No. 18-37

In the Supreme Court of the United States

SECURIFORCE INTERNATIONAL AMERICA, LLC,
PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government abused its discretion in exercising its contractual right to partially terminate a procurement contract for convenience when the contracting officer who signed the associated contract-modification paperwork worked with her supervisory contracting officer and a contracting team that reached the termination decision, so that the contracting officer herself did not "independently" make the decision to partially terminate the contract.

TABLE OF CONTENTS

Page

Opinions below ... 1
Jurisdiction ... 1
Statement ... 1
Argument ... 9
Conclusion ... 14

TABLE OF AUTHORITIES

Cases:

AINS, Inc. v. *United States*, 365 F.3d 1333 (Fed. Cir. 2004), abrogated in part on other grounds, *Slattery* v. *United States*, 635 F.3d 1298 (Fed. Cir. 2011) ... 11

Branti v. *Finkel*, 445 U.S. 507 (1980) ... 14

Camreta v. *Greene*, 563 U.S. 692 (2011) ... 11

Earman v. *United States*, 114 Fed. Cl. 81 (2013) ... 11

INS v. *Orlando Ventura*, 537 U.S. 12 (2002) ... 13

New York Shipbuilding Corp. v. *United States*, 385 F.2d 427 (Ct. Cl. 1967) ... 10, 11

Russello v. *United States*, 464 U.S. 16 (1983) ... 10

SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) ... 13

SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) ... 13

United States v. *Johnston*, 268 U.S. 220 (1925) ... 14

Statutes, regulations, and rule:

Contract Disputes Act of 1978, 41 U.S.C. 7101 *et seq.* ... 1

41 U.S.C. 7103(a)(1) ... 6

41 U.S.C. 7103(a)(3) ... 6

41 U.S.C. 7103(g) ... 6

41 U.S.C. 7104(a) ... 6

41 U.S.C. 7104(b) ... 6

Statutes and rule—Continued: Page

Trade Agreements Act of 1979, 19 U.S.C. 2501 *et seq.* 3
19 U.S.C. 2511 (note) 3
19 U.S.C. 2512(a)(1) 3
19 U.S.C. 2512(b)(2) 3
48 C.F.R.:
Section 1.602-1(a) 11
Section 12.403(b) 12
Pt. 52:
Section 52.212-4(*l*) 2
Section 52.225-5 3
Section 52.229-6(h) 10
Section 52.233-1 6
Section 52.233-1(c) 6
Pt. 225:
Section 225.403(c)(ii) 3
Section 225.403(c)(ii)(B) 3
Sup. Ct. R. 10(a) 11

Miscellaneous:

Exec. Order No. 12,260, § 1-201, 3 C.F.R. 312 (1980 Comp.) 3
S. Rep. No. 1118, 95th Cong., 2d Sess. (1978) 13

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 879 F.3d 1354. The opinion of the Court of Federal Claims (Pet. App. 24a-141a) is reported at 125 Fed. Cl. 749.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2018. A petition for rehearing was denied on April 4, 2018 (Pet. App. 142a-143a). The petition for a writ of certiorari was filed on July 3, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This suit under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 7101 *et seq.*, involves a 2011 contract for the delivery of fuel to several sites within the Republic of Iraq, which petitioner would have supplied

from the State of Kuwait. Pet. App. 2a, 24a-25a. That source of fuel became problematic and led to the government's partial termination of the contract with respect to two of the sites, *id.* at 14a-15a, under a contract provision that authorized the "Government" to terminate the contract in whole or in part for its "sole convenience," C.A. App. 791 (contract provision); cf. 48 C.F.R. 52.212-4(*l*). Petitioner contends that the government's partial termination of the contract was itself a breach of contract because the contracting officer who signed the termination document (Phyllis Watson) did not sufficiently exercise her own independent judgment in making the termination decision. See Pet. 4-9.

a. On September 7, 2011, the Defense Logistics Agency Energy (DLA Energy), a component of the Department of Defense, awarded petitioner a contract for the delivery of fuel to eight State Department sites within Iraq, which petitioner intended to supply from Kuwait. Pet. App. 2a, 25a. That fuel contract was managed primarily by two contracting officers within DLA Energy: Sandra Shepherd, the chief for one of DLA Energy's divisions who performed both supervisory and contracting-officer functions; and Watson, one of Shepherd's subordinates. Trial Tr. (Tr.) 2112, 2114, 2382; see Pet. App. 28a, 85a, 87a, 105a.

Shepherd was the contracting officer responsible for the contract solicitation. Tr. 2383. After Shepherd was promoted to Division Chief, DLA Energy hired Watson to backfill the position that Shepherd had previously occupied. Tr. 2383, 2594-2595. Watson later testified that managing petitioner's contract was a "team effort" that involved not only Shepherd and her, but also others, including contract specialist Kimberly Bass. Tr. 1809-

1810; see Tr. 1484.[1] Consistent with that team approach, Watson obtained prior approval from Shepherd (her supervisor) before signing the September 7 contract that was awarded to petitioner. Tr. 2266.

One day after the contract was awarded, an attorney in DLA Energy identified for the first time a problem with the contract involving the Trade Agreements Act of 1979 (TAA), 19 U.S.C. 2501 *et seq*. See Pet. App. 28a-29a. Under the TAA, the government in some contexts must acquire certain supplies only from designated countries, unless, as relevant here, an authorized agency head has issued a case-specific "national interest" waiver for the acquisition. 19 U.S.C. 2512(a)(1) and (b)(2); see 48 C.F.R. 225.403(c)(ii); Pet. App. 27a. A national-interest waiver was required for petitioner to supply fuel from Kuwait because Kuwait is not a "[d]esignated country." 48 C.F.R. 52.225-5; see Pet. App. 15a, 27a, 140a n.4. The United States Trade Representative (USTR) is generally authorized to grant such waivers. Exec. Order No. 12,260, § 1-201, 3 C.F.R. 312 (1980 Comp.), reprinted as amended in 19 U.S.C. 2511 note. The Department of Defense, however, has independent but more limited authority to "approve national interest waivers for purchases of fuel for use by U.S. forces overseas." 48 C.F.R. 225.403(c)(ii)(B).

Because petitioner's contract was to deliver fuel to eight sites operated by the State Department, DLA Energy officials concluded that the contract would have to

[1] See also, *e.g.*, Tr. 2366, 2500 (Shepherd's testimony that both the termination for convenience and a later termination for cause were decisions made by the contracting "team" within DLA Energy); Tr. 1487, 1510 (Bass's testimony that the contract was "assigned to several different people" and that all members of the "team" were involved in the procurement).

be terminated for convenience unless they could obtain a TAA waiver from the USTR through a Defense Procurement Acquisitions Policy (DPAP) process. Pet. App. 28a. Agency officials later determined, however, that a Defense Department organization was present at six of the eight State Department sites, and that DLA Energy itself therefore could issue a waiver for those six sites and thus avoid the DPAP process. *Id.* at 28a-29a. DLA Energy accordingly processed a waiver for the six sites. *Id.* at 29a, 106a, 144a.

DLA Energy determined that a partial contract termination for convenience was warranted with respect to the two remaining State Department sites. Pet. App. 29a-30a. After petitioner declined to accept a bilateral contract modification to terminate those sites, *id.* at 30a-31a, the DLA Energy contracting team discussed the matter and decided to terminate part of the contract unilaterally to eliminate the sites. Tr. 1811-1812 (Watson testimony); Tr. 2500 (Shepherd). Watson later testified that, in deciding as a contracting officer to partially terminate the contract, she had relied on a memorandum prepared by Bass. Tr. 1753. That memorandum explained that petitioner's sourcing of fuel from Kuwait required a TAA waiver; that DLA Energy's delegated authority to issue such a waiver required a "significant military presence" at the sites in question; and that three contract line-item numbers (corresponding to the two sites) had an insufficient military presence to justify a DLA Energy waiver "at the time of award." C.A. App. 3551 (memorandum); see Pet. App. 29a. The team was also concerned with the potential delay that might result from seeking a waiver from the USTR. Pet. App. 15a-16a, 107a; see *id.* at 102a (noting "the urgency to ensure fuel deliveries * * * in a conflict zone").

By letter dated September 23, 2011, signed by Shepherd (Watson's supervisor), DLA Energy informed petitioner that the contract line items pertaining to the two sites had not been "properly evaluated in compliance with the [TAA]"; that DLA Energy could issue a TAA waiver for other locations but that a USTR-issued waiver was needed for the line items in question; and that the "government [wa]s terminating" for convenience those portions of the contract "rather than seek[ing] such a waiver" from the USTR. C.A. App. 3552 (letter). Watson later testified that the information in that letter was the basis for her signing the document (*id.* at 3553-3555) that partially terminated petitioner's contract for convenience. Tr. 1812. Watson also testified that she had engaged in prior "discussions" with her supervisor (Shepherd) about the decision, Tr. 1750, 1754, and that Shepherd had concluded that the partial termination was in the government's best interests, Tr. 1750. Watson accordingly stated that the she had not made an "independent decision" on the matter. *Ibid.*; see Pet. App. 105a.

b. In October 2011, petitioner failed to deliver fuel orders under the remaining portion of the contract. Pet. App. 41a, 44a. On November 4, 2011, Shepherd issued a show-cause-notice letter in her capacity as Division Chief and contracting officer, informing petitioner that the agency was considering termination of the contract for default. C.A. App. 1307-1308 (letter); see Pet. App. 42a, 85a. On November 15, 2011, Shepherd explained that petitioner had not sufficiently justified its breach, and the government terminated the balance of the contract for cause. Pet. App. 87a-88a; see *id.* at 44a.

2. a. The CDA establishes a process for federal contractors to present contract claims to a contracting

officer and to seek review of the resulting decision. The CDA provides that "[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision." 41 U.S.C. 7103(a)(1). In this context, a "claim" is a written demand or assertion seeking "the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to th[e] contract." 48 C.F.R. 52.233-1(c); C.A. App. 789 (contract provision incorporating Section 52.233-1). A contracting officer must then issue a written decision on the claim, 41 U.S.C. 7103(a)(3), which "is final and conclusive and is not subject to review * * * , unless an appeal or action is timely commenced" as provided by the CDA, 41 U.S.C. 7103(g). The contractor may obtain such review by filing either an administrative appeal, 41 U.S.C. 7104(a), or a contract action in the Court of Federal Claims (CFC) "in lieu" of an administrative appeal, 41 U.S.C. 7104(b).

b. In this case, petitioner filed suit in the CFC, challenging the November 2011 termination of its contract for cause, without first submitting a claim to a contracting officer. Pet. App. 44a-45a. Petitioner subsequently submitted a letter requesting that a contracting officer issue a final decision declaring the September 2011 partial contract termination for convenience to be a material breach of contract. *Id.* at 45a. In response, a contracting officer explained by letter that petitioner's claim was likely without merit, but that a final decision could not be made because, among other things, petitioner did not state a sum certain and thus failed to present a cognizable "claim." *Ibid.* Petitioner subsequently amended its CFC complaint to challenge both

the September 2011 partial termination for convenience and the November 2011 termination for cause. *Ibid.*

c. After a bench trial, the CFC entered judgment for petitioner on its claim for declaratory relief concerning the September 2011 partial termination for convenience, and for the government with respect to the November 2011 termination for cause. 7/13/2016 Judgment; see Pet. App. 92a-93a.

In its post-trial opinion (Pet. App. 24a-141a), the CFC determined that it had jurisdiction to address petitioner's partial-termination-for-convenience claim. *Id.* at 49a-92a. The CFC then held that the partial termination for convenience constituted a breach of contract, *id.* at 93a-110a, because the decision was "an abuse of discretion by the government," *id.* at 103a-108a. The court stated that a "contracting officer has a duty to exercise independent judgment in terminating the contract for convenience"; that "contracting officer Phyllis Watson" had testified that she had not made "'an independent decision'" in this regard; and that "[Watson's] failure to do so was a breach of th[e] obligation" to "exercise independent judgment." *Id.* at 105a, 108a.

The CFC further held, however, that the partial termination for convenience did not affect petitioner's ability to perform the balance of the contract and thus did not render improper the government's subsequent termination for cause. Pet. App. 108a-110a. The court likewise rejected petitioner's remaining bases for challenging the government's decision to terminate the contract for cause in light of petitioner's failure to deliver fuel. *Id.* at 110a-139a.

3. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-23a.

The court of appeals held that the CFC lacked jurisdiction to review the partial termination for convenience because petitioner had not presented a proper "claim" to a contracting officer on that matter before filing suit, as required by the CDA. Pet. App. 4a-9a. The court concluded, however, that the CFC could consider the issue as one of petitioner's defenses to the government's subsequent termination for cause. *Id.* at 9a-11a. Based on circuit precedent, the court of appeals further held that "a termination for default is a government claim not subject to [contracting-officer] presentment under the CDA." *Id.* at 12a.

On the merits, the court of appeals overturned the CFC's holding that the government's partial termination for convenience was an abuse of discretion. Pet. App. 12a-17a. First, the court concluded that petitioner's contract—which provided that "'[t]he Government reserves the right to terminate this contract, or any part thereof, for its sole convenience,'" *id.* at 12a (citation omitted)—"required only that '[t]he Government' make the termination decision" and did not require that a contracting officer "independently" make "the decision to terminate for convenience." *Id.* at 14a (brackets in original). The court explained that it had previously "interpret[ed] similarly worded clauses" as "not requir[ing] a decision by a particular official," *ibid.*, and that the CFC had mistakenly relied on prior decisions involving different "contractual language that entitled the contractor to the resolution of factual disputes by a particular official," *id.* at 13a.

Second, the court of appeals held that the government had not abused its discretion by partially terminating the contract for convenience. Pet. App. 14a-17a.

The court explained that, once the government determined that "two [of the] sites [at issue] required a USTR waiver," *id.* at 15a, it had discretion to terminate the contract for convenience with respect to those sites, because "of both the contract's conflict with the TAA and the possibility that seeking a waiver would cause unacceptable delay," *id.* at 16a.

Because it "conclude[d] that the government did not breach the contract by terminating for convenience," the court of appeals declined to "reach the question whether a breach, had it occurred, would have excused [petitioner's] default" that had led the government to terminate the contract for cause. Pet. App. 17a. The court also rejected petitioner's other challenges to the termination for cause. *Id.* at 17a-21a.

ARGUMENT

As the court of appeals correctly held, petitioner's contract did not specify that a contracting officer must "independently" make "the decision to terminate for convenience," but rather required "only that '[t]he Government' make" that decision. Pet. App. 14a. That holding presents no broad issue of continuing importance. Further review is not warranted.

1. Petitioner contends (Pet. 5-9) that a contracting officer must "make an independent determination" when the government terminates a contract. Pet. 5 (emphasis omitted). That is incorrect. Neither petitioner's contract nor any regulatory provision required the contracting officer (Watson) who signed the paperwork that partially terminated petitioner's contract for convenience to make the termination decision "independently," rather than as part of the agency team that managed the contract.

The court of appeals correctly focused on the text of petitioner's contract, which provided in pertinent part that "[t]he Government reserves the right to terminate this contract, or any part thereof, for its sole convenience." C.A. App. 791 (contract, INT-I1.03-8(n)). That provision is different from others in the contract, which use the term "Contracting Officer" rather than the broader term "Government." See, *e.g.*, *id.* at 783, 785, 794 (INT-G150.03-1(a), (b)(4), and (e)(2); INT-G150.07-2(c); and FAR 52.229-6(h)). For instance, the same contract section at issue here (INT-I1.03-8) uses the term "Contracting Officer" in other subsections when the particular official is significant. *Id.* at 789 (INT-I1.03-8(f) and (g)(a)(i)). Just as such "disparate inclusion or exclusion" in a statute is presumed to reflect an "intentional[] and purpose[ful]" choice, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted), this contract's disparate inclusion and exclusion of "Government" and "Contracting Officer" reflect distinct contractual requirements. The court below correctly held that the termination-for-convenience provision "required only that '[t]he Government' make the termination decision" and did not require that a contracting officer make that decision "independently." Pet. App. 14a (brackets in original).[2]

Petitioner relies (Pet. 6-7) on the 1967 decision in *New York Shipbuilding Corp.* v. *United States*, 385 F.2d

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[2] The government may choose to vest a particular contracting officer with responsibility for making a decision that a contract vests in the "Government." See Pet. 8-9 (citing such cases). But such a contractual provision does not *require* a specific decisionmaker or require that a contracting officer make any such decision unilaterally. In this case, Shepherd and her subordinate, Watson, were both warranted contracting officers.

427, 435 (Ct. Cl.), to support its position that contracting officer Watson should have "made an independent decision" that the partial termination was in the government's best interests. *New York Shipbuilding* was decided well before the 1978 enactment of the CDA and the promulgation of the current Federal Acquisition Regulation (FAR). In addition, that case involved materially different "contractual language that entitled the contractor to the resolution of factual disputes by a particular official." Pet. App. 13a. Because the contract in *New York Shipbuilding* specified that certain contract disputes "'shall be decided by the Nuclear Projects Officer of the Maritime Administration,'" 385 F.2d at 429 (citation omitted), the Court of Claims concluded that the contractor had "bargained for the Nuclear Projects Officer as the first tribunal to resolve controversies," *id.* at 434, and that the resolution of disputes by a different entity was a breach of contract, *id.* at 433-435. The logic of that decision is fully consistent with the court of appeals' construction of the differently worded contract provisions at issue here.[3]

One FAR provision on which petitioner relies (Pet. 5, 8) describes the powers of "[c]ontracting officers" as generally including "authority to * * * terminate contracts and make related determinations." 48 C.F.R. 1.602-1(a). Another states that a "contracting officer

[3] Petitioner cites (Pet. 7 n.1) more recent CFC decisions that follow the approach taken in *New York Shipbuilding*. But "CFC holdings, like those of federal district courts, are * * * not precedential, and do not bind future court rulings." *AINS, Inc.* v. *United States*, 365 F.3d 1333, 1336 n.1 (Fed. Cir. 2004), abrogated in part on other grounds, *Slattery* v. *United States*, 635 F.3d 1298 (Fed. Cir. 2011) (en banc); see *Earman* v. *United States*, 114 Fed. Cl. 81, 102 (2013); cf. *Camreta* v. *Greene*, 563 U.S. 692, 709 n.7 (2011). Those decisions therefore provide no basis for this Court's review. See Sup. Ct. R. 10(a).

should exercise the Government's right to terminate a contract for commercial items * * * for convenience * * * only when such a termination would be in the best interests of the Government." 48 C.F.R. 12.403(b). Those regulations do not undermine the government's partial termination of petitioner's contract in this case.

Contracting Officer Shepherd was responsible for the contract solicitation, was Watson's supervisor for the contract, and later signed the termination of petitioner's contract for cause. See pp. 2-3, 5, *supra*. Shepherd's conclusion that the partial termination of the contract would serve the government's best interests, and the fact that Watson herself did not make an "independent decision" on the matter, Tr. 1750, simply reflect that Watson properly accounted for the views of her supervisor on the contract. Although Watson's memory about the specifics of the decision was hazy in some respects, she made clear that she had "relied on" a memorandum for record explaining the reasons for the termination, Tr. 1753; see C.A. App. 3551 (memorandum), and that the "basis for [her] signing the termination for convenience letter" was reflected in the explanatory letter that Shepherd had written to petitioner, Tr. 1812; see C.A. App. 3552 (letter signed by Shepherd).

Nothing in petitioner's contract or in any provision of law requires an individual contracting officer to administer government contracts in a manner separate and independent from the contracting teams that are appropriately used to manage complex, modern procurement contracts. When Congress enacted the CDA in 1978, it was understood that, even when formal contract "claims" are presented to a contracting officer for a final decision, it would be "unrealistic to suggest that

the various levels of management responsible for the projects and programs to which a contract relates and that bear the responsibility for the propriety and wisdom of the agency's action should at all times remain aloof from the manner in which contracts are administered." S. Rep. No. 1118, 95th Cong., 2d Sess. 21 (1978). The Senate Report accompanying the CDA observed that it would be "impossible to generalize as to what the contracting officer's role should be in all situations," because "practicability dictates * * * the extent to which the contracting officer relies on his own judgment or abides by the advice or determination of others." *Ibid.* The court of appeals correctly rejected petitioner's impractical view that individual contracting officers must act wholly independently when administering complex government contracts.

2. Petitioner argues (Pet. 10-12) that the court below departed from this Court's teachings in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*), and *Chenery*'s progeny, which prohibit a "reviewing court[]" from "stepping into the shoes of [the] agenc[y]" and making a "discretionary judgment[] on [the agency's] behalf." Pet. 10. The *Chenery* principle ensures that a decision that is "place[d] primarily in agency hands" be made as an initial matter by the agency and not by a reviewing court. See *INS* v. *Orlando Ventura*, 537 U.S. 12, 16 (2002) (per curiam) (quoting *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943), and citing *Chenery II*, 332 U.S. at 196). That principle has no bearing on the identification of the person(s) *within* an agency who must make a particular decision on the government's behalf.

3. Petitioner invokes (Pet. 12-14) the court of appeals' observation that the government's rationale for

partially terminating petitioner's contract was the subject of "conflicting testimony." Pet. 13 (quoting Pet. App. 23a n.1). The court below noted that some of the testimony offered at trial had "suggest[ed] that there were Defense personnel at the other two sites and that the Defense waiver was therefore effective as to those sites, as well." Pet. App. 23a n.1. The court of appeals observed, however, that the CFC (after a bench trial) had "credited other witnesses' testimony to the contrary," and it correctly held that the CFC's factual findings were "not clearly erroneous." *Ibid.* To the extent that petitioner challenges the relevant CFC findings under the clear-error standard, that factbound contention lacks merit and does not warrant further review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."); see also *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980) (discussing this Court's "settled practice" of "accepting, absent the most exceptional circumstances, [such] factual determinations in which the district court and the court of appeals have concurred").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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