant thereafter submitted a certified claim dated April 15, 2016. According to the letter submitted by appellant's counsel, although the total claim amount was the same as the previous uncertified claim, the total was calculated as follows:

$3,790,149.20	Termination costs [increased by $133,951.38 from the previous claim]
(1,139,729.60)	Advanced payment of termination costs
2,650,419.60	Termination costs after advanced payment
10,166,048.62	Costs arising from bad faith [decreased by $133,951.18 from the previous claim]
$12,816,468.22	Total

The contracting officer denied the certified claim by final decision dated June 14, 2016. On June 14, 2016, appellant filed a notice of appeal, which was docketed as CBCA 5360 and consolidated with CBCA 4775. Appellant's complaint, filed on July 14, 2016, alleged two counts, one relating to the termination settlement proposal and the other to bad faith termination.

The two consolidated appeals were scheduled for a hearing on the merits to commence on September 12, 2017. Appellant's pre-trial brief, filed on August 22, 2017, asserted entitlement to $3,846,855 for termination costs, $570,415 relating to outstanding debt and obligations, and $281,967,625 in lost profits "based on the Government's bad faith in terminating the contract." Appellant's Pre-Trial Brief at 19. Appellant also filed a document entitled "Expert Report of Chelsea Taylor Collum, the Kenrich Group LLC" (the Kenrich Report), which purported to support and contain the calculation of the amounts claimed in appellant's pre-trial brief.

On August 29, 2017, respondent filed a motion for partial dismissal, asking that the Board dismiss the claim for lost profits in the amount of $281,967,625 as remote and inconsequential as a matter of law, or alternatively to dismiss that claim for lack of jurisdiction as it was not submitted to the contracting officer. As the hearing on the merits was scheduled less than two weeks hence, the Board deferred ruling on the motion for partial dismissal until after that hearing, with only the amounts claimed initially in CBCA 4775 and 5360 to be the subject of the hearing on the merits.

The hearing on the merits commenced on September 12, 2017, but adjourned that morning, when the parties engaged in settlement discussions. The parties agreed to continue settlement efforts with the assistance of a Board judge, but the case was not resolved during

an ADR proceeding that was held on October 17, 2017. On June 19, 2018, the Board dismissed for lack of jurisdiction the claim for lost profits in the amount of $281,967,625 and $570,415 for bad debts and obligations. *NVS Technologies, Inc. v. Department of Homeland Security*, CBCA 4775, et al., 18-1 BCA ¶ 37,070. On June 20, 2018, appellant filed a certified claim with the contracting officer for the amounts claimed in its pre-trial brief.

At the request of the parties, the amount of termination costs, including those termination costs asserted in the Kenrich report, was decided in an ADR proceeding by binding arbitration, which was conducted by a Board judge on September 5, 2018. On March 28, 2019, a binding decision was issued, determining the amount of termination costs to which appellant was entitled.

The hearing on the merits in CBCA 4775 and 5360 with regard to the allegation of bad faith termination and the amounts claimed in the certified claim, which is the subject of CBCA 5360, was held on September 12-14, 2018.

On December 18, 2018, appellant filed a notice of appeal of the contracting officer's deemed denial of its June 20, 2018 claim, and that appeal was docketed as CBCA 6334. On January 2, 2019, respondent filed a motion to dismiss the appeal, alleging that appellant had not responded to requests for information about the claim after the claim was filed. Appellant filed its complaint on January 17, 2019, alleging one count for "bad faith termination damages, requesting judgment for lost profits in the amount of $281,967,625 and $570,415 for bad debts and obligations."

On March 15, 2019, appellant filed a response, alleging that respondent had not stated grounds to dismiss the appeal. On May 30, 2019, respondent filed a motion to withdraw its motion to dismiss, and concurrently filed a motion to consolidate CBCA 6334 with CBCA 4775 and 5360, stating:

> The Board was presented with Appellant's "bad faith" theory in the CBCA 4775/5360 appeal, and Appellant's pending additional appeal has made no additional causation-related allegations beyond those that were the subject of the September 12-14, 2018, hearing. In the main CBCA 6334 represents an attempt to substitute an approximately $282M[illion] recalculated claim for an earlier-filed $10.3M[illion] bad faith claim.[15] Appellant's causation grounds

[15] In its post-trial brief filed on December 17, 2018, in CBCA 4775 and 5360, appellant had asserted entitlement to $281,967,625 lost profit and $570,415 for bad debts and obligations, previously dismissed by the Board for lack of jurisdiction. These amounts were

> for the pending appeal consist only of the original allegations, and the Contracting Officer has previously denied them; therefore, the joinder of the CBCA 6334 appeal with the CBCA 4775/5360 appeal would serve the interests of judicial efficiency.

On January 22, 2020, appellant concurred in respondent's motions in CBCA 6334, not objecting to respondent's withdrawal of its motion to dismiss and stating that respondent's motion to consolidate the appeal with CBCA 4775 and 5360 was appropriate. Appellant also listed factual allegations to support an argument that "the evidence provided for and during the trial [in CBCA 4775 and 5360] has provided ample facts that go far beyond what was discussed prior to the trial."

On March 5, 2020, the Board issued an order consolidating the three appeals. This decision resolves the three consolidated appeals.

Discussion

The Contract Expired After Receipt of All Allotted Funding

Respondent asserts that the incrementally-funded contract expired once funds were discontinued and appellant received all allotted funds. The LOF clause states that the Government is not obligated to reimburse the contractor for costs incurred in excess of the total amount of funds allotted to the contract, nor is the contractor obligated to continue performance or incur costs in excess of allotted funds. Provision (e) of the LOF clause allows the contractor to request termination for convenience if funds are discontinued. Alternatively, if the contractor does not request termination for convenience after discontinuance of funds, provision (i) allows the contracting officer to terminate the contract and direct an increase of additional funds solely to cover termination or other specified expenses, which is what occurred in this case. After receipt of all allotted funds, with no additional funds allotted, an incrementally funded contract expires, i.e., legally "'[dies] a natural death,' according to its terms." *Law Mathematics & Technology, Inc. v. United States*, 779 F.2d 675, 678 (Fed. Cir. 1985).

Appellant alleges that discontinuance of funding did not result in the expiration of the contract, because the contract was subsequently terminated for convenience, and that termination was in bad faith. Appellant states:

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reasserted as quantum in appellant's certified claim dated June 20, 2018, the deemed denial of which was appealed and docketed as CBCA 6334.

> This issue is what the Government has previously described as permitting the . . . [c]ontract to die a "natural death." The fact that the Government could have simply allowed the contract to wither on the vine is immaterial since it chose to terminate the Contract for its convenience. The Respondent invoked the terms of 48 CFR § 52.249- 6. The Respondent cannot now say never mind we could have taken a different route.

Appellant's Post-Trial Brief at 22.

Appellant's characterization of the subsequent termination for convenience as "a different route" than the initial decision to discontinue funding is erroneous, as the LOF clause provides for termination for convenience after funds are discontinued. Once Mr. Woodbury, acting director of CBD, exercised his authority to discontinue funding pursuant to the LOF clause, Mr. Buford, the contracting officer, exercised his discretion and authority pursuant to the clause to subsequently terminate the contract for convenience and direct an increase of funds to pay for termination costs, so that appellant would benefit by recovering its termination costs. The decision to terminate for convenience was clearly not "a different route" from that contemplated by the LOF clause, but an action explicitly allowed by the clause after the discontinuance of funding. As such, termination for convenience would not obviate the contract's expiration for discontinuance of funding. As appellant has been paid all allotted funds, pursuant to the LOF clause, under such circumstances, there is "no legal basis to stop the contract from 'dying a natural death.'" *Law Mathematics & Technology, Inc.,* 779 F.2d at 678.

Appellant's Allegations of Breach of the Implied Duty of Good Faith and Fair Dealing and Bad Faith Termination

To recover costs in excess of the total allotted amount of an incrementally funded contract, a contractor must demonstrate that the LOF clause does not control.[16] *Ebasco*

[16] Appellant cites *Oxnard v. United States*, 851 F.2d 344 (Fed. Cir. 1988), and *American Electric Laboratories v. United States*, 774 F.2d 1110, 1116 (Fed. Cir. 1985), asserting that promissory estoppel bars the effect of the LOF clause, which would allow appellant to receive funds exceeding the amount which has been allotted and paid. Appellant's Post-Trial Brief at 23. However, the cited cases state that promissory estoppel will apply when contractors are induced to incur contract performance costs in excess of the amount of allotted funds. *Oxnard*, 851 F.2d at 347; *American Electric Laboratories*, 744 F.2d at 1116. Appellant did not incur performance costs in excess of the amount of the allotted funds, and was paid for all work performed, including its termination costs.

Services, Inc. v. United States, 37 Fed. Cl. 370 (1997). Appellant asserts that despite the discontinuance of funding, the contract did not expire, because the agency's discontinuing funding and terminating the contract was a breach of the implied duty of good faith and fair dealing and a bad faith termination for convenience.[17] Appellant states unsupported allegations to support these theories, and does not identify which allegations support each theory. To resolve these assertions, we analyze respondent's actions taken pursuant to the LOF clause–first, the discontinuance of funding, and then the termination for convenience.

Discontinuance of Funding

Mr. Woodbury had the authority to discontinue funding. He did not have the authority to terminate the contract for convenience. Appellant conflates the two actions by making the following allegations with regard to the termination decision:

> Appellant seeks the Board's ruling on its allegation that the Government terminated [the contract] in bad faith based on [Mr. Woodbury's] in February 2014 documented animus towards NVS and his usurpation of the discretion afforded to the Government's assigned contracting officer. The record here demonstrates that Mr. Woodbury and others in the agency had a specific intent to harm NVS in order to benefit other programs associated with colleagues of the [sic] Mr. Woodbury and his superior Alan Cox.

Appellant's Post-Trial Brief at 1-2.

Appellant alleges further that "Mr. Woodbury's actions went beyond appropriate actions by a Government employee," Appellant's Post-Trial Brief at 2; that "Mr. Woodbury and Mr. Cox actively sought to kill NVS's Contract through deceit, trickery, and misinformation," *id.* at 23; that "Messrs. Woodbury's and Cox's intent to harm NVS and benefit associates of Mr. Woodbury moves this case from a natural death to an assassination"

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[17] Appellant's claims and complaints in these appeals did not refer to a breach of the implied duty of good faith and fair dealing. Appellant raises this issue for the first time in its post-trial brief:

> [T]he record in this matter supports the finding that the Government terminated Appellant's contract in bad faith and failed to comply with the implied contract [sic] of good faith and fair dealing as to NVS.

Appellant's Post-Trial Brief at 1.

[and] "Mr. Woodbury's actions were tainted by his intent to injure NVS," *id*. at 27-28; and that "Mr. Woodbury's documented animus towards NVS . . . overcame the contracting officer's discretion and the contracting officer has become nothing more than an adjunct and tool of Mr. Woodbury, an individual with no warrant nor actual authority to bind the Government." *Id*. at 28.

Mr. Woodbury and Mr. Cox were involved in the decision to discontinue funding, not the decision to terminate the contract for convenience. We therefore address the allegations as to their conduct within the context of appellant's assertion of a breach of the implied duty of good faith and fair dealing and appellant's allegations that it has incurred damages as the result of the decision to discontinue funding.

Implied in every contract is a duty of good faith and fair dealing in its performance and enforcement. *Lakeshore Engineering Services, Inc. v. United States*, 748 F.3d 1341, 1349 (Fed. Cir. 2014); *Metcalf Construction Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014). In *Ebasco*, the contractor asserted the Government's alleged breach of the duty of good faith and fair dealing as a basis for overcoming the limitation of the LOF clause, as appellant asserts in the instant appeals. 37 Fed. Cl. at 382. The court stated:

> Plaintiff's . . . theory for avoiding the LOF clause is that the [Government] breached the instant contract by acting unfairly and in bad faith. Every government contract contains an implied covenant of good faith and fair dealing. *Solar Turbines, Inc. v. United States*, 23 Cl. Ct. 142, 156 (1991). Where a contractor incurs costs above the contract ceiling as a result of a breach of this covenant, contractual provisions such as the LOF clause are not necessarily controlling and the contractor potentially can recover those expenditures above the contract price that resulted from the government's bad faith or unfair conduct. *Id*. at 156 n.8.

The court stated further: "Any analysis of a question of Governmental bad faith must begin with the presumption that public officials act 'conscientiously in the discharge of their duties.'" *Id*. At 382 (quoting *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301 (Ct. Cl. 1976) (quoting *Librach v. United States*, 147 Ct. Cl. 605, 612 (1959))).

Appellant has not presented any evidence to overcome the presumption that Mr. Woodbury and Mr. Cox acted conscientiously in the discharge of their duties. Both were very credible witnesses, and their actions did not demonstrate unfair dealing, intent to harm appellant, or bad faith by them or other government personnel. They concluded, based upon their review, that the contract did not merit further funding.

The agency's funding concerns arose before Mr. Woodbury's appointment. The contract was awarded in 2010. Mr. Cox testified that by 2011, agency officials were concerned about the rate of spending on the contract. In September 2013, when Mr. Woodbury was appointed as acting director of CBD, he became concerned that the allotted funds had increased to $23,426,988.41, exceeding the initial estimated costs, or contract ceiling, of $18,307,266, by five million dollars, while the estimated costs, or contract ceiling, had increased to $30,214,760, exceeding the initial estimated costs by twelve million dollars.

In addition to the increase in funding, Mr. Woodbury testified that after reviewing the contract file, he concluded that the administration of the contract was one of the most "irregular" he had seen in his career, with regard to the number of changes and the deletion of tasks in the statement of work that had been previously performed, funded, and paid. He was concerned that the agency's project manager did not have an arm's length relationship with appellant, and that the project manager and the science advisor were not being forthright with him as to the status and goals of the project. He felt it necessary to conduct an independent, third-party review of the contract, but this did not occur because of a disagreement between the agency and appellant concerning the intellectual property rights of appellant's deliverables.

Mr. Woodbury emphasized that he was concerned with the progress of contract performance and the amount of funding that had been expended in excess of the initial projected ceiling, and the amount of increased ceiling funding in modification 13 that was projected without a guarantee of a working prototype. Modification 13 had deleted all prior tasks and eliminated the requirement of a working prototype, replacing it with a prototype for testing only.

While the agency's science advisor, referred to by appellant and the OIG audit team as a "subject matter expert," was in favor of continuing funding, the science advisor had no responsibility for or authority to determine funding, nor could he predict the time frame or the amount of funding necessary to complete a working prototype. It is understandable that the science advisor would prefer the contract to proceed, and Mr. Woodbury, who was responsible for funding, would have other considerations. While Mr. Woodbury and the science advisor differed as to whether funding should be continued, Mr. Woodbury was not required to accept the advice of the science advisor. Mr. Woodbury denied that he ignored the science advisor's advice to continue the project. He described his comprehensive analysis and the discussions he had with all agency officials, including the science advisor,

before he decided to discontinue funding. His decision not to accept the science advisor's advice does not support appellant's allegations that he ignored the advice.[18]

Ultimately, Mr. Woodbury decided to discontinue funding. In light of the prior expenditure of $23 million, he did not believe that the expenditure of an additional $7 million included in the current, unfunded ceiling, without the guarantee that appellant would produce the required prototype, the requirement for which had been reduced, by modification 13, from that of a working prototype to one ready for testing.[19] This was not a usurpation of the discretion afforded to the Government's contracting officer, as alleged by appellant, because the contracting officer had no authority to determine funding. Additionally, there is no evidence to support appellant's allegations that Mr. Woodbury had "bad faith animus" against NVS or any specific intent to harm the company. He testified that he had no prior relationship with NVS, and very little interaction with NVS.[20]

Appellant also has failed to prove the following allegations:

> Mr. Woodbury enacted his scheme to attack NVS by attempting to transfer funds planned for NVS's contract to other agencies, attempting to disclose NVS's proprietary information to third parties, and lying to other Government stakeholders concerning the progress and validity of NVS's technology.

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[18] Appellant alleges in its concurrence to respondent's motion to consolidate that the science advisor personally witnessed Mr. Cox threatening appellant with retaliation for complaining to Senator Feinstein about the abrupt termination of the MAMTP contract. The science advisor made reference to a statement allegedly made by Adam Cox with regard to "killing the contract." However, he testified that he did not know what Mr. Cox meant, and Mr. Cox denied that he made such a statement.

[19] Appellant alleges in its concurrence to respondent's motion to consolidate that DHS failed to provide any actionable evidence of wrongdoing on NVS's part. Appellant fails to explain "actionable wrongdoing" or why it would be required as a basis to discontinue funding.

[20] Appellant alleges in its concurrence to respondent's motion to consolidate that Mr. Woodbury "rejected attempts by NVS to invite him for a personal, on-site inspection and that he refused to offer any adequate mitigation measures to address the MAMPT's perceived shortcomings." With no working prototype, appellant does not explain what an inspection would have shown, or how Mr. Woodbury could have offered advice as to how NVS could have ultimately achieved a working prototype.

Appellant's Post-Trial Brief at 1-2.

Mr. Woodbury responded by emphasizing that appellant had been paid all funds allocated to the contract, and therefore there were no funds available to transfer to other programs. There is no evidence that Mr. Woodbury acted to benefit other programs associated with individuals that he knew working in those programs, nor is there evidence that he had a personal relationship with an individual at a testing lab.

Mr. Woodbury's attempt to have a third party review contract performance is the basis for appellant's allegation that he attempted to disclose NVS's proprietary information to third parties. Mr. Woodbury believed that the Government had rights to the R&D developed under the contract and paid for by the agency, which appellant disputed. There is no evidence to support the allegation that Mr. Woodbury had the intent to disclose appellant's proprietary information to third parties, or that he lied concerning the progress and validity of appellant's technology. The previously discussed dispute over data rights prevented the third party review.

The agency did not breach the implied duty of good faith and fair dealing or act in bad faith when Mr. Woodbury exercised his authority and discontinued funding of the contract pursuant to the LOF clause. He persuasively and credibly explained the basis of his decision, and there is no evidence that he or any agency personnel had the intent to harm appellant by the decision to discontinue funding.

Termination for Convenience

Appellant alleges that the decision of the contracting officer, Mr. Burford, to terminate the contract for convenience, following the decision to discontinue funding, was an abdication of his authority and a termination in bad faith. With regard to the burden of proof for bad faith termination for convenience, this Board has recognized the following:

> A court or board of contract appeals may find that a termination for the convenience of the Government constituted a breach of contract only if the tribunal finds that the termination was motivated by bad faith or constituted an abuse of discretion, or that the Government entered into the contract with no intention of fulfilling its promises. *Greenlee Construction, Inc. v. General Services Administration*, CBCA 415, et al., 07-2 BCA ¶ 33,619, at 166,510 (citing T *& M Distributors, Inc. v. United States*, 185 F.3d 1279, 1283 (Fed. Cir. 1999); *Krygoski Construction Co. v. United States*, 94 F.3d 1537, 1541, 1543-44 (Fed. Cir. 1996); *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995)). As long as adequate cause for the termination

> is found, the termination will be held valid, even if that cause was not known at the time of termination. *John Reiner & Co. v. United States*, 325 F.2d 438, 443 (Ct. Cl. 1963).

Oregon Woods, Inc. v. Department of the Interior, CBCA 1072, 09-1 BCA ¶ 34,014, at 168,202-03 (2008), *reconsideration denied*, 09-1 BCA ¶ 34,063, *aff'd*, *Oregon Woods, Inc. v. Salazar*, 355 Fed. App'x 403 (Fed. Cir. 2009).

The burden of proof is further explained by our appellate authority. "In the absence of bad faith or clear abuse of discretion, the contracting officer's election to terminate for the government's convenience is conclusive." *T & M Distributors, Inc.*, 185 F.3d at 1283. Proof of bad faith requires showing "clear and convincing" evidence that overcomes the presumption that government officials act in good faith. *See Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002). "[T]he clear and convincing standard most closely approximates . . . the 'well-nigh irrefragable' proof standard." *Id.* at 1239-40. For that reason, "it logically follows that showing a government official acted in bad faith is intended to be very difficult, and that something stronger than a 'preponderance of evidence' is necessary to overcome the presumption that he acted in good faith, i.e., properly." *Id*. at 1240.

With regard to abuse of discretion, this Board has recognized the following:

> In determining whether the decision . . . was so arbitrary or capricious as to constitute an abuse of discretion, [the Board will] consider– "(1) evidence of subjective bad faith on the part of the government official, (2) whether there is a reasonable, contract-related basis for the official's decision, (3) the amount of discretion given to the official, and (4) whether the official violated an applicable statute or regulation."

AFR & Associates, Inc. v. Department of Housing & Urban Development, CBCA 946, 09-2 BCA ¶ 34,226, at 169,169 (quoting *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1326 (Fed. Cir. 1999)).

Appellant alleges that "the Government's bad faith in terminating the contract was a material breach . . . voiding the remainder of the Contract's terms preventing the Government from avoiding the effect of its actions under the limitation of funds clause." Appellant's Post-Trial Brief at 23. Additionally, appellant argues that Mr. Buford, as contracting officer, abdicated his authority to administer the contract by failing to exercise his own discretion when he terminated the contract for convenience, and "Mr. Woodbury's documented animus towards NVS in favor of his colleagues from the Department of Defense overcame the

contracting officer's discretion and the contracting officer has become nothing more than an adjunct and tool of Mr. Woodbury, an individual with no warrant nor actual authority to bind the Government." *Id.* at 28.

These allegations lack merit. Again, appellant does not distinguish between Mr. Woodbury's authority to discontinue funding and Mr. Buford's authority to terminate the contract. Once the decision to discontinue funding was made, appellant had the right to request termination for convenience, which it did not. Mr. Buford testified that, as contracting officer, he had the discretion to either allow the contract to expire on its own terms, without compensating the contractor for its termination costs, or to terminate the contract for convenience to allow termination costs. The decision to terminate was therefore not a contractual prerequisite after funds were discontinued.

Mr. Buford testified further 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 to allow appellant the benefit to submit a proposal to recover allowable termination costs, which appellant would not have been entitled to unless the contract was terminated. Thus, rather than harming appellant, as appellant alleges, the decision to terminate for convenience clearly benefitted appellant. There was no abuse of discretion. Rather, there was a reasonable, contract-related basis for the decision to terminate for convenience, the decision was within Mr. Buford's discretion, and the decision was clearly within the parameters of the LOF clause.[21]

Appellant also alleges that the contract was terminated to allow the agency to seek a "better bargain," i.e., a better price for the work, citing *Krygoski.* Appellant alleges that a BAA issued thereafter by the DOI was for the same technology. Respondent offered affidavit testimony that the technology sought by the BAA was different from that in the NVS contract. Two contracts were awarded in response to the BAA, but there was no persuasive evidence that the requirements sought by the BAA were the same or even similar to those of the NVS contract or that the agency was seeking a "better bargain."

Finally, appellant alleges that the agency continued to negotiate with appellant after termination, in response to a proposal from appellant to reinstate the contract. No decision was made to reinstate the contract. Appellant's attempt to reinstate the contract does not

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[21] Appellant alleges in its concurrence to respondent's motion to consolidate that "Mr. Woodbury continually pressured Mr. Buford . . . to terminate the MAMPT contract while Mr. Buford remained reluctant to do so until the very end." This allegation is contrary to the evidence in the record.

invalidate the agency's decision to discontinue funding and terminate the contract for convenience.

Appellant has failed to provide the clear and convincing evidence required to support a claim for bad faith termination, and has failed to prove an abuse of discretion by the contracting officer. Once the decision to discontinue incremental funding was made, the contract expired for lack of funds. The contracting officer's decision to terminate the contract for convenience allowed the contractor to recover its termination costs.

The OIG Audit Report

Appellant alleges that "Mr. Woodbury's actions were so extreme that the Government's Office of Inspector General chose to refer those actions to investigation for fraud waste and abuse." Appellant's Post-Trial Brief at 1-2. This allegation is erroneous. Mr. Woodbury's concern with the interaction between the agency's personnel and appellant's personnel in the administration of the contract was such that he requested the OIG to initiate a fraud, waste, and abuse (FWA) investigation. Rather than initiate a FWA investigation, however, the OIG conducted an audit of contract performance which resulted in the OIG audit report. Appellant relies upon the content of the OIG audit report as a basis of its claims.

The parties offered testimony during the hearing from two members of the audit team as to the audit and OIG audit report. Appellant's witness, Mr. Andrew Smith, had been removed from the audit team at the request of the contracting officer and the acting director of the CBD because he was acting in a manner that they considered inappropriate to the audit function, as he was advocating for the reinstatement of the contract. Mr. Smith confirmed that he was acting in this manner when he testified that he was "trying to get the product and/or the contract completed."

Mr. Smith was not a credible witness, as his testimony contained many erroneous statements. He testified that he had viewed a video "on the internet" that demonstrated that appellant had developed a working device, contrary to the testimony of appellant's CEO, who testified that there was no working prototype when funds were discontinued. Mr. Smith offered no evidence of the existence of the video, or its purported origin. He further testified that within an hour, in response to a wager with a colleague, he found evidence of an improper relationship between Mr. Woodbury and a person who worked at another laboratory to which the witness believed Mr. Woodbury was attempting to transfer funds from appellant's contract. However, the ultimate conclusion of the OIG audit report, as confirmed by respondent's witness, Karen Gardiner, the auditor in charge, who had remained on the audit team to conclusion, was that there was no evidence of a conflict of interest or

disqualifying personal relationship between Mr. Woodbury and other individuals. Mr. Smith also testified erroneously that Mr. Woodbury terminated the contract and signed the termination notice letter to appellant.[22]

The OIG audit report contained significant legal and factual inaccuracies. For example, it concludes:

> According to the termination clause included in the NVS contract, Federal Acquisition Regulation 52.249-6, the Government may terminate a contract for convenience only when the contracting officer determines it is in the Government's interest. The decision to stop funding the project forced the contracting officer to terminate the contract.

This is an erroneous reading of the contract terms. This statement ignores the terms of the LOF clause and the separate, distinct reasons for discontinuing funding and terminating the contract. As discussed previously, the decision to discontinue funding did not force the contracting officer to terminate the contract, as the contracting officer was not required to terminate the contract after funds were discontinued. The contracting officer exercised his discretion and made an independent decision to terminate the contract, affording appellant the opportunity to recover termination costs.

The OIG audit report also states that Mr. Woodbury terminated the contract for convenience against the recommendation of the subject matter experts. This statement is also erroneous. Mr. Woodbury did not direct the termination of the contract. While he did not agree with the subject matter experts, who advocated continuing the contract, he was not required to accept their advice, and believed that the amount of funding previously spent and the increased estimated costs did not justify additional funding. Neither the subject matter expert nor appellant could guarantee the production of a working prototype if funding continued to the level of estimated costs.

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[22] Appellant alleges erroneously in its concurrence to respondent's motion to consolidate that Mr. Smith testified that Mr. Woodbury had been under investigation by the Department of Defense OIG "for a very similar pattern of corrupt misconduct regarding the misappropriation of government funds." Mr. Smith testified that he believed another individual had been under investigation, not Mr. Woodbury, but Mr. Smith's conclusions were not in the audit work papers. Transcript at 475-77.

The OIG audit report concludes that "an S&T program review revealed there was substantial data showing the NVS technology worked." This conclusion is unsupported, as there was no working prototype when funds were discontinued. Appellant's CEO confirmed that no working prototype had been produced, and he testified that at least an additional ten million dollars of funding would be required to produce a beta prototype.

Appendix B of the OIG audit report purports to negate Mr. Woodbury's reasons for discontinuing funding. When we consider Mr. Woodbury's and Mr. Buford's credible testimony in comparison with the many factual and legal inaccuracies in both Mr. Smith's testimony and the OIG audit report, we do not find the OIG audit report, including its analysis in Appendix B, to be a reliable or accurate representation or critique of Mr. Woodbury's decision to discontinue funding and Mr. Buford's decision to terminate the contract for convenience.

Conclusion

Respondent's acting director of the CBD properly exercised his authority and the agency's contractual right to discontinue funding pursuant to the LOF clause of the contract, and appellant has received all allotted funds for its contract performance. The contract expired upon discontinuance of funding.

The contracting officer properly exercised his discretion to terminate the contract for convenience pursuant to the LOF and the Termination for Convenience clauses of the contract, and appellant has received all termination costs to which it is entitled, the amount of which has been determined in a separate, binding ADR proceeding at this Board.

Decision

The claim for termination costs, which has been resolved by binding arbitration, is **DISMISSED WITH PREJUDICE**. The claims for breach of the implied duty of good faith and fair dealing and bad faith termination for convenience of the contract are **DENIED**.

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

We concur:

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge