



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND
IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON JULY 9, 2019**

DENIED: July 1, 2019

CBCA 4968

OPTIMUM SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

James W. Copeland of Copeland Law Firm, LLC, Atlanta, GA, counsel for Appellant.

Paul Sax, Office of the Solicitor, Department of the Interior, Lakewood, CO, counsel for Respondent.

Before Board Judges **HYATT**, **VERGILIO**, and **KULLBERG**.

Opinion for the Board by Board Judge **KULLBERG**. Board Judge **VERGILIO** concurs.

KULLBERG, Board Judge.

Respondent, Department of the Interior (DOI or Government), and appellant, Optimum Services, Inc. (OSI), have filed cross-motions for summary relief.¹ At issue is

¹ The Board's revised rules replaced the term summary relief with summary judgment. 48 CFR 6101.8(f) (2018). The Government's motion preceded that change in the

whether the termination of OSI's contract for convenience in response to a post-award protest was a breach of contract. OSI seeks recovery of its anticipated profits. For the reasons stated below, the Board denies OSI's motion, grants DOI's motion, and denies the appeal.

Background

On June 16, 2008, the National Park Service (NPS), an agency within DOI, issued solicitation N5297080232 (solicitation) for ecological restoration services in the Everglades National Park in Florida. Appeal File, Exhibit 9 at 2.² The description of work in the solicitation noted that the Everglades National Park encompassed more than 1.5 million acres and provided, generally, for "on-site ecological restoration . . . with the recovery of a pre-existing ecosystem . . . that . . . has been physically disturbed." Exhibit 2 at 99. One area identified for such restoration was the "Hole-in-the-Donut (HID)." *Id.* The HID consisted of "approximately 6040 acres [that were] once virtually a monospecific stand of an invasive exotic plant called Brazilian pepper." *Id.*

On December 23, 2008, NPS awarded to OSI contract C2000091200 (contract). Exhibit 2 at 1. NPS awarded the contract after OSI had filed a protest at the Government Accountability Office (GAO)³ that challenged NPS' September 18, 2008, award of the contract to Westwind Contracting, Inc. (WCI). Exhibits 3, 5. In response to OSI's protest, NPS took corrective action that included further discussions and a new source selection decision.⁴ Exhibits 6, 25. NPS terminated WCI's contract the same day that it awarded OSI's contract. Exhibit 8.

The contract was an indefinite-delivery/indefinite-quantity (IDIQ) contract with a base year and four option years for restoration services in the Everglades National Park. Exhibit 2 at 6, 10. Paragraph B.1 of the contract provided that "the minimum quantity of services

Board's rules, and appellant filed its motion shortly afterward.

² All exhibits are found in the appeal file, unless otherwise noted.

³ On July 7, 2004, the General Accounting Office was renamed the Government Accountability Office. Pub. L. No. 108-271, § 8(a), 118 Stat. 814 (2004). References to GAO in this decision will refer to either the Government Accountability Office or the General Accounting Office, depending on when that name was in use.

⁴ On November 17, 2008, GAO dismissed Optimum's protest. *Optimum Services, Inc.*, B-400677 (Nov. 17, 2008).

ordered by the Government shall equal \$2 million worth of services.” *Id.* at 6. Additionally, paragraph F.3 of the contract stated that “[t]he contractor is guaranteed a minimum of \$2 million during the life of the contract.” *Id.* at 10.

The contract incorporated in full Federal Acquisition Regulation (FAR) clause 48 CFR 52.249-2 (2007) (FAR 52.249-2), Termination for Convenience of the Government (fixed price), May 2004, that provided, in pertinent part, the following:

(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government’s interest. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date.

....

(e) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer.

....

(f) Subject to paragraph (e) of this clause, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid or remaining to be paid because of the termination. The amount may include a reasonable allowance for profit on work done. However, the agreed amount . . . may not exceed the total contract price as reduced by (1) the amount of payments previously made and (2) the contract price of work not terminated.

Exhibit 2 at 79-80. The contract also incorporated in full FAR 52.215-8, Order of Precedence–Uniform Contract Format, October 1997, that stated, in pertinent part, the following:

Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order:

(a) The Schedule (excluding the specifications).

(b) Representations and other instructions.

- (c) Contract clauses.
- (d) Other documents, exhibits, and attachments.
- (e) The specifications.

Id. at 35. Finally, the contract included FAR 52.233-3, Protest after Award, August 1996, that provided, in pertinent part, the following:

(a) Upon receipt of a notice of protest (as defined in FAR 33.101) or a determination that a protest is likely (see FAR 33.102(d)), the Contracting Officer may, by written order to the Contractor, direct the Contractor to stop performance of the work called for by this contract. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Upon receipt of the final decision in the protest, the Contracting Officer shall either—

- (1) Cancel the stop-work order; or
- (2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.

.....

(e) The Government's rights to terminate this contract at any time are not affected by action taken under this clause.

Id. at 73.

On January 12, 2009, WCI protested NPS' award of the contract to OSI at the United States Court of Federal Claims (COFC). Exhibit 9. WCI alleged in its complaint that NPS had violated FAR 15.507 by giving OSI key information from WCI's second price proposal without its permission during OSI's debriefing on September 23, 2008. *Id.* at 11-13. WCI also alleged that NPS had not properly evaluated OSI's proposal. *Id.* at 13-15. On January 13, 2008, COFC granted OSI's motion to intervene in the protest. Exhibit 10.

In a series of conference calls during the period from January 12 to 15, 2009, employees of NPS discussed how the agency should respond to WCI's protest. Exhibit 106

at 7. The contracting officer (CO) at NPS during that period was not present during those conference calls, but he relied upon “input from other critical attendees.” *Id.* at 8. OSI’s written deposition question 9(a) to the CO asked the following: “[W]ho made the NPS’ decision to take corrective action (including the termination for convenience of [OSI’s] contract) in response to [WCI’s] COFC bid protest?” *Id.* at 8-9. The CO represented the following:

Contracting “decisions” don’t become such until the warranted contracting officer executes the document formalizing the decision. We clearly had a lead attorney that was guiding us through this process to make sure we were conducting ourselves in a legally-sufficient manner. The decision to do corrective action and the termination fell on my shoulders having followed the advice from [counsel].

Id. at 9.

By letter dated January 15, 2009, NPS’ legal counsel informed the Department of Justice (DOJ) counsel of the following:

After reviewing the Department of Justice’s recommendations and obtaining the approvals of relevant program office officials as well as our own chain-of-command, the U.S. Department of [the] Interior, [the NPS] has determined to take voluntary corrective action in connection with this matter. The form of voluntary corrective action will entail the [NPS] cancelling the current solicitation and terminating the contract award to [OSI] for convenience. The [NPS] will use a different contractual vehicle for a particular segment of its needs at the Everglades National Park this season. This autumn, the [NPS] will solicit a new contract to better reflect its needs.

Exhibit 11. On January 16, 2009, WCI filed a motion to dismiss the protest, and OSI filed its opposition to the dismissal on January 19, 2009. Exhibits 12, 13. On January 22, 2009, COFC dismissed the protest over OSI’s objection. *Westwind Contracting, Inc. v. United States*, No. 09-25C (Fed. Cl. Jan. 22, 2009). On January 26, 2009, NPS notified OSI that the contract had been terminated for convenience. Exhibit 17.

On January 23, 2009, OSI filed a protest with GAO, which challenged NPS’ decision to cancel the solicitation. Exhibit 16. In its response to OSI’s protest, NPS explained that “another round of pricing would decrease the price proposals so low below the Independent Government Cost Estimate (IGCE) that either NPS would have to find the prices

unreasonable or, if not unreasonable, there would be an impact on the performance of the contract.” Exhibit 20 at 3. Additionally, NPS stated the following:

Because of the short dry season, typically lasting from December to May, no work can be performed this year under this [request for proposals]. NPS is using a different contractual vehicle to accomplish some work during the remainder of this dry season. This other contract will not decrease the amount of acreage to be covered in the re-solicitation because the IDIQ contract cannot cover all acreage of work. Additionally, NPS faced the risk of losing the funding, which is provided by the state of Florida through a mitigation bank fund, if NPS did not conduct any work this dry season.

Id. at 3 n.2.

GAO denied OSI’s protest. *Optimum Services, Inc.*, B-401051, 09 CPD ¶ 85 (Apr. 15, 2009). With regard to cancellation of the solicitation, GAO’s decision stated the following:

We have held that a reasonable basis for cancellation exists where the solicitation does not accurately reflect the agency’s requirements. Due to reduced funding levels, the agency here recognized that the solicitation did not accurately reflect its requirements given that the maximum estimated order quantities for the CLINs were overstated, as were the maximum order dollar values for the base and option periods.

Id. at 3-4 (citations omitted). GAO’s decision also dismissed as “mere inference and supposition” OSI’s contention that NPS’ “articulated reasons for canceling the solicitation [were] essentially a pretext . . . motivated by the . . . desire to avoid resolving [WCI’s] protest in court.” *Id.* at 3 n.1.

On February 12, 2009, NPS issued solicitation N5297090038 for “Environmental Remediation of the ‘HID.’” Exhibit 21 at 1-2. Subsequently, on March 11, 2009, NPS awarded contract C5297090038 to Cherokee Enterprises, Inc. (CEI) in the amount of \$1,325,531. *Id.* at 2. On August 21, 2009, NPS issued another solicitation for land restoration and vegetation clearing for the HID area at the Everglades National Park. Exhibit 31 at 2. The solicitation provided for “Multiple IDIQ Award . . . to eligible 8a Contractors registered in the South Florida District of the [Small Business Administration].” *Id.* On February 4, 2010, NPS awarded contracts under the solicitation to CEI and Homestead Concrete & Drainage, Inc. (Homestead). Exhibits 31 at 3, 32 at 3. OSI contends that it was ineligible for an award because the contracts were “8-A set

aside contracts (instead of Small Business Set Aside Contracts), for which [it] could not qualify.” Appellant’s Second Amended Set of Undisputed Facts at 99-100.

On January 15, 2015, OSI submitted to NPS its claim for termination costs in the amount of \$21,468 and a breach of contract claim in the amount of \$584,785. Exhibit 73 at 1. OSI contended that NPS breached the contract because it did not purchase the minimum quantity of \$2 million before terminating the contract, and the termination of the contract was either done in bad faith or was an abuse of discretion. *Id.* at 6-21. OSI computed its breach of contract damages based upon its anticipated profits on \$2 million, the minimum amount of services to be purchased under the contract. *Id.* at 22.

The CO’s decision, which was dated June 12, 2015, allowed OSI payment of only its incurred costs in the amount of \$21,468 and denied the remainder of OSI’s claim for breach of contract damages. Exhibit 1 at 8. On September 18, 2015, OSI submitted to NPS its invoice in the amount of \$21,468. Exhibit 74. On September 28, 2015, OSI executed a release of claim in which it agreed that NPS’ payment of \$21,468 was a release of all claims with the exception of its breach of contract damages claim. Exhibit 75. OSI filed a timely appeal of the CO’s decision. Subsequently, each party filed a motion for summary relief.

Discussion

Both DOI and OSI have moved for summary relief regarding the issue of whether NPS’ termination of the contract for convenience was a breach of contract. OSI has accepted payment from NPS for its actual costs incurred under the contract, and the only issue before the Board is whether OSI is entitled to recover breach of contract damages. DOI’s motion for summary relief argues that neither of the grounds for breach of contract asserted in OSI’s claim, bad faith and abuse of discretion, are supported by the facts in this appeal. Additionally, DOI contends that the contract did not require NPS to purchase the required minimum under the contract before terminating the contract for convenience. For those reasons, DOI urges that the appeal be denied.

OSI’s motion alleges that the termination of its contract for convenience was the result of either bad faith or an abuse of discretion, and, in the alternative, OSI argues that it was a breach of contract for NPS to terminate the contract before purchasing the guaranteed minimum of \$2 million. With regard to its allegation of bad faith, OSI contends that NPS terminated the contract in order to obtain a better price for the work from a different contractor. OSI contends that the termination of its contract was an abuse of discretion because WCI’s protest lacked merit, and NPS had alternatives to terminating the contract in response to WCI’s protest. Additionally, OSI contends that NPS’ decisions to cancel the solicitation and award contracts to CEI and Homestead were unreasonable. Finally, OSI

argues that the CO did not make an independent decision to terminate the contract because he relied upon the advice of legal counsel.

The Board rules on the parties' motions for summary relief according to the same standard for summary judgment. *See GE Capital Information Technology Solutions-Federal Systems v. General Services Administration*, GSBCA 15467, 01-2 BCA ¶ 31,445, at 155,306 (summary relief is the analogous procedure to summary judgment). Summary judgment is only appropriate where there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* It is not the judge's function "to weigh the evidence and determine the truth of the matter." *Id.* at 249. All justifiable inferences and presumptions are to be resolved in favor of the nonmoving party. *Id.* at 255.

The moving party has the initial responsibility of stating the basis for its motion and "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[A]llegations without support are not evidence." *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,970 (quoting *Max Castle*, AGBCA 97-128-1, 97-1 BCA ¶ 28,833, at 143,845). Where both parties move for summary relief, each party's motion must be reviewed on its own merits, and all reasonable inferences must be resolved in favor of the non-moving party. *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001). The fact that cross-motions have been filed does not require the granting of one of the motions. *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001).

The Board addresses, first, whether the termination of OSI's contract either was done in bad faith or was an abuse of discretion. In general, termination for convenience is "[o]ne of the few exceptions to the common law requisite mutuality of contract." *Maxima Corp. v. United States*, 847 F.2d 1549, 1552 (Fed. Cir. 1988). "The Government can terminate a contract for convenience when it is in its best interests." *J.R. Mannes Government Services Corp. v. Department of Justice*, CBCA 5911, 18-1 BCA ¶ 37,015, at 180,263 (citing *Securiforce International America, LLC v. United States*, 879 F.3d 1354, 1365 (Fed. Cir. 2018)). Additionally, 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).

“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 recognizes 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); *see also Keco Industries v. United States*, 492 F.2d 1200, 1203-04 (Ct. Cl. 1974).

OSI cites the Board's decision in *Sigal Construction Corp. v. General Services Administration*, CBCA 508, 10-1 BCA ¶ 34,442, in support of its contention that NPS acted in bad faith by terminating the contract in order to obtain "the contract work . . . by another contractor at a better price." Appellant's Amended Motion for Summary Relief at 81. In *Sigal*, the Board found that during the course of contract performance, a GSA employee contacted another contractor and "request[ed] a cost proposal to perform . . . restoration required by the contract awarded to Sigal." *Id.* at 169,969. GSA then suspended part of Sigal's work under the contract. *Id.* The Board found that GSA "constructively terminated for convenience a portion of the contract." *Id.* at 169,971. Consequently, the Board held that "[i]t was a breach of contract." *Id.* Additionally, the Board recognized that "[o]ne of the few limitations on the Government's right to terminate for convenience is that the Government may not terminate simply to get a better price for performing needed work." *Id.* (citing *Krygoski Construction Co.*, 94 F.3d at 1541).

Additionally, OSI relies on *Krygoski Construction Co.* and *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982) (en banc), in support of its contention that NPS terminated its contract in order to obtain a better price. Appellant's Amended Motion for Summary Relief at 81. In *Krygoski Construction Co.*, the court recognized that "the applicability of . . . '[*Torncello*] stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by advert[ing] to the convenience termination clause.'" 94 F.3d at 1543-44 (quoting *Salsbury Industries v. United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990)). The court in *Torncello* stated, "We cannot condone termination based on knowledge of a lower cost when that knowledge preceded award of the contract." 681 F.2d at 772.

The grounds for showing bad faith as set forth in *Sigal*, *Krygoski*, and *Torncello* are not present in this appeal, and OSI's reliance on those decisions is misplaced. The record shows that NPS terminated OSI's contract in response to WCI's protest, and the termination of OSI's contract was part of an agreement to resolve that protest. OSI has neither proven nor alleged that NPS awarded the contract to OSI with the intent of not honoring that contract because a less expensive potential contractor had already been identified, and "[t]he mere fact that a contracting officer awards a contract to another company after terminating the . . . contract is insufficient to show bad faith." *Universal Home Health Supplies, Inc. v. Department of Veterans Affairs*, CBCA 4012, *et al.*, 16-1 BCA ¶ 36,370, at 177,285 (quoting *Kalvar Corp. v. United States*, 543 F.2d 1298, 1302 (Ct. Cl. 1976)).

OSI contends that NPS' "decision to take corrective action was unreasonable because [WCI's] Count 1 arguments (violation of FAR 15.507 [and] failure to mitigate unfair competitive advantage) were not a reasonable basis for the NPS to find actual impropriety in the award to [OSI], or any prejudice to [WCI]." Appellant's Amended Motion for

Summary Relief at 14. Additionally, OSI argues that NPS’ “decision to take corrective action was unreasonable because the NPS failed to consider its option of making multiple awards to [OSI] and [WCI].” *Id.* at 45. OSI contends that the corrective action, which included cancelling the solicitation and issuing new solicitations, “was not rationally related to the perceived impropriety in the award to [OSI].” *Id.* at 47. Although OSI acknowledges that GAO denied its protest of NPS’ decision to cancel the solicitation, OSI contends that “GAO’s April 2009 decision was irrational.” *Id.* at 75. The Board addresses OSI’s arguments along the lines of two issues: (1) the reasonableness of NPS’ termination of the contract in response to WCI’s protest; and (2) the Board’s jurisdiction to review matters related to NPS’ corrective action with regard to the solicitation.

We address, first, the reasonableness of NPS’ decision to terminate OSI’s contract in response to WCI’s protest. A contractor is not entitled to recover anticipated profits when an agency terminates a contract for convenience in response to a protest. *See G.C. Casebolt v. United States*, 421 F.2d 710, 712-13 (Ct. Cl. 1970) (contract terminated after protest filed); *John Reiner & Co.*, 325 F.2d at 443 (contract terminated after GAO ruled that contract award was improper); *Arnold V. Hedberg*, ASBCA 31747, 90-1 BCA ¶ 22,577, at 113,312 (1989) (termination of lease after GAO granted protest was “per se reasonable and done in good faith.”); *see also Salsbury Industries*, 905 F.2d at 1522 (“Convenience terminations have been sustained when they were invoked to avoid conflict with other governmental entities.”). In *G.C. Casebolt*, the court recognized that “it could clearly be deemed ‘in the best interest of the Government’ (the standard for a convenience-termination) to terminate plaintiff’s contract at once, so as to deflate the existing controversy . . . and to avoid a possible rebuke by the General Accounting Office.” 421 F.2d at 713.

The above-cited decisions recognized that the Government acts reasonably in resolving a protest informally because doing so avoids the possibility of an adverse decision, and resolving a protest by terminating a contract does not entitle a contractor to anticipated profits. Those decisions do not suggest that an adverse result from a protest must be proven with certainty in order to justify the termination of a contract, and the Board rejects OSI’s attempt to direct the Board into a detailed analysis of the merits of WCI’s protest as a means to determine the reasonableness of NPS’ decision to terminate the contract. NPS was faced with possible delays in contract performance and the expenditure of time and resources as a result of continuing to oppose WCI’s protest, and its decision to terminate OSI’s contract was, therefore, in the best interests of the Government. OSI is not entitled to recover anticipated profits under such circumstances.

OSI presents, at length, a number of grounds upon which NPS could have opposed WCI’s protest and suggests that NPS unreasonably failed to consider alternatives to the termination of its contract, such as multiple contract awards. The contract put OSI on notice

that the Government's right to terminate the contract for convenience was not affected by a protest. Such an attempt by OSI to argue that NPS could have successfully opposed WCI's protest or resolved it differently is a matter of speculation and not evidence. *See Bowers Investment Co. v. Department of Transportation*, CBCA 1196, 09-2 BCA ¶ 34,238, at 169,217 (appellant failed to carry burden of proof with a claim "based on unsubstantiated circumstantial evidence and speculation").

The second issue presented by OSI is whether the Board has jurisdiction to review the corrective action taken by NPS, which was the cancellation of the solicitation, and OSI's protest of that cancellation at GAO. This Board's jurisdiction is pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). Our authority under the CDA "is limited to hearing and deciding appeals by contractors of decisions issued by contracting officers on claims' by or against particular agencies of the Federal Government 'under contracts for the procurement of property (other than real property in being); services; construction, alteration, repair, or maintenance of real property; or disposal of personal property.'" *Kristin Allred v. Department of Veterans Affairs*, CBCA 4952, 15-1 BCA ¶ 36,108, at 176,282 (quoting *AMEC Construction Management, Inc. v. General Services Administration*, CBCA 389, et al., 07-1 BCA ¶ 33,505, at 166,039). The CDA "deals with contractors, not with disappointed bidders." *Coastal Corp. v. United States*, 713 F.2d 728, 730 (Fed. Cir. 1983) (quoting *United States v. John C. Grimberg, Inc.*, 702 F.2d 1362, 1368 (Fed. Cir. 1983)). In contrast, "bid protest jurisdiction arises when an agency decides to take corrective action even when such action is not fully implemented." *Systems Application & Technologies, Inc. v. United States*, 691 F.3d 1374, 1381 (Fed. Cir. 2012). The Competition in Contracting Act (CICA), 31 U.S.C. §§ 3552-3556, provides that "the Comptroller General may determine whether the solicitation, proposed award, or award complies with statute and regulation." *Id.* § 3554(b)(1). NPS' decision to terminate the contract and its decision to cancel the solicitation were two separate actions, and the Board only reviews the termination of the contract pursuant to the CDA. The Board does not review NPS' decision to take corrective action by cancelling the solicitation. Although OSI again argues, at great length, that the cancellation of the solicitation was unreasonable and that GAO's denial of its protest of the cancellation was "irrational," the Board's CDA jurisdiction does not allow for the review of matters that GAO addressed almost ten years ago.

Finally, OSI erroneously contends that NPS' termination of the contract was a breach of contract because the CO did not "'put his own mind to the problems and render his own decisions' as to whether a termination was in the Government's interest." Appellant's Amended Motion for Summary Relief at 80 (quoting *New York Shipbuilding Corp. v. United States*, 385 F.2d 427, 435 (Ct. Cl. 1967)). In *Securiforce International America, LLC v. United States*, 879 F.3d 1354 (Fed. Cir. 2018), the Court recognized the following:

In *New York Shipbuilding Corp. v. United States* . . . the Court of Claims determined that where a contract specified that factual disputes “shall be decided by the Nuclear Projects Officer of the Maritime Administration,” [385 F.2d] at 429, the contractor was entitled to a resolution by that particular officer, *id.* at 433-35. “The contractor, in particular, bargained for the Nuclear Projects Officer as the first tribunal to determine controversies,” but a different official rendered the final decision, contrary to the contract’s terms. *Id.* at 434.

.....

Securiforce’s contract required only that “[t]he Government” make the termination decision. Our cases interpreting similarly worded clauses in the default context do not require a decision by a particular official but only a reasonable conclusion that there was no reasonable likelihood the contractor would perform within the time remaining. . . . We conclude that the Claims Court erred in holding that the decision to terminate for convenience was invalid because it was not reached independently by the CO.

879 F.3d at 1364. OSI’s reliance on *New York Shipbuilding*, therefore, is misplaced because that decision dealt with a contract requirement for decisions to be made by the nuclear projects officer, and there was no similar requirement in OSI’s contract. The Termination for Convenience clause stated that “[t]he Government may terminate performance of work.” Nothing in the contract suggests that the CO’s decision to terminate the contract would be made in isolation. OSI offers no legal authority to suggest that the CO should have made his decision without considering the advice of others, including legal counsel. In response to OSI’s discovery, the CO stated that he made his decision to terminate OSI’s contract based upon advice of counsel, but the decision “fell on [his] shoulders.” No reasonable reading of that statement would suggest that the CO abdicated his responsibility or acted in any manner contrary to the requirements of the contract.

OSI’s alternate theory for summary relief argues that it is entitled to recover its anticipated profits on the required contract minimum of \$2 million because “[a]n obligatory minimum quantity is necessary to provide non-illusory consideration for an indefinite quantities contract.” Appellant’s Amended Motion for Summary Relief at 90. “[T]he Government’s decision to terminate a contract for convenience essentially acts to convert a fixed-price contract into a cost reimbursement contract.” *Russell Sand & Gravel Co. v. International Boundary & Water Commission*, CBCA 2235, 13 BCA ¶ 35,455, at 173,868 (citing *Divecon Services, LP v. Department of Commerce*, GSBCA 15997-COM, et al., 04-2 BCA ¶ 32,656, at 161,636; *Airo Services, Inc. v. General Services Administration*, GSBCA 14301, 98-2 BCA ¶ 29,909, at 148,071; *Richerson Construction, Inc. v. General*

Services Administration, GSBCA 11161, et al., 93-1 BCA ¶ 25,239, at 125,704 (1992); *Praecom, Inc. v. United States*, 78 Fed. Cl. 5, 12 (2007), *aff'd*, 296 F. App'x 929 (Fed. Cir. 2008)). “Boards of Contract Appeals have recognized that the Government may terminate an indefinite-quantity contract prior to purchasing the minimum quantity, without rendering the contract illusory due to lack of consideration.” *Montana Refining Co.*, ASBCA 50515, 00-1 BCA ¶ 30,694, at 151,627 (1999) (citing *Plaza 70 Interiors, Ltd.*, HUD BCA 94-C-150-C9, 95-2 BCA ¶ 27,668, at 137,938-39; *Automated Services, Inc.*, DOT BCA 1753, 87-1 BCA ¶ 19,459, at 98,353). “[T]he compensation available under the termination for convenience clause provides adequate consideration to the contractor.” *Id.* The contract, therefore, did not require NPS to purchase the minimum quantity under the contract before it could terminate the contract for convenience, and the Government’s right to terminate the contract for convenience does not render it illusory. OSI has already recovered its actual, incurred costs under the contract, and it is not entitled to recover any anticipated profits.

Additionally, OSI argues that “[t]he Order of Precedence clause gives the guaranteed minimum terms precedence over the termination for convenience clause.” Appellant’s Amended Motion for Summary Relief at 87. Such an interpretation, however, “would vitiate the Termination for Convenience clause and, thus, be contrary to the rule that an interpretation should avoid conflict between contract provisions.” *Montana Refining Co.*, 00-1 BCA at 151,629 (citing *Hol-Gar Manufacturing Corp. v. United States*, 35 F.2d 972, 979 (Ct. Cl. 1965)). “[W]here a contract provision is clear, ‘[t]he rules of contract construction should not be permitted to create an ambiguity where none exists or change or twist the plain meaning of a simple agreement.’” *National Housing Group, Inc. v. Department of Housing & Urban Development*, CBCA 340, et al., 09-1 BCA ¶ 34,043, at 168,377 (quoting *WIBCO, Inc.*, GSBCA 4247, 75-2 BCA ¶ 11,564, at 55,208). The Order of Precedence clause in the contract only applied in resolving an inconsistency between contract provisions, but the Termination for Convenience clause was not inconsistent with the required minimum under the contract. As discussed above, a termination for convenience converts a fixed-price contract into a cost reimbursement contract, and, consequently, the contractor’s recovery is limited to the cost of work performed up to the point of termination. No reasonable reading of the contract would suggest that OSI is entitled to be paid anticipated profits for work never performed because the contract was terminated for convenience.

The Board finds that there are no material facts in dispute for purposes of deciding this appeal on the issue of whether OSI is entitled to recover breach of contract damages. DOI’s motion has shown that NPS properly terminated the contract for convenience and that OSI is not entitled to recover breach of contract damages. OSI has not established that the termination for convenience was either done in bad faith or was an abuse

of discretion, and NPS was not obligated to purchase the required contract minimum before terminating the contract for convenience. In the absence of a dispute of material facts, the Board finds that OSI has failed to meet its burden of proof and denies its motion, and the Board grants the Government's motion.

Decision

Appellant's motion for summary relief is denied. The Government's motion for summary relief is granted. The appeal is **DENIED**.

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge

I concur:

Catherine B. Hyatt

CATHERINE B. HYATT
Board Judge

VERGILIO, Board Judge, concurring.

Because I would grant the agency's motion for summary judgment (which makes moot the contractor's motion), I concur in the result denying the appeal. The contractor contends that the termination for convenience is a breach of the contract and that it is entitled to profits on work not performed (it has received other termination settlement costs). The contract permits the agency to terminate the contract. Although the contractor contends that the contracting officer acted in bad faith and abused his discretion, neither assertion is sufficiently substantiated to support the notion that the termination was a breach and thus avoid summary judgment. Under the contract, the contractor is not entitled to profits on work not performed. The contractor does not prevail.

In seeking what it characterizes as lost profits, the contractor contends in its complaint that the agency breached the contract by failing to satisfy the minimum requirements of the contract, and that the contracting officer acted in bad faith and abused his discretion in terminating for convenience the underlying contract.

The contract contains a Termination for Convenience clause. In response to a protest, the agency terminated for convenience the contract with the contractor. The contract permits such a termination and details the relief available to the contractor. The contractor may recover profits on work performed, but not on work not performed. The guaranteed minimum in the contract is subject to the termination for convenience provisions and the relief available thereunder. The contractor is not entitled to the profits it seeks under the clause and contract. *Greenlee Construction, Inc. v. General Services Administration*, CBCA 415, et al., 07-2 BCA ¶ 33,619, at 166,513.

The contractor contends that the termination for convenience represents a breach of the contract, such that its relief should not be limited to that defined by the clause. The contractor has failed to identify any specific conduct by the contracting officer in terminating the contract for convenience that would support a conclusion that the action was taken in bad faith or represents an abuse of discretion. *J.R. Mannes Government Services Corp. v. Department of Justice*, CBCA 5638, 17-1 BCA ¶ 36,911.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge