No. 07-1234

In The Supreme Court of the United States

THE LONG ISLAND SAVINGS BANK, FSB and THE LONG ISLAND SAVINGS BANK OF CENTEREACH FSB,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST

With the written consent of the parties, as reflected in the letters on file with the Clerk, *Amicus Curiae* National Defense Industrial Association ("NDIA") submits this brief in support of Petitioner, pursuant to Rule 37.2(a) of this Court.[1]

Contractors provide the federal government with supplies, construction, and services under contracts with an obligated value in fiscal year 2005 of approximately $381 billion, or some 35% of the discretionary budget of the entire United States government. *See* U.S. CENSUS BUREAU, CONSOLIDATED FEDERAL FUNDS REPORT FOR FISCAL YEAR 2005 xx, http://www.census.gov/prod/2007pubs/cffr-05.pdf.

NDIA is a non-profit organization comprised of more than 1,300 corporations and 47,000 individuals spanning the entire spectrum of the defense industry. Members include individuals from academia, government, the military services, small businesses, corporations, prime contractors, and the international community. They fulfill a large share of the Department of Defense's contracts for goods and services.

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

No counsel for either party to this proceeding authored this brief in whole or in part, and no person or entity other than the National Defense Industrial Association ("NDIA") or its members contributed money to the preparation or submission of the brief. *See* Sup. Ct. R. 37.6.

Members are located in and perform services and contracts throughout the United States.

NDIA's members have come to rely on the predictable system of government contracting established by the Federal Acquisition Regulation ("FAR")[2] and related procurement and regulatory requirements. A major element of NDIA's mission is to promote a "vigorous, responsive, government – Industry National Security **Team**." National Defense Industrial Association, *Who we are – what we offer!*, http:// www.ndia.org/Content/ NavigationMenu/Resources1/Mission_Statement.htm (emphasis added) (last visited Apr. 30, 2008). NDIA believes that the Federal Circuit's decisions in *Long Island Savings Bank, FSB v. United States*, 476 F.3d 917 (Fed. Cir. 2007) (vacated) and *Long Island Savings Bank, FSB v. United States*, 503 F.3d 1234 (Fed. Cir. 2007) serve to undermine the stability of the federal contracting process by establishing a new rule governing treatment of tainted contracts that is inconsistent with the long-standing regime established pursuant to direction from Congress and the President and explicitly designed to protect the integrity of the public procurement system from the corruption associated with tainted contracts. The new rule gives rise to uncertainty and unduly increases the risk of doing business with the federal government. NDIA and its membership have a significant

[2] The Federal Acquisition Regulation ("FAR") is located at Title 48 of the Code of Federal Regulations.

interest in this matter and wish, *first*, to call the attention of the Court to the unintended consequences of the rule and, *second*, to point out that the rule is simply unnecessary in light of the existing statutory and regulatory regimes.

SUMMARY OF ARGUMENT

Long Island Savings Bank, FSB v. United States, 503 F.3d 1234 (Fed. Cir. 2007) ("*LISB*"), had its inception as a thrift case under *United States v. Winstar Corp.*, 518 U.S. 839 (1996), but its holding extends far beyond the *Winstar*-line of cases, creating a rule which inadvertently and unnecessarily injects a heavy dose of uncertainty into the federal procurement process with serious consequences for the entire government contracting community. In *LISB*, the Federal Circuit extended its rulings in *Godley v. United States*, 5 F.3d 1473 (Fed. Cir. 1993) and *J.E.T.S., Inc. v. United States*, 838 F.2d 1196 (Fed. Cir. 1988) (two procurement fraud cases holding that government contracts tainted by fraud at their inception are void *ab initio*), bolstering its conclusions with a misapplication of the Supreme Court's decision in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961) (a procurement case holding that a contract tainted by fraud may be voided at the government's discretion, not that the contract was void *ab initio*) and general principles of federal and state contract and agency law. The Federal Circuit concluded that: (1) where a contract with the federal

government is tainted from its inception by a false certification executed by a rogue employee, it is void *ab initio*, even though the contract was completely performed to the full satisfaction of the agency; and (2) a false certification made when a company enters into a contract with the government constitutes a prior material breach, preventing the contractor from seeking any claims for damages and excusing the government from any subsequent obligation on the contract, despite the fact that the contract was fully and completely performed and that the breach was wholly immaterial to the contract performance as a whole. *See LISB*, 503 F.3d at 1251-53.

As to the first issue of voidness, the decision extends and stretches Supreme Court jurisprudence as to treatment of contracts tainted by fraud at their inception, which has held only that protection of the public fisc and the people's faith in government is "fully accorded" when the government has discretion to determine whether to disaffirm such contracts, making such contract voidable. *See United States v. Miss. Valley Generating Co*., 364 U.S. 520, 563 (1961) ("This protection can be fully accorded only if contracts which are tainted by a conflict of interest on the part of a government agent may be disaffirmed by the Government."). Never has the Supreme Court held that a tainted contract is automatically void *ab initio*. *See United States ex rel. Siewick v. Jamieson Sci. & Eng'g*, 214 F.3d 1372, 1377 (D.C. Cir. 2000) ("There is no suggestion in the [*Mississippi Valley*]

opinion that the contract self-destructed into voidness . . . ").

As to the second issue of prior material breach, the decision creates a situation where **any** misrepresentation, miscertification, or misstatement (whether knowingly made or merely accidental) could be considered a "material breach," even where there is no substantive impact on the performance of the contract. Under the court's rule, any such prior breach would prevent the contractor from recovering any damages arising from a subsequent government breach of its contractual obligations; simultaneously, the government itself would be excused of all obligations under the contract, thereby entitling it to retain all of the benefits of the contractor's work and forcing the contractor to carry the entire burden of the failed contract without any compensation. And all of this occurs because – in *post hoc* litigation – government attorneys removed from actual contract performance allege a broadly applicable affirmative defense to help them win their case. Such an unbalanced result is, on its face, bad policy for both the government and its many contractors, and arises from a rule that is quite unnecessary to deter procurement fraud in light of existing statutory and regulatory requirements described below.

The Federal Circuit's decision in *LISB* is, in application, inconsistent with the voidability regime prescribed by 18 U.S.C. § 218, Executive Order

12,448 and FAR Subpart 3.7[3] as federal policy *vis-à-vis* contracts tainted at their inception by the serious crimes of conflict of interest and bribery, which explicitly contemplates that such contracts are voidable at the election of the government, not simply – and automatically – void *ab initio*. The holding in *LISB* will have the practical effect of limiting the discretion afforded federal agencies by Congress and the President as to treatment of tainted contracts. And it exposes contractors whose contracts are "tainted" by false certifications involving matters often considered less serious than conflict of interest or bribery to consequences clearly not anticipated by Congress and the President when prescribing the voidability regime.

The government already has a host of remedial measures available to protect the integrity of the procurement process and exact justice from corrupt contractors and their employees. Creating a general rule that allows the government to avoid summarily its contractual obligations (whether by automatically voiding a contract or by achieving much the same result by virtually nullifying the contract through invocation of the "prior material breach" doctrine) is,

[3] The titles of these authorities are, respectively, 18 U.S.C. § 218 (Voiding transactions in violation of chapter; recovery by the United States); Exec. Order No. 12,448, 48 Fed. Reg. 51,281 (Nov. 4, 1983) (Exercise of Authority Under Section 218 of Title 18, United States Code); and FAR Subpart 3.7 (Voiding and rescinding contracts).

for reasons discussed above, bad for the defense industry and bad for the government which provides for our national defense. NDIA has a vested interest in ensuring that both of these interests are recognized, and, for the following reasons urges this Court to reverse the decision in *LISB*.

First, the rule announced in *LISB* is automatic in operation in that it contemplates that a tainted contract will "self-destruct[ ] into voidness," *Jamieson Science & Engineering*, 214 F.3d at 1377, thereby reflexively punishing contractors without regard to the specific facts and circumstances of the offense. Such an outcome is unfair on its face.

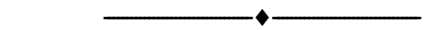
Second, imposing such an automatic rule is inconsistent with the concepts of fundamental fairness embodied in the statutory and regulatory scheme, which was enacted in the wake of the hugely controversial Dixon-Yates matter and the Supreme Court's decision in *Mississippi Valley*, 364 U.S. 520 (1961). This statutory and regulatory scheme explicitly grants discretion to agencies *vis-à-vis* contracts tainted by bribery or conflict of interest, later expanded to address procurement integrity violations by explicitly providing the contracting agency an election between disaffirmance and treating the contract as fully in effect and affording "[t]he person or entity affected . . . an opportunity to submit pertinent information on its behalf before a final decision is made" and assuring that any "remedy shall take

into consideration the fair value of any tangible benefits received and retained by the agency."[4] Based on information obtained in this process, the agency can take the action appropriate to its own interests, *i.e.*, it can elect either to void and rescind the contract or to treat it as fully in effect. The Federal Circuit's ruling is inconsistent with this agency election with respect to tainted contracts and, as well, with the discretion granted agencies by the Executive Order to impose other remedies and to consider the fair value of benefits received.

Third, the Federal Circuit's ruling will have the unintended **practical** effect of vitiating an agency election to treat a contract as fully in effect, if a contractor later pursues its rights to appeal a contracting officer decision to a Board of Contract Appeals or the Court of Federal Claims pursuant to the Contract Disputes Act, 41 U.S.C. § 601, *et seq*. That is because the Boards and Court of Federal Claims will be required by *LISB* to declare any contract tainted by a false certification void *ab initio*, even if the agency had determined to proceed. Ironically, the practical effect of such a policy will be to encourage contractors to abandon performance. Otherwise, they will face a later determination that the contract was void *ab initio*. Neither Congress nor the Executive Branch are likely to have contemplated such a

[4] Exec. Order No. 12,448, 48 Fed. Reg. 51,281 (Nov. 4, 1983).

conflicted real-world process and potential outcomes when they crafted the voidability regime delineated in FAR Subpart 3.7.



ARGUMENT

I. THE FEDERAL CIRCUIT'S DOCTRINE THAT A TAINTED GOVERNMENT CONTRACT IS AUTOMATICALLY VOID *AB INITIO* IS NOT BASED ON SUPREME COURT JURISPRUDENCE, IS INCONSISTENT WITH THE DISCRETION EXPLICITLY GRANTED AGENCIES AS TO SUCH CONTRACTS BY STATUTE, EXECUTIVE ORDER, AND REGULATION, AND WILL HAVE UNINTENDED PRACTICAL CONSEQUENCES FOR THE FEDERAL PROCUREMENT PROCESS.

A. This Court Should Grant Certiorari To Review the New "General Rule" That a Tainted Contract Is Automatically Void *Ab Initio*.

The Federal Circuit's ruling in *LISB* is unequivocal that "the general rule is that a Government contract tainted by fraud or wrongdoing is void *ab initio*." *LISB*, 503 F.3d at 1245 (internal quotation marks omitted). The decision does not identify any exceptions to this "general rule" and, indeed, there can be none. *Id.* at 1251 ("[T]he government has proven that the plaintiffs obtained the contract by knowingly making a false certification. The

Assistance Agreement was thus tainted at its inception by fraud and void ab initio."). At no time has this Court held that public policy requires a contract tainted at its inception by fraud to be found void *ab initio*. In *Mississippi Valley*, the Supreme Court did use strong language in holding the contracts in question voidable:

> Although nonenforcement frequently has the effect of punishing one who has broken the law, its primary purpose is to guarantee the integrity of the federal contracting process and to protect the public from the corruption which might lie undetectable beneath the surface of a contract conceived in a tainted transaction.

Miss. Valley Generating Co., 364 U.S. at 564-65. And strong language was appropriate because *Mississippi Valley* addressed contracts arising out of the Dixon-Yates scandal, involving allegations of use of public sector funds for private sector purposes and conflict of interest.[5]

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[5] The controversy started in the early days of 1953 when "President Eisenhower announced his intention . . . to encourage . . . private enterprise or local communities to provide power-generating sources in partnership with the Federal Government," *Miss. Valley Generating Co.*, 364 U.S. at 526, and takes its hyphenated name from Edgar H. Dixon, President of Middle South Utilities and Eugene A. Yates, Chairman of the Board of the Southern Company, whose companies jointly submitted proposals in late 1953 and the spring of 1954 to the Atomic Energy Commission to provide power to the Tennessee

(Continued on following page)

But even given the unusual circumstances of the Dixon-Yates controversy, this Court refrained from holding that a "tainted" contract is automatically void, holding rather that it is **voidable** at the agency's discretion. *Jamieson Sci. & Eng'g*, 214 F.2d at 1377 ("There is no suggestion in [*Mississippi Valley*] that the contract self-destructed into voidness . . ."). And the Federal Circuit was careful not to assert that the Supreme Court so held. Thus, while the Federal Circuit has characterized *Mississippi Valley* as a case in which the Supreme Court found a contract voidable "because similarly tainted by a prohibited conflict of interest" *LISB*, 503 F.3d at 1246 (quoting *J.E.T.S.*, 838 F.2d at 1200), the court explicitly identifies itself as the originator of this "general rule" which was "established . . . in *J.E.T.S.*, which held that a government contractor's false certification barred its subsequent claim." *Id.* at 1246. The Federal Circuit's ruling is the culmination of the gradual decisional evolution of the procurement doctrine that

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Valley Authority. The proposal (and the Eisenhower Administration) became embroiled in the then ongoing controversy over private versus public power and the matter went downhill from there, encountering on the way down the Supreme Court decisions in *Mississippi Valley* and extensive congressional hearings leading to passage of the statute establishing the voidability regime that includes 18 U.S.C. § 218. *Miss. Valley Generating Co.*, 364 U.S. 520, 526-27; Pub. L. No. 87-849, 76 Stat. 1125 (codified as amended at 18 U.S.C. § 218); S. Rep. No. 87-2213 (1962), *as reprinted in* 1962 U.S.C.C.A.N. 3852, 3863; *see also generally* AARON WILDAVSKY, DIXON-YATES: A STUDY IN POWER POLITICS (Yale Univ. Press 1962).

a tainted contract is **by definition** unenforceable – even if the taint arose from the covert actions of a lone employee that, when revealed, were rejected and, to the extent practicable, disclosed and corrected by the contractor. *See LISB*, 503 F.3d at 1245-46 (citing *Godley*, 5 F.3d at 1476; *J.E.T.S.*, 838 F.2d at 1200).

The effect of this doctrine is that, without regard to the specific facts and circumstances, a contract which is tainted (through a false certification) has "self-destructed into voidness," *Jamieson Science & Engineering*, 214 F.3d at 1377, so that if it ever existed at all, it is now extinct and beyond the power of anyone to revive it. The doctrine precludes even the federal agency that awarded the contract and whose operations may be dependent on its continuance from saving the contract. It precludes action by the federal agency that, as the D.C. Circuit observed, "might be concerned that [the contract's] disaffirmance would unduly impede future transactions with the contracting firm (possibly in possession of skills or other resources of exceptional value to the government) or with other potential contractors." *Id.* at 1377.

Read literally, the Federal Circuit's rule would eliminate any discretion of the contracting agency as to treatment of contractors involved in a contract tainted by a false certification or any other fraudulent act. Such an outcome is, again, inconsistent with and in fact contrary to the voidability regime established

by Congress through statute and the President through Executive Order.

B. The Federal Circuit's Ruling Is Inconsistent With Federal Procurement Policy Regarding Contracts Tainted by the Serious Crimes of Bribery and Conflict of Interest That Gives Agencies an Election To Disaffirm Such Contracts or Treat Them as Fully in Effect.

Both the Federal Circuit's decision in this case and its doctrine that a tainted contract is void *ab initio* are apparently expressive of a well-intentioned belief that equating "taint" with "voidness" is a proposition that "protects the integrity of the federal contracting process and safeguards the public from undetectable threats to the public fisc." *LISB*, 503 F.3d at 1254 (quoting *Godley*, 5 F.3d at 1475). But the legislative and executive branches have already addressed these concerns through a highly articulated, comprehensive, and integrated plan addressing bribery and conflict of interest schemes – perhaps the most pernicious and prototypical types of procurement "fraud" – and they have done so precisely in response to the Dixon-Yates matter whose facts informed this Court's decision in *Mississippi Valley*. *See generally*, *e.g.*, Pub. L. No. 87-849, 76 Stat. 1119-26 (codified as amended at 18 U.S.C. §§ 201-18).

On October 23, 1962, Congress passed Public Law 87-849 which explicitly granted authority to government agencies to exercise discretion in determining

whether to void transactions that violated a range of statutory provisions prohibiting, among other things, conflicts of interest and bribery:

> **In addition to any other remedies provided by law the President or, under regulations prescribed by him, the head of any department or agency involved, may declare void and rescind any contract**, loan, grant, subsidy . . . or the performance of any service or transfer or delivery of any thing to, by or for any agency of the United States . . . , in relation to which there has been a final conviction for any violation of this chapter [18 U.S.C. § 201 *et seq*.], and the United States shall be entitled to recover in addition to any penalty prescribed by law or in a contract the amount expended . . . or the reasonable value thereof.

Pub. L. No. 87-849, § 218, 76 Stat. 1125 (codified at 18 U.S.C. § 218) (emphasis added).

Congress's use of the word "may" in Section 218 is to be read in this instance as providing "the head of any department or agency involved" a choice as to whether to "void and rescind" a contract that has been tainted by violation of the provisions cited. Congress specifically stated its intent to grant federal agencies discretion as to whether they wished to void and rescind contracts tainted by the crimes of bribery and conflict of interest. In this regard, the opening language of Section 218 makes clear that Congress did not intend the section to "operate to modify the Supreme Court decision relating to the Dixon-Yates

matter." S. REP. NO. 87-2213 (1962), *as reprinted in* 1962 U.S.C.C.A.N. 3852, 3863. And in fact Section 218 is wholly consistent with the Supreme Court's decision in *Mississippi Valley* in that, like that decision, it gives "the government the right to 'disaffirm a contract which is infected by an illegal conflict of interest'" without "depriving the government of its election . . . to treat the contract as fully in effect." *Jamieson Sci. & Eng'g*, 214 F.3d at 1377 (quoting *Miss. Valley Generating Co.*, 364 U.S. at 566).

On November 4, 1983, President Reagan issued Executive Order 12,448, which implemented 18 U.S.C. § 218 and "provide[d] federal agencies with the authority to promulgate regulations for voiding or rescinding contracts or other benefits obtained through bribery, graft or conflict of interest." Exec. Order No. 12,448, 48 Fed. Reg. 51,281 (Nov. 4, 1983). Notably, the Executive Order explicitly provides for procedural protections for the contractor whose employee has, for example, bribed a public official in an effort to obtain a contract:

> Implementing regulations adopted pursuant to this Order shall, at a minimum, provide the following procedural protections:
>
> (a) Written notice of the proposed action shall be given in each case to the person or entity affected;
>
> (b) The person or entity affected shall be afforded an opportunity to submit pertinent information on its behalf before a final decision is made;

> (c) Upon the request of the person or entity affected, a hearing shall be held at which it shall have the opportunity to call witnesses on its behalf and confront any witness the agency may present; and
>
> (d) The head of the agency or his designees shall issue a final written decision specifying the amount of restitution or any other remedy authorized by section 218, provided that such remedy shall take into consideration the fair value of any tangible benefits received and retained by the agency.

Id. § 3.

The terms of 18 U.S.C. § 218 and Executive Order 12,448 establish that, from the outset, the legislative and executive branches intended that a contract award tainted by the serious crimes of bribery and conflict of interest should be carefully considered and – potentially, but **not automatically** – voidable at the discretion of the agency, thus forcing the contractor to forfeit all proceeds from the contract if deemed void. But the approach of the legislative and executive branches to protect the federal contracting process and safeguard the public "from undetectable threats to the public fisc," *Godley*, 5 F.3d at 1475, is fundamentally different from the Federal Circuit's approach.

Contrary to the doctrine set forth in *LISB*, the statute and Executive Order: (1) provide the agency discretion to protect its interests *vis-à-vis* its contractors by making the contract **voidable**, rather than

void *ab initio*; and (2) provide contractors the protections of process, including notice, the opportunity to respond, hearing and consideration of the value the government received from contract performance. *Accord* FAR 3.704 (identifying the general policy that "the agency head . . . shall consider the facts available and, if appropriate, **may** declare void and rescind contracts, and recover the amounts expended.") (emphasis added); FAR 3.705 (describing the procedures that an agency should use in voiding or rescinding contracts, indicating that the procedures "shall be as informal as practicable, consistent with the principles of fundamental fairness," and also that the final decision "shall be based on the information available to the agency head . . . including any pertinent information submitted . . . If the agency declares void and rescinds the contract, the final decision shall . . . reflect consideration of the fair value of any tangible benefits received and retained by the agency.").

C. The *LISB* Ruling Ironically Allows Contractors Whose Tainted Contracts Are Fully in Effect To Exercise Their Due Process Right of Appeal Under the Contract Disputes Act, but at Such a Risk That a Rational Contractor Would Abandon Performance, Thereby Frustrating the Intent of the Policy.

The Federal Circuit has held that "taint" is equivalent to "void." In application, this holding affects agency capacity to exercise discretion and

election as to contracts tainted by bribery, conflict of interest, or violation of procurement integrity rules that neither the Congress nor the Executive Branch could have contemplated when they crafted the process now set out in detail in FAR Subpart 3.7.

A contractor whose bribery-tainted contract the agency has "elected to treat as fully in effect" and who subsequently has a significant claim would have the right to appeal a Contracting Officer's final decision denying the claim to the cognizant Board of Contract Appeals or the Court of Federal Claims. *See* 41 U.S.C. §§ 606, 607. The contractor will recognize that, as both of these fora are bound by decisions of the Federal Circuit, its appeal will be subject to the affirmative defense that the contract was tainted and void *ab initio* and, like *LISB*, it will likely lose not only its appeal of the denied claim but the entire contract and all its proceeds. 28 U.S.C. §§ 1295(a)(10), (b), 1346(a)(2), 1491(a)(1). In these circumstances, a rational contractor would not appeal but, instead, choose to abandon performance of the contract, thereby frustrating the agency's purpose when it exercises its election to keep the contract "fully in effect," not to mention frustrating the purpose of the voidability regime.

II. THE FEDERAL CIRCUIT'S ALTERNATE HOLDING REGARDING THE DOCTRINE OF PRIOR MATERIAL BREACH FURTHER MAGNIFIES THE BUSINESS RISKS TO DEFENSE CONTRACTORS BECAUSE ANY MISREPRESENTATION CAN ESSENTIALLY DISSOLVE THE CONTRACT, REGARDLESS OF WHETHER IT IS MATERIAL TO THE CONTRACT AS A WHOLE.

The *LISB* ruling that a "prior material breach" arising from a contractor misrepresentation excuses government performance elides the question of the materiality of a misrepresentation to the substance of the contract. In order for a contract breach to be material, the breach must impede the breaching party's performance. *See* RESTATEMENT (SECOND) OF CONTRACTS § 241; *see also Hansen Bancorp, Inc. v. United States*, 367 F.3d 1297, 1312 (Fed. Cir. 2004) (observing that, in order for a breach to be material, it "must be of a relatively high degree of importance" to the contract overall) (internal quotation marks omitted). Where the performance originally agreed to between the parties is unaffected by the breach, contract performance is not excused. *See* RESTATEMENT (SECOND) OF CONTRACTS § 241 cmt. a (observing that an immaterial breach instead gives rise to a claim for damages for partial breach).

We do not restate Petitioners' argument here, but we note that under the prior material breach standard announced by the Federal Circuit, *see LISB*, 503 F.3d at 1245-46, 1251-52, **any** misrepresentation

(whether express or implied), **any** incorrect certification (whether with regard to a specific provision of law or compliance with the law generally), or **any** misstatement of fact (even if simply an innocent mistake) could constitute a material breach even if there is no substantive impact on the performance of the contract. In submitting a proposal to the government, if a contractor certifies its compliance with applicable law, and that certification later turns out to have been incorrect, the government may yet declare that it never had any obligation under the contract, and the government may yet avoid its contractual obligations with impunity, while still retaining the benefit it received from the contractor's performance – even if that benefit far exceeds any conceivable damage suffered by the government.

In reality, the facts and circumstances surrounding the false certification in the *LISB* decision are easily replicated in any traditional government contract. In submitting a proposal for a government contract, FAR 4.12 requires all entities to submit and maintain certain representations and certifications with respect to their compliance with various regulatory requirements. *See*, *e.g.*, FAR 52.203-2 (Certificate of Independent Price Determination); FAR 52.203-11 (Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions); FAR 52.209-5 (Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters); FAR 52.214-14 (Place of Performance – Sealed Bidding); FAR 52.219-1 (Small Business

Program Representations); FAR 52.219-22 (Small Disadvantaged Business Status); FAR 52.222-18 (Certification Regarding Knowledge of Child Labor for Listed End Products); FAR 52.222-25 (Affirmative Action Compliance); FAR 52.222-38 (Compliance with Veterans' Employment Reporting Requirements); FAR 52.225-2 (Buy American Act Certificate).

All standard federal solicitations include a Section K, "Representations and Certifications," wherein offerors make scores of representations and assurances that they currently conform with a wide variety of broadly applicable laws. The government relies upon these representations in making the contract award. Any number of these representations and certifications could be suitable surrogates for the certification executed by Mr. Conway in *LISB*, in that each and every certification provides an opportunity for an individual employee or agent with responsibility for the relevant subject matter to make a false certification without the knowledge of the contractor or principal.

Eliminating consideration of the materiality of a misrepresentation to the contract as a whole will necessarily give rise to *post-hoc* litigation scenarios where the interests of the agency in maintaining a contract do not align with the interests of the Department of Justice in winning a case. In such instances, the agency's interests will become irrelevant and the contract subject to avoidance the moment the Department of Justice identifies a purported fraud,

an alleged misrepresentation, or even a simple mistake to the Court. Consider the following examples:

- The U.S. Army awards a $100 million construction contract to build a number of buildings on an Army base. The winning small business contractor submits a proposal certifying, among other things, that it complies with the Drug Free Workplace Act. *See* FAR 23.504 and FAR 52.223-6. Unbeknownst to the contractor, one of its senior managers is selling prohibited substances in the workplace. After the construction project is completed – once the Army has full use of the depots, barracks, recreational facilities, and mess halls – the senior manager is convicted for drug-related crimes. As required under the contract, *see* FAR 52.223-6(b)(5), the contractor notifies the Army of the conviction, and the Army takes no action. However, later, when the contractor pursues a claim against the Army for increased construction costs, the government claims that the contractor is not entitled to increased costs, and furthermore, the Army is excused from any performance under the contract based on the false certification that the contractor complied with the Drug Free Workplace Act, 41 U.S.C. § 701.[6] Under the Federal Circuit's rule, the Army would be entitled to keep all of the buildings

[6] In fact, such a result would appear to be mandated under the Federal Circuit rule, despite the fact that FAR 52.223-6(d) specifically recognizes that the agency has discretion in imposing an appropriate remedy, including suspending contract payments, entering default termination against the contractor, suspending the contractor, or initiating debarment proceedings.

constructed by the contractor for free – absolved of any responsibility to pay a single cent on the contract – and the contractor would be forced to bear the entire burden of the contract costs, all because of the errant acts of a rogue employee.

- A large aerospace company enters into a $500 million contract with the U.S. Air Force to provide upgrades to military aircraft. As required under FAR 9.505, the contractor certifies that it does not have an organizational conflict of interest ("OCI"); however, unbeknownst to the contractor, one of the employees working on the program previously helped define the system requirements while working for another company. Many years later, after the system upgrade is complete, the contractor discovers the employee's OCI and discloses this fact to the government. Under the Federal Circuit's rule, the Air Force would be allowed to retain the entire benefit of the systems upgrade, while also requiring return of the total $500 million contract price; meanwhile, the bewildered aerospace company would be left with nothing except nearly $500 million in liabilities relating to the contract performance that was acceptable to the Air Force.[7]

[7] This hypothetical regarding potential OCIs is not that difficult to imagine. Given the increasing consolidation in the defense industry and given the increased frequency in which OCI issues have arisen in recent years, *see*, *e.g.*, *Axiom Res. Mgmt., Inc. v. United States*, 78 Fed. Cl. 576 (2007); *Greenleaf Constr. Co.*, B-293105, 2006 CPD ¶ 19 (Jan. 17, 2006); *Alion Sci. & Tech. Corp.*, B-297022, 2006 CPD ¶ 2 (Jan. 9, 2006), it is easily conceivable that an unidentified OCI might excuse further

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Without a requirement that a prior breach be material to the contract as a whole, government suppliers face significant risk and uncertainty in doing business with the government – not merely the risk that the contractor may be held liable for the damages the government may suffer (a risk that a contractor should rightly bear), but also the risk that it may receive absolutely no compensation from the government under a contract that it fully and adequately performs, while the government retains the full benefit of such effort (a risk that a contractor should **not** be forced to bear).

CONCLUSION

The Federal Circuit's void *ab initio* rule will give rise to unfair consequences and disrupt the statutory and regulatory scheme established by Congress and the President. Furthermore, the Federal Circuit's alternate holding with regard to a contractor's prior material breach presents a patently inequitable situation where a government contractor is forced to

performance by the Government on a contract under the Federal Circuit's rule. *Accord United States v. Sci. Applications Int'l Corp.*, 502 F. Supp. 2d 75 (D.D.C. 2007) (holding that a contractor could be liable under the civil False Claims Act for a false certification relating to an OCI); *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003) (same).

bear enormous risks for simple mistakes, while the Government is able to avoid any responsibility.

For the reasons stated above, *Amicus Curiae* NDIA urges this Court to grant LISB's Petition for a Writ of Certiorari, accept this case for review, and reverse the Federal Circuit's decision in *Long Island Savings Bank, FSB v. United States*, 503 F.3d 1234 (Fed. Cir. 2007).

Respectfully submitted,

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