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APPELLEE'S BRIEF

BRIEF FOR DEFENDANT-APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2008-5059

WILLIAM D. HOOKER (doing business as
Georgia Bowhunters Supply),

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 03-CV-1501,
Senior Judge Robert H. Hodges, Jr.

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July 16, 2008

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STATEMENT OF RELATED CASES

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

BRIEF FOR DEFENDANT-APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2008-5059

William D. Hooker,
Plaintiff-Appellant,

v.

United States,
Defendant-Appellee.

STATEMENT OF THE ISSUES

1. Whether the trial court's holding, that claimant abandoned his hog-trapping contract when he stopped performing, turned in his equipment, submitted a final invoice, and did not seek to resume performance, was clearly erroneous.

2. Whether the trial court correctly held that claimant could not obtain reformation of the beaver trapping contract where he failed to produce evidence of physical or financial damages.

3. Whether the trial court correctly held that the Government did not breach claimant's requirements contract for trapping beavers when a drought decreased the need for beaver trapping through no fault of the Government.

STATEMENT OF THE CASE

I. Nature of the Case

Plaintiff-appellant, William D. Hooker, appeals from the decision by the United States Court of Federal Claims in Hooker v. United States, 79 Fed. Cl. 480 (2007). At trial, Mr. Hooker attempted to demonstrate that the Government was liable for the alleged breach of contracts for trapping beavers (the "beaver contract") and hogs (the "hog contract") at the Department of Energy's Savannah River Site in South Carolina. First, Mr. Hooker argued that a contract modification extended the hog contract to November 2001 and that the Government breached the contract by allegedly hindering his performance between November 30, 1999 and November 2001. SA13 at 19 - SA14 at 1.[1] Second, he alleged that work on the beaver contract exposed him to radioactive contamination about which the Government failed to inform him, and that the trial court should reform the beaver contract to reflect what he "would have bid" had he known of the alleged contamination. SA14 at 2–14. Finally, Mr. Hooker argued that the Government acted in bad faith by reducing his work orders and attempting to induce him to abandon his contracts. SA15 at 15–17.

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[1] "PA ___" refers to plaintiff's appendix. "SA ___" refers to the supplemental appendix attached to this brief. "Pl's Br. __" refers to Mr. Hooker's opening brief. References are to appendix page numbers and, where appropriate, line numbers. Thus, "SA13 at 19" refers to appendix page 13 at line 19.

II. Course of Proceeding and Disposition Below

This appeal arises from two consolidated cases, Court of Federal Claims Nos. 03-1501C and 04-1126. Mr. Hooker filed his first complaint on June 17, 2003 and his second on July 7, 2004. The cases were consolidated for trial on July 23, 2004. On April 17, 2007, the trial court denied the parties' cross motions for summary judgment. A trial was conducted in Aiken, South Carolina on September 12 and 13, 2007.

During his case in chief, Mr. Hooker called numerous witnesses, including Government employees and employees of Washington Savannah River Company, the Government Managing and Operating Contractor at the site.[2] After Mr. Hooker rested his case, the Government moved for a judgment on partial findings pursuant to Rule 52(c) of the Rules of the United States Court of Federal Claims. SA238 at 5-25 – SA239 at 1-3. The trial court granted the Government's motion, holding that Mr. Hooker had failed to establish that the Government breached either the hog contract or the beaver contract. PA7.[3] The trial court held that: (1) Mr. Hooker abandoned the hog contract in November 1999 and did not attempt to

[2] The Westinghouse Savannah River Company ("WSRC") changed its name to the Washington Savannah River Company during the course of these proceedings.

[3] On September 13, 2007, the trial court dictated its decision into the record from the bench, and on November 28, 2007, the trial court issued a written opinion.

perform any work after November 30, 1999, PA7; (2) Mr. Hooker did not produce any evidence to show that he had suffered physical or financial damages as a result of the Government's alleged failure to inform him of the alleged contamination and, therefore, there would be no remedy available even if his allegations were true, id.; and (3) the Government did not act in bad faith in its administration of the beaver or hog contracts, SA277 at 11-15.

On appeal, Mr. Hooker first argues that the trial court erred in finding that he abandoned the hog contract on November 30, 1999, because the court allegedly ignored evidence that the Government prevented him from performing. Pl's Br. 22. Second, he contests the trial court's conclusion that there was no remedy available for the Government's alleged failure to inform him of radiological dangers. Id. at 22–27. Finally, he argues that the Government "breached the beaver contract in bad faith when it had requirements for beaver trapping yet failed to give him work orders." Id. at 14.

STATEMENT OF FACTS

A. The Savannah River Site

The Savannah River Site ("SRS") is a Department of Energy ("DOE") facility that occasionally produces radioactive isotopes for defense, space exploration, and medical purposes. PA1. The United States Forest Service has an Interagency Agreement with DOE to manage natural resources at SRS. PA2.

B. The Hog Contract

On October 29, 1997 the Forest Service awarded Mr. Hooker a contract to trap hogs causing damage at the SRS. SA286, ¶ 22. The Government exercised its option to extend the contract for one year, through September 30, 1999. SA288, ¶ 34. As the expiration of the contract approached, however, the parties agreed to extend the term of the contract "to October 31, 1999, or until a new contract is awarded." PA29; SA288, ¶ 35. Mr. Hooker continued to perform the contract until November 30, 1999, after which he ceased hunting hogs. PA7 SA297, ¶ 109.[4] Sometime after that date, the Government asked Mr. Hooker to turn in his equipment and submit a final invoice. SA24 at 1–24. On January 5, 2000, Mr. Hooker turned in his Government equipment and submitted a final invoice for the hogs that he had trapped previously. PA7; SA288, ¶ 39.

[4] Mr. Hooker testified at his deposition that he stopped hunting hogs at the site because he was tired of the contract and, in his words, had "had enough of the BS." SA314 (p. 59, ln. 5 of deposition transcript).

Both Homer Gabard, the Forest Service contracting officer, and Frankie Brooks, his subordinate, testified that Mr. Hooker complied with the Government's requests to turn in his equipment and submit a final invoice without objection, and that Mr. Hooker did not give any indication that he expected the contract to continue past November 30, 1999. SA67 at 22 – SA68 at 10; SA112 at 21 – SA113 at 1.

C. The Beaver Contract

The Forest Service awarded Mr. Hooker the beaver contract on January 22, 1999 for trapping beavers and clearing beaver dams and debris from blocked culverts. SA288–89, ¶¶ 40–42. The contract states that "no toxicological hazards are associated with beaver trapping at SRS." SA290, ¶ 49. Pursuant to the contract, when the Government discovered nuisance beavers at one of the 53 work sites, it would direct Mr. Hooker to remove the beavers. SA86 at 21–SA88 at 24; SA293, ¶ 75. Mr. Hooker performed the contract until December 1999, when the contract expired by its terms. SA p. 296, ¶ 104.

1. The Alleged Radiological Hazard

Mr. Hooker had worked at SRS for 23 years, spending much of that time working for the SRS's managing and operating contractor in the tank farms where high-level nuclear waste was stored, and was trained as a "RAD II" worker

qualified to work in radiation control areas (also known as RCAs). SA290-91, ¶¶ 52, 53 & 57; SA210 at 24 – SA211 at 5. He continued to work at SRS while he was the beaver and hog contractor for the USFS. See SA290 at ¶ 52. In addition, before entering into the contract Mr. Hooker had learned of signs at several of the beaver trapping sites designating them "soil contamination area[s]." SA236 at 14-SA237 at 19.

Nonetheless, Mr. Hooker did not claim to be concerned about radiological hazards at SRS until February 1999, when the Government issued him a work clearance permit to enter one of the beaver trapping sites. SA209 at 18–22; PA36-36. A work clearance permit was required to enter sites that were being monitored by the Radiological Control Department at the SRS. SA37 at 4–24. The permit noted that the "person entering creek is Rad II qualified" and that "Rad Con Ops will survey protective equipment, waders, gloves, etc." PA36. However, the check box on the form for indicating the presence of radiological hazards was left blank. Id.

Gregory Tunno, the WSRC manager responsible for worker safety on the site testified that the signs and permits did not signify the presence of hazardous

levels of radiation, but rather signaled employees to contact Mr. Tunno's department for a survey of the area before beginning work. SA169 at 10 – SA171 at 5-17. Mr. Hooker notes that Mr. Tunno described the beaver trapping sites as part of an "active environmental restoration project, where there is heavy equipment and there could be digging up soils and digging up rocks" and highlights Mr. Tunno's testimony that such an area could present a potential radiation hazard. Pl.'s Br. 7. However, Mr. Tunno testified that he would "be concerned" and require safety equipment for those who "bring in heavy equipment, backhoes and that kind of thing" for digging. SA155 at 22 – SA156 at 3. Mr. Tunno also distinguished, as "completely different," such work from taking a simple soil sample. SA155 at 4-14.

After completing his work relating to the work clearance permit, Mr. Hooker approached Mr. Gabard and Ms. Brooks and asked them for more money because "Rad workers were paid more." SA109 at 7 – SA110 at 5; SA 296, ¶¶ 84, 86. However, Mr. Hooker never purchased any additional safety equipment or incurred any additional costs to protect against radiation. SA203 at 2 – SA204 at 7. The Government rejected Mr. Hooker's request for more money, but told him

that he did not have to trap in any area that concerned him. SA294, ¶ 85; SA38 at 17–20.

In 2000, after the completion of the beaver contract, Mr. Hooker complained to the Center for Disease Control ("CDC") and the National Institute for Occupational Safety and Health ("NIOSH") about the alleged conditions at the site. SA179 at 9–23; SA192 at 16–21; SA338–39. In response to Mr. Hooker's complaints, WSRC performed an extensive safety and industrial hygiene investigation of the beaver trapping sites that concluded that there was no increased radiation or other toxicological hazard exposure to workers, including Mr. Hooker. SA182 at 17–25; SA357–59. In addition, NIOSH conducted an independent investigation and determined that there was "no basis for a substantial health risk due to exposure to radioactive materials." SA330. Finally, the Department of Energy's Radiological Assistance Program surveyed the equipment that Mr. Hooker had used at the site and did not find any sign of radiological material. SA175 at 17–23; SA340–56.

2. Reduction Of The Government's Requirements Due To Drought

The beaver contract was a "requirements" contract under which the Government promised to pay Mr. Hooker $45 per beaver to provide all its beaver trapping needs at the site. SA289, ¶¶ 44, 48. Although the contract estimated the

number of beavers to be removed, it explicitly stated that "the Government is not obligated to order any work to be performed." Id., ¶ 46; see also FAR 52.216–21. It also provided that, "if the Government's requirements do not result in orders in the quantities described as estimated . . . that fact shall not constitute the basis for an equitable price adjustment." SA289, ¶ 48.

Beginning in July 1999, the Government's requests to Mr. Hooker to trap beavers declined significantly. SA106 at 17 – SA107 at 10. Mr. Gabard and Ms. Brooks both testified that they had not reduced their requests for beaver trapping services in order to retaliate against Mr. Hooker for his request for more money. SA76 at 5–9; SA110 at 16-22; SA113A at 19. Instead, they noted that a drought had reduced the number of beavers and the need for beaver trapping and culvert clearing. SA42 at 19–22; SA103 at 24 – SA104 at 24. Ms. Brooks demonstrated that the water level in many of the beaver sites fell significantly after June 1999. SA136 at 15–19; SA104 at 11–18. Nevertheless, Mr. Hooker insisted that the Government decreased its work requests simply because it desired to retaliate against him for his concern about radiation. SA217 at 5–8.

SUMMARY OF THE ARGUMENT

Mr. Hooker's argument that the trial court improperly dismissed the hog contract claim fails because he turned in his equipment, submitted a final invoice, and ceased trapping hogs almost two years before November 2001. Because Mr. Hooker took these actions without objection and never again attempted to resume the contract, he abandoned the contract and acquiesced in the Government's determination that the contract had ended.

Mr. Hooker's claim for reformation of the beaver contract because of alleged radiological contamination is similarly unavailing. Reformation of a contract requires proof that the contractor incurred additional extra costs as a result of Government wrongdoing. See Ace Constructors, Inc. v. United States, 70 Fed. Cl. 253, 274 (2006). Mr. Hooker failed to demonstrate that he was exposed to any radiological hazard. Further, Mr. Hooker admits that he cannot carry this burden because he did not purchase any additional equipment or incur any other costs as a result of the alleged contamination. Instead, he simply claims that he "would have bid more" on the contract had he known of the alleged contamination, a claim that is too speculative to serve as the basis of damages.

Finally, Mr. Hooker's claim that the Government breached the beaver contract by reducing its requirements for beaver trapping is without merit. In a

requirements contract, the Government has the right to reduce its requirements as long as it does so in good faith for "valid business reasons." See Technical Assistance Int'l, Inc. v. United States, 150 F.3d 1369, 1372 (Fed. Cir. 1998). In this case, the Government's requirements for beaver trapping decreased because of a drought that lowered the water level of the streams at the SRS and limited the number of beavers at the site. There is no evidence of bad faith on the part of the Government or any attempt to deprive Mr. Hooker of the benefits of his contract by reducing his requirements.

Consequently, this Court should uphold the decision of the trial court on all three claims.

ARGUMENT

I. Standard And Scope Of Review

A. Legal Standard Applied By Trial Court Regarding RCFC 52(c) Motion

Pursuant to Rule 52(c) of the Rules of the United States Court of Federal Claims

> If during a trial a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence.

> Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

RCFC 52(a) provides that "[i]t will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court." A trial court acting as the trier of fact may make a judgment on partial findings under RCFC 52(c) as if it were ruling at the end of a trial and without resolving all factual issues in favor of the plaintiff. Howard Indus., Inc. v. United States, 115 F. Supp. 481, 485-86 (Ct. Cl. 1953).

B. This Court Reviews Legal Conclusions De Novo And Factual Findings For Clear Error

When reviewing a judgment of the trial court pursuant to RCFC 52(c), this Court may only overturn findings of fact that are "clearly erroneous." See Amgen, Inc. v. Hoechst Marion Roussel, Inc., 314 F.3d 1313, 1339 (Fed. Cir. 2003) (citing Yamanouchi Pharm. Co. v. Danbury Parmacal, Inc., 231 F.3d 1339, 1343 (Fed. Cir. 2000)) (under nearly identical Fed. R. Civ. P. 52(c), the appellate court "review[s] the district court's [factual] determination[s] for clear error, as if [they] had been entered at the close of all the evidence"). The Court reviews questions of law without deference. Yamanouchi, 231 F.3d at 1343.

II. The Dismissal Of The Hog Contract Claim Should Be Affirmed

Mr. Hooker argues that he is entitled to the value of the hog contract between November 30, 1999, when he was allegedly "prevented from performance" by the Government, and November 2001, when the Government awarded a new contract. Pl.'s Br. at 22. The trial court properly rejected that claim.

According to Mr. Hooker, the September 7, 1999 modification – which states that the hog contract "is extended to October 31, 1999, or until a new contract is awarded" – extended the Hog Contract through November 2001. PA29. Mr. Hooker's argument is irrelevant, however, because the trial court found that he abandoned the hog contract after November 1999. PA7. Abandonment of a contract is a question of fact. Montana Bank of Circle, N.A. v. United States, 7 Cl. Ct. 601, 610 (1985). Thus, Mr. Hooker must show that the findings of the trial court upon this issue are clearly erroneous, a burden that he cannot satisfy.

A party abandons a contract when it "engages in any acts inconsistent with the existence of a contract." Patton v. United States, 74 Fed. Cl. 110, 118 (2006) (quoting Franconia Assocs. v. United States, 61 Fed. Cl. 718, 745 (2004)); see also Montana Bank, 7 Cl. Ct. at 610 ("An abandonment of rights under a contract can occur by conduct that clearly indicates such purpose."). Such acts include a failure

to attempt to continue performance. Restatement (Second) of Contracts §283 cmt. a. (2008) ("Sometimes mere inaction on both sides, such as the failure to take any steps looking toward performance or enforcement, may indicate an intent to abandon the contract."). Moreover, failing to object to the other party's termination of a contract can be evidence of abandonment. Cf. id. ("If one party, even wrongfully, expresses a wish or an intention to cease performance and the other party fails to object, circumstances may justify the inference that there has been an agreement of rescission.").

The application of these principles to this case provides ample evidence to support the trial court's conclusion that Mr. Hooker abandoned the hog contract after November 1999. Indeed, when the Government asked him to turn in his equipment and submit a final invoice, Mr. Hooker did so without objection. SA67 at 22 – SA68 at 10; SA112 at 21 – SA113 at 1. In addition, Mr. Hooker has failed to demonstrate that he ever spoke to Mr. Gabard or any other authorized Government agent regarding any purported concerns about an alleged improper ending date to the contract.

In fact, Mr. Hooker gave no indication, until 2004 when he filed his contracting officer claim and complaint in this case, that he expected the contract to extend beyond November 1999. SA289, ¶ 28. Had Mr. Hooker expected the contract to extend past November 1999, he would have and should have objected to the Government's request to turn in his equipment and to cease performance. Instead, he acquiesced in the Government's conclusion that the contract had ended. This provides ample evidence to support the trial court's conclusion that Mr. Hooker abandoned the contract after November 1999.

Finally, Mr. Hooker claims that the statement of the trial court – contained in footnote no. 3 of the trial court's decision, PA4 – that "Mr. Hooker stated at trial that he stopped performing the contract as of November 30, 1999, because he was tired of dealing with the Government" – was clearly erroneous. Pl's Br. 21. Further, he states that "[i]t is puzzling why the court would include such an inaccurate statement in the opinion." Id.

First, the trial court's conclusion that Mr. Hooker abandoned the hog contract was based upon his actions, not that statement. This is apparent from the decision itself, which does not rely upon that statement in concluding that Mr. Hooker had abandoned the contract. See PA7. Indeed, the trial court expressly noted that "Mr. Hooker testified at trial that he did not perform or attempt to perform after

November 30, 1999" and that, after he returned the Government's equipment and submitted his final invoice, he "did not request additional payment or attempt to perform any part of the contract." Id. Accordingly, the statement in the footnote is immaterial.

Second, although a review of the transcript confirms that Mr. Hooker did not make the statement upon at trial, Mr. Hooker overlooks the fact that he did make it during his deposition of June 2, 2006. SA314 (p. 59, ln. 5 of deposition). Specifically, Mr. Hooker testified during his deposition that he ceased hunting hogs because he was tired of it and because he had "had enough of the BS, I promise you." Id. (p. 58, ln. 16 through p. 59, ln. 5 of deposition). Because this deposition was filed with the Government's summary judgment motion of September 7, 2006, it is part of the record on appeal. See Fed. R. App. P. 10(a)(1); Barcamerica Int'l USA Trust v. Tyfield Importers, Inc., 289 F.3d 589 (9th Cir. 2002) (depositions filed with a summary judgment motion are part of the record on appeal); Brown v. Home Ins. Co., 176 F.3d 1102, 1104 n.2 (8th Cir. 1999) (depositions cited in a summary judgment motion are part of the record on appeal, even when not attached to the motion). Accordingly, Mr. Hooker has no reason to be puzzled about the trial court's statement.

For these reasons, this Court should affirm the trial court's dismissal of the hog contract claim.

III. Mr. Hooker Is Not Entitled To Reformation Of The Beaver Contract Because Of The Alleged Existence Of Contamination

The trial court held, among other things, that Mr. Hooker's failure to produce evidence of physical or financial damages prevented him from recovering for the Government's alleged failure to warn him of radiological hazards at the beaver trapping sites. PA7. Mr. Hooker argues that this conclusion is incorrect because he is entitled to the equitable remedy of reformation, even if he did not suffer specific damages. Pl.'s Br. 22–24. Because he alleges "his bid would have been higher had he known of radiation risks," he argues that the court should reform the contract based upon what he would have bid in the absence of the alleged misrepresentation. Pl.'s Br. 24. Mr. Hooker's arguments should be rejected.

A. Reformation Requires Proof Of Specific Physical Or Financial Damages

A plaintiff seeking reformation bears the burden of proving specific damages resulting from the Government's behavior. Ace Constructors, Inc., v. U.S., 70 Fed.

Cl. 274 ("The proper measure of an equitable adjustment is the extra costs incurred by the government contractor."). Moreover, speculation about what a contractor would have bid in the absence of an alleged Government wrongdoing is not a sufficient basis for damages if it did not actually incur additional costs. Bromley Contraction Co. v. United States, 229 Ct. Cl. 750, 750 (1982) (a contractor who bids based upon defective specifications cannot recover the price it would have set absent the defective specifications when it cannot establish that its costs actually increased beyond what it bid).

SAB Construction, Inc. v. United States, 66 Fed. Cl. 77 (2005), involved facts analogous to those at issue here. In SAB, the Government contracted with a builder to renovate part of a Nevada air force base. Id. at 79. The Government did not inform the contractor of the presence of asbestos in the building and approved a renovation plan that did not include special procedures for asbestos abatement. Id. at 81. During the renovation, the contractor thus unknowingly removed asbestos to a regional landfill without incurring the additional costs that normally would be associated with asbestos abatement. Id. After discovering the presence of the asbestos, the contractor sought to recover for the value of the special abatement procedures that it would have rendered had it known of the hazard. Id. at 92. The court denied that claim, stating that "restitution damages based on the

value of . . . services that were not performed by [the contractor] are not recoverable." Id. Moreover, because the contractor had not incurred any additional costs in removing the asbestos, there was "nothing for the court to restore to [the contractor], and thus paying [the contractor] for services it did not perform would result in a windfall." Id.

Accordingly, a contractor can only recover for "loss actually suffered," such as "injury to person or property." Restatement (Second) of Contracts, §347 cmt. c (2008). In sum, in the absence of any such injury, and putting aside an issue regarding jurisdiction of the trial court to entertain tort claims, Mr. Hooker, like the plaintiff in SAB, cannot recover for the value of services that he did not actually perform.

B. Mr. Hooker Did Not Incur Physical Or Financial Damages And Otherwise Failed To Prove His Contamination Claim

During the trial, and in his appeal brief, Mr. Hooker acknowledged that he incurred no additional costs or physical damages as a result of the alleged contamination. See SA203 at 2 – SA204 at 7; Pl's Br. 23. Moreover, Mr. Hooker points to no evidence that he ever obtained additional equipment or training for himself or any employee as a result of the alleged contamination. As the trial court held, Mr. Hooker failed to "show dangerous levels of soil contamination" PA8. Further, Mr. Hooker presented "no evidence of additional time or money spent" as

a result of the alleged contamination. Id. Accordingly, the trial court reasonably held that Mr. Hooker "cannot recover damages that he did not incur." Id. Mr. Hooker has failed to demonstrate that he is entitled to any relief in the absence of damages.

Moreover, the trial court's conclusion that Mr. Hooker failed to establish dangerous contamination, is not contradicted by Mr. Hooker. Although he claims that the contract contained a statement that there were no toxicological hazards associated with trapping beaver at the SRS, he points to no evidence that he was exposed to any toxicological hazard. Indeed, Mr. Hooker essentially admits in his brief that he failed to demonstrate the existence of hazardous contamination. Specifically, in response to the trial court's holding that Mr. Hooker "did not show dangerous levels of soil contamination," Mr. Hooker merely responds that he did not need to show hazardous contamination, "only that conditions were different than that stated in the contract, i.e. protections were required and he was not informed." Pl's Br. 27.

First, Mr. Hooker's argument is based upon an assumption that has not been proven: that the conditions at the site were such that he was required to have

protections for the type of work he performed. Indeed, the best Mr. Hooker can do is to speculate that the specifications were "apparently false." Pl's Br. 25.[9]

Second, apparently referring to his attempt to raise a differing site condition claim, Mr. Hooker asserts that he had to prove "only that conditions were different than that stated in the contract." Pl's Br. 27. This misstates and oversimplifies the law. The trial court cited Travelers Cas. and Sur. Co. of America v. United States, 75 Fed. Cl. 696 (2007), for the propositions that:

> A claim based on differing site conditions must show materially different conditions on site, compared to those represented by the contract. Those conditions must be reasonably unforeseeable based on all the information available to the contactor at the time of bidding. . . . Most importantly, the contractor must have reasonably relied upon its interpretation of the contract and contract related documents, and show damages as a result of the reliance."

SA 7 (citing Travelers, 75 Fed. Cl. at 704).

Although Mr. Hooker expressly refers to that case in his brief, he fails to demonstrate how he has proved the elements necessary to prevail upon such a claim. See Pl's Br. 26-27. As "proof" that protections allegedly were required, Mr. Hooker relies upon certain trial testimony, apparently of Mr. Tunno – which

[9] Based upon available medical findings and environmental data, NIOSH concluded that "beaver and pig trapping at SRA has not been associated with harmful exposure to radioactive or toxic environmental contaminants." See parties Joint Stipulations of Facts. SA300, ¶ 119.

Mr. Hooker has taken out of context – and one instance in which a work clearance permit was issued.

However, Mr. Tunno testified that he would "be concerned" and require safety equipment for those who "bring in heavy equipment, backhoes and that kind of thing" for digging. SA156 at 22–25. He also distinguished, as "completely different," such work from work in which someone was taking a simple soil sample. SA156 at 4-14. Because Mr. Hooker points to no evidence that he performed the type of heavy excavation work described by Mr. Tunno, his reliance upon Mr. Tunno's testimony is misplaced. The reliance upon the work clearance permit is similarly misplaced. The issuance of a work clearance permit does not establish that Mr. Hooker was exposed to a radiation hazard. Indeed, the check box on the form for indicating the presence of radiological hazards was left blank. PA36.

Further, the Court held that, given Mr. Hooker's long experience with the SRS, and his extensive radiological training, "[i]t was foreseeable to [Mr. Hooker] during the bidding process that radiological contamination could exist in some beaver trapping areas." PA8. Mr. Hooker has failed to demonstrate that the trial court erred in this regard.

Finally, given the absence of any evidence of actual damages, Mr. Hooker claims that he "would have bid" five times as much on the contract if he had known of the alleged radiological hazard. SA225 at 18–20. The trial court reasonably held that this was too speculative to provide a basis for damages. PA8; see also Roseburg Lumber Co. v. Madigan, 978 F.2d 660, 667–68 (Fed. Cir. 1992) (denying contract reformation where Government had utilized erroneous minimum acceptable bid rates, because speculation about the price of the winning bid in the absence of the error was too uncertain a basis for damages); see also Wunderlich Contracting Co. v. United States, 351 F.2d 956, 969 (Ct. Cl. 1965) (the plaintiff bears the burden of "provid[ing] a basis for making a reasonably correct approximation of the damages"). The trial court further noted that Mr. Hooker provides no reason to assume that he would have been awarded the contract with a higher bid. See PA8. In any event, given that Mr. Hooker admittedly suffered no actual damages or incurred any additional costs, the trial court's holding that Mr. Hooker failed to establish the element of damages, far from being clearly erroneous, was supported by the record.

In sum, the trial court viewed the evidence and heard the testimony presented by Mr. Hooker with respect to the contamination issue, and concluded, among other things, that Mr. Hooker did not show dangerous levels of soil

contamination, that he did not show that he expended additional time or money due to alleged contamination, and that he did not establish that he suffered any damages. PA8. Significantly, the trial court reached its conclusion only after Mr. Hooker called numerous witnesses and rested his case. On appeal, Mr. Hooker essentially suggests that this Court overturn the trial court's conclusions, draw different inferences than the trial court, and form conclusions different from those reached by the trial court. However, because the trial court's conclusions were reasonable, and certainly were not "clearly erroneous," its decision should be affirmed. See Amgen, 314 F.3d at 1339.

IV. The Government Had The Contractual Right To Reduce Its Beaver Contract Requirements

A. The Government Had Valid Business Reasons To Reduce Its Requirements

The beaver contract was a requirements contract. PA4–5; SA289, ¶¶ 44, 48. A requirements contract obligates the Government to purchase all its needs for particular goods or services from the contractor. See Hi-Shear Technology Corp. v. United States, 356 F.3d 1372, 1379 (Fed. Cir. 2004). The Government is not required to order as much as it estimated it would need as long as it orders all of its "actual requirements" from the contractor. Rumsfeld v. Applied Companies, Inc., 325 F.3d 1328, 1339 (Fed. Cir. 2003); see also Medart, Inc. v. Austin, 967 F.2d

579, 581 (Fed. Cir. 1992) (in a requirements contract, "the risks associated with variance between actual purchases and estimated quantities are allocated to the contractor"). The only limitation upon the Government's ability to vary its requirements is that it must do so in good faith. Technical Assistance Int'l, Inc. v. United States, 150 F.3d 1369, 1373 (Fed. Cir. 1998). Moreover, the Government "acts in good faith if it has a valid business reason for varying its requirements other than dissatisfaction with the contract." Id. at 1372.

B. A Drought Decreased The Number Of Nuisance Beavers And Provided A Valid Business Reason For The Government's Reduction Of Its Requirements

The trial court found explicitly that the Government was not at fault for the reduction in services under the beaver contract and that the Government had not acted in bad faith. SA280 at 14–19; SA277 at 13–15. This conclusion is supported by the evidence and, therefore, is not clearly erroneous. Specifically, both Mr. Gabard and Ms. Brooks testified that they did not reduce Mr. Hooker's trapping opportunities to retaliate against him for his claims seeking additional money. SA76 at 5-9; SA110 at 16-22; SA113A at 19. Instead, they both testified that a drought had reduced the number of beavers and lessened the Government's need for beaver trapping. SA42 at 20–22; SA103 at 24 – SA104 at 24. The testimony of Mr. Gabard and Ms. Brooks is direct evidence that conditions at the site were

responsible for the reduction of beavers, and that the Government did not reduce its requirements in bad faith.

Mr. Hooker argues that the streams where he was trapping are fed by other sources besides rainfall. Pl.'s Br. 15–16; see also SA136 at 15–19. Nevertheless, Mr. Hooker failed to establish through competent evidence that a drought would not decrease the water level even if there were other sources. Moreover, Ms. Brooks' contemporaneous survey of the drought's impact upon the beaver sites confirms that the drought had a significant effect upon the beaver population. SA316; see also SA114 at 3-8. The scarcity of beavers due to the drought was a valid reason for a reduction in the Government's requests for beaver trapping.

With respect to alleged bad faith, Mr. Hooker claims that the Government "breached the beaver contract in bad faith when it had requirements for beaver trapping yet failed to give him work orders." Pl's Br. 14. Mr. Hooker relies upon his own testimony and the testimony of his employee, Andy Cromer, that significant beaver activity and normal water levels were present during the relevant period. SA220 at 7–8, SA234 at 11–12. This testimony contradicts that of Ms. Brooks and Mr. Gabard.

After considering the testimony and evidence presented, the trial court rejected Mr. Hooker's contention that the Government personnel acted in bad faith.

Specifically, the trial court stated: "[F]or whatever reason bad faith was brought into [the case], I could not see any bad faith through the witness stand." SA277 at 11-14. Mr. Hooker has failed to demonstrate that the rejection of his bad faith allegations was clearly erroneous. See RCFC 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.").

In a case such as this, where the trial court has observed the demeanor of the witnesses, the appellate court should be hesitant to overturn the trial court's conclusions. See Hubbard v. United States, 480 F.3d 1327, 1332 (Fed. Cir. 2007) (reviewing court is "in no position to second guess" the credibility determinations of the trial court); Syntex (U.S.A.) LLC v. Apotex, Inc., 407 F.3d 1371, 1384 (Fed. Cir. 2005) ("Credibility determinations are the type of factual determinations that are best left to the fact finder, the trial court."); Energy Capital Corp. v. United States, 302 F.3d 1314, 1329 (Fed. Cir. 2002) (an appellate court must "accord the trial court broad discretion in determining credibility because the court saw the witnesses and heard their testimony").

Mr. Hooker also asserts that the testimony at trial "sheds doubt on the drought being the real reason for the stoppage of work orders." Pl's Br. 16. However, this does not provide a basis for overturning the trial court's decision. Nor does it accurately set forth the relevant standard of review. The time has long passed for Mr. Hooker to make such arguments.

The trial court here believed the testimony of Mr. Gabard and Ms. Brooks. It reached that conclusion after Mr. Hooker had called them as witnesses during his case in chief. SA22–64; SA81–107; SA114–116. Accordingly, this Court should defer to the trial court's assessment of Ms. Brooks's and Mr. Gabard's testimony concerning the impact of the drought upon the Government's requirements for beaver trapping.

Moreover, the Government has the ultimate authority to determine its own requirements so long as it does not violate the good faith restriction. See Technical Assistance Int'l, 150 F.3d at 1372 (noting that the Government "has specifically bargained for such flexibility"). A contractor's opinions upon the subject thus carry little weight. Moreover, because the trial court here held that the Government did not act in bad faith, the trial court's conclusion that the Government did not improperly reduce its requirements under the beaver contract therefore should be upheld.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Federal Claims.

Respectfully submitted,

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July 16, 2008

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 16th day of July, 2008, I caused copies of the "Brief of Defendant-Appellee" to be sent by first class mail, postage prepaid addressed as follows:

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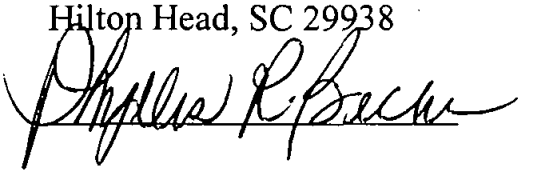

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I hereby certify that this brief contains 6,234 words, excluding the table of contents, table of authorities, statement of related cases, certificate of service, and any certifications of counsel, as calculated by the word processing system used to prepare this brief.