

tract reinstatement and declaratory relief under the Tucker Act, 28 U.S.C. §§ 1491(a)(1), 1491(a)(2) on nonmonetary Disputes arising from an express Contract for the hire of equipment and for the procurement of support services, 41 U.S.C. § 7102(a)(2). Plaintiff Crewzers here challenges Government Claims first terminating for convenience and then later terminating “for cause” a Blanket Purchase Agreement (BPA) between Crewzers and the United States Department of Agriculture’s United States Forest Service’s (USFS’s) Northern Region (Region 1) for the hire of two sizes of flame retardant vinyl Tents (Types 3 and 4). The Tent BPA was effective for three years after the date of Award, April 11th, 2011. These Government Claims terminating Crewzers’ Tent BPA for convenience and then later “for cause” were asserted in letters dated November 8th, 2011 and December 7th, 2011 (the Decisions) signed by Deborah Wesselius, a USFS Contracting Officer, 41 U.S.C. § 7103(a)(3), who is located in USFS Region 1 at Missoula, Montana.

2. Plaintiff Crewzers asserts: (1) USFS Contracting Officer Deborah Wesselius abused her discretion when on November 8th, 2011 she terminated

Crewzers' BPA for the convenience of USFS Region 1 because Tents are still required by USFS Region 1 and will be used in 2012, 2013, and early 2014 at Base Camps established by USFS and others to combat wildland fires, *Torncello v. United States*, 681 F.2d 756, 766 (Ct. Cl. 1982) ("termination for convenience [allowed] only when the expectations of the parties [are] subjected to a substantial change"); (2) USFS Contracting Officer Deborah Wesselius and other USFS personnel acted in bad faith in asserting this Government Claim at first terminating Crewzers' Tent BPA for the convenience of USFS Region 1, *Keeter Trading Co. v. United States*, 85 Fed. Cl. 613, 633 (2009); (3) USFS Contracting Officer Deborah Wesselius and other USFS personnel interfered with Crewzers' performance of the USFS Region 1 Tent BPA with a specific intent to deprive Crewzers of its contractual rights, *North Star Alaska Housing Corp. v. United States*, 76 Fed. Cl. 158, 211 (2007); (4) the actions of USFS Contracting Officer Deborah Wesselius and other USFS personnel breached the covenant of good faith and fair dealing which existed under the Tent BPA between Crewzers and USFS Region 1, *Scott Timber*

Co. v. United States, 97 Fed. Cl. 685, 689-90 (2011); (5) USFS Contracting Officer Deborah Wesselius' Decision to terminate Crewzers' Tent BPA for the convenience of USFS Region 1 was not "honestly rendered" and is therefore arbitrary, or capricious, or an abuse of discretion, *Moreland Corp. v. United States*, 76 Fed. Cl. 268, 290 (2007); and (6) Crewzers' deviations from the requirements of its Tent BPA with USFS Region 1, if any, were not material and therefore did not give USFS Region 1 a unilateral right to discontinue Crewzers' performance under the Tent BPA, *Stone Forest Industries, Inc. v. United States*, 973 F.2d 1548, 1550-51 (1992).

3. Plaintiff Crewzers asserts: (1) when USFS Contracting Officer Deborah Wesselius on December 7th, 2011 subsequently terminated Crewzers' Tent BPA "for cause" and on the very same grounds which on November 8th, 2011 she had found suited only as a basis for a termination for the convenience of USFS Region 1, her action was of no effect, *Line Construction Co. v. United States*, 109 Ct. Cl. 154, 190-91 (1947) (substitution of a termination for cause for a previous termination for convenience "does not come within the limits of

any exceptions that we can find laid down in the books whereby a man may escape the consequences of his act.”); (2) USFS Contracting Officer Deborah Wesselius and other USFS personnel acted in bad faith in asserting this second Government Claim terminating Crewzers’ Tent BPA with USFS Region 1 “for cause,” *Keeter Trading*, 85 Fed. Cl., at 613; (3) USFS Contracting Officer Deborah Wesselius and other USFS personnel interfered with Crewzers’ performance of the Tent BPA with a specific intent to deprive Crewzers of its contractual rights under the Tent BPA with USFS Region 1, *North Star Alaska Housing*, 76 Fed. Cl., at 211; (4) the actions of USFS Contracting Officer Deborah Wesselius and other USFS personnel breached the covenant of good faith and fair dealing which existed under the Tent BPA between Crewzers and USFS Region 1, *Scott Timber*, 97 Fed. Cl., at 689-90; (5) USFS Contracting Officer Deborah Wesselius’ Decision to terminate Crewzers’ Tent BPA “for cause” was not “honestly rendered” and is therefore arbitrary, or capricious, or an abuse of discretion, *Moreland Corp.*, 76 Fed. Cl., at 290; and (6) Crewzers’ deviations from the requirements of its Tent BPA with

USFS Region 1, if any, were not material and therefore did not give USFS Region 1 the right to discontinue Crewzers' performance under the Tent BPA, *Stone Forest Industries*, 973 F.2d, at 1550-51.

4. Plaintiff Crewzers asks that the Court declare: (1) that USFS Contracting Officer Deborah Wesselius acted in bad faith in asserting these Government Claims terminating Crewzers' Tent BPA with USFS Region 1; (2) that USFS Contracting Officer Deborah Wesselius and other USFS personnel interfered with Crewzers' performance of the USFS Region 1 Tent BPA with a specific intent to deprive Crewzers of its contractual rights; (3) that USFS Contracting Officer Deborah Wesselius and other USFS personnel breached the covenant of good faith and fair dealing which USFS owed to Crewzers under the USFS Region 1 Tent BPA; (4) that USFS Contracting Officer Deborah Wesselius' Decisions to terminate Crewzers' Tent BPA were not "honestly rendered" and were therefore arbitrary, or capricious, or an abuse of discretion; (5) that Crewzers had in no way materially breached any of Crewzers' obligations under the Tent BPA with USFS Region 1; and (6) that Crew-

zers is now entitled to recover breach of contract damages, including expectation damages, these for the remainder of the three-year term of the Tent BPA with USFS Region 1. Alternatively, Crewzers asks for reinstatement of the Tent BPA with USFS Region 1 under the broad authority of Federal Acquisition Regulation 2.101, "Definitions," 48 C.F.R. § 2.101 (October 1st, 2010), *Todd Construction, L.P. v. United States*, 656 F.3d 1306 (Fed. Cir. 2011), *2011 U.S. App. LEXIS 17980, *11*, and under this Alternative Crewzers seeks also a declaration that Crewzers is entitled to recover breach of contract damages for the period prior to this reinstatement.

PARTIES

5. Plaintiff Crewzers is a closely-held for-profit Nevada corporation and a Small Business with nineteen years' experience providing support services and hired equipment to be used in the suppression of wildfires in wildland areas and in response to "all-hazard incidents" (natural and man-made disasters). (<http://www.crewzers.com/>, last visited January 25th, 2012).

6. Defendant United States Department of Agriculture is an Executive Department of the United States. 5 U.S.C. § 101. USFS is an Agency of the United States Department of Agriculture, and USFS and the United States Department of Agriculture are both instrumentalities of the United States. Defendant United States Department of Agriculture and its Agency USFS are both a “Department” just as this term is defined in 28 U.S.C. § 451, and thus Defendant United States Department of Agriculture and its Agency USFS is also an “Executive Agency” as is required by 41 U.S.C. § 7102(a). USFS Region 1 is an Activity of the USFS. (http://en.wikipedia.org/wiki/United_States_Forest_Service, last visited January 25th, 2012). USFS Region 1 issues USFS Contracts and Agreements for the hire of equipment and for support services as required by USFS and others in Montana, Northern Idaho, North Dakota, Northwestern South Dakota, and Northeast Washington. This hired equipment and these support services are used for suppression of wildfires in wildland areas and in response to all-hazard incidents.

7. Plaintiff Crewzers is the Awardee of a USFS BPA for the regional and nationwide hire of two sizes of flame retardant vinyl Tents (Type 3 and Type 4), the Tents to be identified with Company name and a unique identification number. This BPA was awarded to Crewzers by USFS Contracting Officer Deborah Wesselius on April 11th, 2011, and it is effective for a period of three years from the date of award, or through April 11th, 2014. The dollar limitation for individual Orders placed under this Tent BPA is \$150,000. Orders under this Tent BPA are placed, not by warranted Contracting Officers, but instead by designated USFS personnel and by designated personnel from the National Park Service; from the Bureau of Land Management; from the Bureau of Indian Affairs; from the United States Fish and Wildlife Service; from the Federal Emergency Management Agency; from the State of Montana, Department of Natural Resources and Conservation (Montana DNRC); and from the State of Idaho, Department of Lands.

8. Plaintiff Crewzers is a proper party for purposes of the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B)(ii), i.e., Crewzers is a private party and

a closely-held for-profit Nevada Corporation which at the time this Amended Complaint on Government Claims Under an Express Contract is filed has not more than 500 employees and whose net worth does not exceed \$7,000,000 averaged over the past three years.

JURISDICTION

9. This Court has jurisdiction under 28 U.S.C. § 1491(a)(1), under 28 U.S.C. § 1491(a)(2), and under 41 U.S.C. § 7104(b)(1). The USFS Region 1 Tent BPA here in issue establishes an express contractual relationship under 28 U.S.C. § 1491(a)(1) which provides Crewzers a substantive right to money damages. The Court has jurisdiction under 28 U.S.C. § 1491(a)(2) to render a Judgment upon Claims by or against, or Disputes with, a Contractor under an express Contract, including nonmonetary Disputes on which Decisions of a Contracting Officer have been issued. The United States Department of Agriculture, its USFS, and USFS Region 1, are all instrumentalities of the United States and within the waiver of Sovereign immunity provided by 28 U.S.C. § 1491(a)(1) for Actions against the United States founded upon

express Contracts with the United States. Review of these two Decisions by USFS Contracting Officer Deborah Wesselius proceeds here *de novo*, that is, this Court must conduct its own inquiry into the matter being reviewed and must reach its own conclusions. 41 U.S.C. § 7104(b)(4). USFS Contracting Officer Deborah Wesselius' Decisions may not be relied upon and neither may they be presumed to be correct. *The Redland Company, Inc. v. United States*, 97 Fed. Cl. 736, 756 (2011). The Contract Disputes proceeding here encompasses the entire scope of the "claims," Federal Acquisition Regulation 2.101, "Definitions," 48 C.F.R. § 2.101 (2010), over which USFS Contracting Officer Deborah Wesselius was given authority, and this scope includes reinstatement by this Court of the unlawfully terminated USFS Region 1 Tent BPA. *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1580 (Fed. Cir. 1994).

10. This Civil Action is timely filed. USFS Contracting Officer Deborah Wesselius issued her Decision terminating Crewzers' Tent BPA for the convenience of USFS Region 1 on Tuesday, November 8th, 2011 but a copy of

this first Decision was not received by Plaintiff Crewzers until Tuesday, December 13th, 2011 and was provided electronically, upon Crewzers' request. USFS Contracting Officer Deborah Wesselius subsequently issued her Decision terminating Crewzers' BPA "for cause" on Wednesday, December 7th, 2011, and Crewzers received a paper copy of this second Decision on Saturday, December 10th, 2011. This Civil Action was timely filed on Wednesday, February 1st, 2012, well within twelve months from the date the right to pursue this Civil Action first arose, Saturday, December 10th, 2011. 41 U.S.C. § 7104(b)(3). Likewise, this Amended Complaint on Government Claims under an express Contract is timely filed within twenty-one days after service on Wednesday, February 1st, 2012, RCFC 4(c), of Plaintiff Crewzers' Complaint on Government Claims under an Express Contract.

AVERMENTS

The Express Contract.

11. The Tent BPA between Plaintiff Crewzers and USFS Region 1 was awarded by USFS Contracting Officer Deborah Wesselius with an effective

date of April 11th, 2011. The Tent BPA was in force for a period of three years, through April 11th, 2014. The BPA set out a series of Prices for two sizes of flame retardant vinyl Tents (Daily Rate, Weekly Rate, Monthly Rate, Delivery/Pickup Charge per mile and Relocation Charge), these Prices for fourteen specific Interagency Dispatch Centers, and these Prices applicable to Orders placed through the listed Interagency Dispatch Centers for single or multiple flame retardant vinyl Tents. Internally within USFS Region 1, these Prices were ranked, lowest evaluated Price first, by USFS Contracting Officer Deborah Wesselius on Dispatch Priority Lists (DPLs) established by her for specific Interagency Dispatch Centers. Orders against these DPLs for specific flame retardant vinyl Tents were then placed by ranked Prices, and these Orders were placed through these Interagency Dispatch Centers under an "Ordering Protocol for Resources." Orders were placed by designated personnel from USFS and from other Agencies. Tent Vendors not listed on the DPLs are excluded from competing under the Ordering Protocol estab-

lished by the USFS Region 1 Tent BPA, exclusion effective through April 11th, 2014, the last day of the effective term of the USFS Region 1 Tent BPA.

12. The USFS Region 1 Tent BPA with Crewzers set out Pricing for three-hundred forty-two total Tents in eleven specific Interagency Dispatch Centers. Crewzers' Pricing for the smaller Type 4 Tents was the lowest-ranked for seventy-two percent of the Interagency Dispatch Centers (eight out of eleven). For five of these fourteen specific Interagency Dispatch Centers, Crewzers was the only Contractor on the DPLs for each of the two Tent sizes, and these DPLs offered Prices on a total of one-hundred seventy-three flame retardant vinyl Tents which were available to be Ordered from Plaintiff Crewzers by these five specific Interagency Dispatch Centers. In all, Crewzers' Pricing was the lowest-ranked for sixty-six percent of the DPLs for both Tent sizes (three-hundred forty-two of the five-hundred seventeen Tents offered by Crewzers). Lump-sum payments were processed when Base Camps were removed, and invoicing under the USFS Region 1 Tent BPA was completed on-site at the Base Camps where flame retardant vinyl Tents

had been delivered, set-up, and then taken-down. Each Base Camp submitted “payment packages” to the designated Payment Office which, for USFS, was the Albuquerque Service Center. Payments were made based on the Order which had been issued by one of the Interagency Dispatch Centers, were based on the pricing terms set out in the USFS Region 1 Tent BPA, and were based on the periods for which Tents were furnished, this as verified by Base Camp personnel.

13. USFS Region 1 maintains electronic copies of the Tent BPA and of the DPLs, and these electronic copies are accessible over the Internet both by USFS and by USFS Tent Contractors. Correspondence between USFS Region 1 and its USFS Tent Contractors is conducted in writing, and, most frequently, this correspondence is conducted through the exchange over the Internet of electronic messages and electronic versions of Contractual documents.

14. The USFS Region 1 Tent BPA required Crewzers, when receiving an Order, to confirm availability and ability to meet specified timeframes to re-

port to the Base Camp for a wildland fire. If Crewzers could not be reached, or if Crewzers decided that it was not available or able to meet the time and date to report to a Base Camp, then the Order could be offered to the Tent Contractor on the DPL with the next lowest-price. Crewzers was under no obligation to honor an Order. Neither was an Interagency Dispatch Center, if Crewzers could not meet the time and date to report to a Base Camp, required to offer the Order to another Tent Contractor; rather, an Interagency Dispatch Center could issue an Order anyway.

15. The Ordering Protocol established by the USFS Region 1 Tent BPA excepted use of these DPLs: (1) during periods of initial attack at the onset of a wildfire and (2) when these DPLs conflicted with tribal preference support policy for the suppression of wildfires within the geographic jurisdiction of a Native American reservation. During periods of initial attack at the onset of a wildfire, Orders were placed not under the DPLs, but instead using a “closest forces” concept, that is, regardless of lowest price, Orders could be placed for any flame retardant vinyl Tents which were available on the DPLs and

which might be delivered to a Base Camp by the date and time requested. The USFS Region 1 Tent BPA for these flame retardant vinyl Tents explicitly recognized that USFS Region 1 needs for flame retardant vinyl tents “cannot be determined in advance”

16. When an Order was placed with Crewzers for the hire of a flame retardant vinyl Tent or Tents, Crewzers was required by the USFS Region 1 Tent BPA to be paid mileage from the “point of hire” to a particular Base Camp, and Crewzers was to be paid mileage when the hired flame retardant vinyl Tent or Tents was released by the Base Camp and returned to its point of hire. The time under hire was required by the USFS Region 1 Tent BPA to begin when the flame retardant vinyl Tent or Tents were dispatched from the point of hire to the Base Camp, and ended at the estimated time of arrival when the flame retardant vinyl Tent or Tents were returned to that point of hire. The “point of hire” was defined in the USFS Region 1 Tent BPA as the “Contractor’s place of business or where resource is located at the time of

dispatch.” The location of the point of hire for Tents was not limited in the USFS Region 1 Tent BPA to the designated Interagency Dispatch Centers.

17. The hired flame retardant vinyl Tent or Tents were required, unless otherwise negotiated, to be set-up by Crewzers within twelve hours after arrival at a Base Camp and were required to be taken-down and removed by Crewzers, unless otherwise negotiated, within twelve hours after the Order for their hire was released. Crewzers was required only to provide basic operating instructions for any equipment furnished with the flame retardant vinyl Tent or Tents; Crewzers was not required to provide daily maintenance. Crewzers was not required under the USFS Region 1 Tent BPA to prepare the site where the flame retardant vinyl Tent or Tents were to be erected, nor was Crewzers required to provide electrical power. The hired flame retardant vinyl Tent or Tents were to be inspected for compliance with the USFS Region 1 Tent BPA upon arrival at the Base Camp. If Ordered flame retardant vinyl Tents were rejected as noncompliant upon arrival at a Base Camp, Crewzers was to be given notice and Crewzers was to be allowed twenty-

four hours to bring rejected flame retardant vinyl Tents into compliance. Rejected flame retardant vinyl Tents were to be released from the Base Camp, and rejected flame retardant vinyl Tents were to be removed from the DPLs.

18. The USFS Region 1 Tent BPA required USFS Performance Evaluations for each Order when a flame retardant vinyl Tent or Tents was hired for use at a Base Camp, and these USFS Performance Evaluations were to be made using only the forms provided in the USFS Region 1 Tent BPA; these USFS Performance Evaluations were to be completed at the Base Camp “by the government representative supervising the work,” and these USFS Performance Evaluations were to be completed at the Base Camp after the Order for flame retardant vinyl Tent or Tents was released. Only if the Government representative was released from the Base Camp prior to the release of the Order for flame retardant vinyl Tent or Tents was the USFS Performance Evaluation to be completed early, and then the USFS Performance Evaluation was to be made only “for work the resource performed under their super-

vision,” i.e., only up through the time the Government representative was at the Base Camp.

19. The USFS Region 1 Tent BPA was effective for a period of three years from date of award. There were to be annual reviews and Tent Contractors were given the right to adjust their Prices and to change the Inter-agency Dispatch Centers for which they offered a hired flame retardant vinyl Tent or Tents. Tent Contractors could not change the offered Tent sizes; Tent Contractors could not change the other required attributes of the flame retardant vinyl Tents. USFS Region 1 was not permitted under the Tent BPA to make other unilateral Changes in the Tent BPA Terms and Conditions. The USFS Region 1 Tent BPA included the “Contract Terms and Conditions—Commercial Items (JUN 2010),” Federal Acquisition Regulation 52.212-4, 48 C.F.R. § 52.212-4 (October 1st, 2010) Provision which explicitly denied USFS Region 1 the right to make unilateral Changes to the Tent BPA:

(c) *Changes.* Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

Tents.

20. Required attributes of the flame retardant vinyl Tents were described in detail in the USFS Region 1 Tent BPA. Two sizes were to be offered for hire: Type 3 (five-hundred one to seven-hundred square feet) and Type 4 (two-hundred to five-hundred square feet). Tents were to be furnished with water and slip-resistant flooring; staking sufficient to withstand a minimum fifty miles per hour wind load; “adequate artificial lighting for office environment;” a cooling unit (a “swamp cooler”) sufficient to maintain indoor temperature fifteen degrees cooler than outdoor temperature; one hundred feet of electrical cord of sufficient gauge and with a minimum of four power outlets to connect to an electrical power source so as to energize lighting, cooling, and small electric devices such as laptops and attached printers; a screened, clear window; and hinged and framed doors. Tents were to be free-standing with self-supporting internal frame, minimum six-foot side walls, and no center pole.

21. Required attributes of the flame retardant vinyl Tents described in detail in the USFS Region 1 Tent BPA are met only by Tents manufactured by Western Shelter Systems, Eugene, Oregon (Western Shelter Systems), or met only by Tents manufactured by Design Shelter, Incorporated, Mississauga, Ontario, Canada. Western Shelter Systems is, with the exception of Canada, the exclusive licensee of the original basic octagon shelter and interlocking frame design of a Canadian entrepreneur whose family now operates Design Shelter, Incorporated. (<http://www.westernshelter.com/home-commercial/about-commercial/>, last visited January 26th, 2012). The flame retardant vinyl Tents offered for hire by Crewzers under the USFS Region 1 Tent BPA were the Western Shelter Systems HS1935 (five-hundred seventy square feet, Type 3) and the Western Shelter Systems HO20 (two-hundred eighty-six square feet, Type 4). The hinged and framed door sizes of these Western Shelter Systems flame retardant vinyl Tents owned by Crewzers and available for hire were the exact sizes of the hinged and framed doors required by the USFS Region 1 Tent BPA.

Crewzers' 2011 Performances.

22. During the 2011 wildland fire season in USFS Region 1 (June 15th through September 30th), Crewzers provided flame retardant vinyl tents to Base Camps established for four wildland fires, the "Stewart Fire," the "Forty-One Complex," the "West Riverside Fire," and the "Granite Pass 1." Crewzers received USFS Performance Evaluations for each one of these four wildland fires, and for three of these four wildland fires, USFS Performance Evaluation ratings ranged from "Good" to "Outstanding." Crewzers received no notice that hired flame retardant vinyl Tents were rejected as noncompliant upon arrival at a Base Camp, no rejected flame retardant vinyl Tents were released from a Base Camp, and no rejected flame retardant vinyl Tents were removed from the DPLs. Crewzers received no notice that it had even once failed to arrive at a Base Camp as had been agreed in an Order issued by an Interagency Dispatch Center.

The Termination for Convenience Of November 8th, 2011.

23. On November 8th, 2011, long after the wildland fire season in USFS Region 1 was over, USFS Contracting Officer Deborah Wesselius prepared a letter to Crewzers wherein she announced: "After careful review of performance documentation for these incidents the Northern Rockies has determined that the agreement AG-0343-B-11-7024 is not in the Governments [sic] best interest, and is hereby terminated" This Decision referred to three wildland fires: the "Forty-One Complex," the "West Riverside Fire," and the "Granite Pass 1." The Decision omitted the "Stewart Fire" wildland fire.

24. The Decision of November 8th, 2011 concludes as follows:

Based on the above listed failure [sic] to comply with contract terms and conditions and the resultant administrative impact, I have decided to terminate agreement number AG-0343-B-11-7024 in its entirety in accordance with the Governments [sic] right *to terminate for its convenience* as stated in FAR 52.212-4. . . .

(Emphasis added).

25. The Decision was transmitted only by the United States Mails, not electronically. USFS Contracting Officer Deborah Wesselius did not ask

Crewzers whether or not Crewzers had received this letter; Crewzers did not learn of this Decision until December 13th, 2011. USFS Contracting Officer Deborah Wesselius was “done” with Crewzers, just as USFS Contracting Officer Deborah Wesselius had said in a telephone conversation with Crewzers on September 5th, 2011.

The Claimed Material Breaches And USFS Displays Of Animus.

26. In her Decision of November 8th, 2011 USFS Contracting Officer Deborah Wesselius contended that Crewzers delivered Tents to the “West Riverside Fire” Base Camp without working swamp coolers, that Tents were there set up without adequate lighting, and that the Tents delivered to the West Riverside Fire Base Camp did not, as required, display Company name and a unique identification number. The facts are otherwise: USFS Base Camp personnel did not choose deployment sites for the Crewzers Tents until the morning of August 24th, 2011, and power was not provided by USFS Base Camp personnel until late in the evening of August 24th, 2011; Crewzers delivered replacement lighting within twelve hours after notice that the

lighting supplied was flickering (twenty-four hours were allowed by the USFS Region 1 Tent BPA to make this correction); only one of the four swamp coolers provided by Crewzers malfunctioned and this malfunction was corrected within twenty-four hours after notice; and while signage on the set-up Tents delivered by Crewzers displayed Company name and a unique identification number, one of the signs so displaying Crewzers' name and a unique identification number was removed at some time during the period the Tents were at the West Riverside Fire Base Camp, a period in which USFS Region 1, not Crewzers, was responsible for the Tents.

27. Crewzers received on September 1st, 2011 its USFS Performance Evaluation for the Tents delivered, set-up, and then taken-down at the West Riverside Fire Base Camp. Crewzers was rated "Good" on "Quality of Product or Service," was rated "Excellent" on "Timeliness of Performance," and was rated "Outstanding" on "Business Relations." On September 1st, 2011 Crewzers completed on-site its invoice for the Tents delivered, set-up, and

then taken-down at the West Riverside Fire Base Camp. Crewzers' invoice noted a "Possible Claim Pending," this that signs were missing.

28. The West Riverside Fire Base Camp was operated by the Montana DNRC, and it was Montana DNRC personnel at the West Riverside Fire Base Camp who were responsible for processing Crewzers' invoice. The Tents delivered, set-up, and then taken-down by Crewzers at the West Riverside Fire Base Camp were sent from, and returned to, Crewzers' point of hire in Ritzville, Washington, a one-way trip of two-hundred fifty-five miles. Under the USFS Region 1 Tent BPA Crewzers was entitled as of right to be paid mileage for a round-trip from Ritzville, Washington to the West Riverside Fire Base Camp. But USFS Contracting Officer Deborah Wesselius directed personnel at the Montana DNRC to breach the payment terms of the USFS Region 1 Tent BPA, and Crewzers was paid for round-trip mileage only to and from the Interagency Dispatch Center in Missoula, Montana, a very short round-trip in comparison to the mileage payment to which Crewzers was entitled under the USFS Region 1 Tent BPA. This action by USFS Contracting

Officer Deborah Wesselius was taken in obvious disregard of the payment terms of the USFS Region 1 Tent BPA and in bad faith, and it purposefully deprived Crewzers of its contractual rights. *North Star Alaska Housing*, 76 Fed. Cl., at 117 (administrative personnel “being used as a tool to make [the Contractor] pay for stuff.”)

29. In her Decision of November 8th, 2011 USFS Contracting Officer Deborah Wesselius contended that Crewzers attempted to set-up Type 3 Tents at the “Forty-One Complex” Base Camp larger than those Type 4 Tents Ordered; that when confronted with the mistake, Crewzers became “belligerent, confrontational, rude, argumentative, and belligerent,” and that “[o]nly at the Government’s insistence was the order finally complied with.”

30. Again, the facts are otherwise. Crewzers arrived at the Forty-One Complex Base Camp early in the afternoon of August 30th, 2011 with a four-person crew, a chase vehicle, and a truck and trailer with both sizes of Tents (Type 3 and Type 4) loaded aboard the trailer. Crewzers did so because in USFS Region 1 it was experiencing that upon arrival at a Base Camp there

would be changes made, either in Tent sizes, or in the number of Tents actually required to be set-up at the Base Camp. Crewzers began set-up of a larger, Type 3, Tent. USFS employee Roylene Gaul, a Trainee in Base Camp operations, walked up yelling "I did not want the Taj Mahal, what are you doing?" She was loud and aggressive. Crewzers checked the Order by accessing an electronic copy of it over the Internet and found it was mistaken, found that the Order was for smaller, Type 4, Tents. Crewzers offered to leave the Type 3 Tent in place so that then USFS Region 1 would receive use of a larger, Type 3 Tent, for the price of a smaller, Type 4 Tent. The USFS Trainee, Roylene Gaul, was not to be denied her insistence on smaller Tents whether or not USFS Region 1 got the free use of a larger Tent: "I ordered small ones, SMALL ONES, and that's what I want." Crewzers took down the partially erected Type 3 Tent and replaced it with a Type 4 Tent.

31. These verbal exchanges were observed by the USFS-hired Camp Crew at the Forty-One Complex Base Camp. Later, they remarked that "Roylene seemed stressed and a little out of control." Even if the mistake had not

been recognized and Crewzers had set-up the larger Type 3 Tents, under the payment procedures established for the USFS Region 1 Tent BPA, Crewzers would not have been paid for larger Type 3 Tents when the Order was for smaller Type 4 Tents.

32. On September 7th, 2011 USFS Trainee Roylene Gaul Ordered for the Forty-One Complex Base Camp a Type 3 Tent to be set-up as a Copy Room and an additional Type 4 Tent to be set-up as a Security Tent. Crewzers had unloaded the Type 4 Tent at the Forty-One Complex Base Camp and was in the set-up process for the Type 3 Tent when Trainee Roylene Gaul and USFS Contracting Officer Deborah Wesselius together cancelled the Order for an additional Type 4 Tent. Crewzers later, on September 13th, 2011, Crewzers spoke with USFS Contracting Officer Deborah Wesselius and “asked her if there was anything that we needed to discuss.” USFS Contracting Officer Deborah Wesselius replied that “everything was good and that there are no problems.” This was a lie, because Trainee Roylene Gaul

had that very day authored a negative USFS Performance Evaluation for Crewzers.

33. The Forty-One Complex wildland fire lasted a total of twenty-one days, and the Order for the hire of Crewzers' Type 3 and Type 4 Tents did not conclude until September 19th, 2011. Nonetheless, USFS Trainee Roylene Gaul authored six days early a negative USFS Performance Evaluation for Crewzers, and when USFS Trainee Roylene Gaul did so, she used the wrong Performance Evaluation forms, not the forms required by the USFS Region 1 Tent BPA. USFS Trainee Roylene Gaul was at the Forty-One Complex Base Camp through September 19th, 2011 and was not authorized to omit Crewzers' performances for one-third of the total period of performance under the Order of Crewzers' Tents for the Forty-One Complex Base Camp.

34. USFS Contracting Officer Deborah Wesselius was also at the Forty-One Complex Base Camp during this period—she did not there discharge her duty to supervise the activities of USFS Trainee Roylene Gaul and she did not there discharge her duty to ensure that USFS Trainee Roylene Gaul

adhered to the requirements of the USFS Region 1 Tent BPA. Federal Acquisition Regulation 1.602-2, "Responsibilities," 48 C.F.R. § 1.602-2 (October 1st, 2010), then provided that Contracting Officers "are responsible" for "ensuring compliance with the terms of the contract" This was negligent conduct on the part of USFS Contracting Officer Deborah Wesselius and a breach by USFS Region 1 of the covenant of good faith and fair dealing. *Fireman's Fund Insurance Co. v. United States*, 92 Fed. Cl. 598, 679-680 (2010).

35. In her Decision of November 8th, 2011 USFS Contracting Officer Deborah Wesselius contended that Crewzers did not arrive at the "Granite Pass 1" Base Camp at the date and time needed by the Order which had been issued; that Crewzers did not meet USFS Region 1 Tent BPA time requirements for Tent set-up and take-down; that swamp coolers and lights did not work, were missing, else were inadequate; that some Tents were missing electric cabling and outlets; and that when completing the invoicing process for Order close-out, Crewzers "removed an original Government document

from the Governments [sic] documentation envelop [sic],” and “when requested to return it immediately,” Crewzers’ “refused to do so.”

36. This was not the first time that USFS Contracting Officer Deborah Wesselius had complained about the time Crewzers arrived at the Granite Pass 1 Base Camp. She had called on September 5th, 2011 and then she subjected Crewzers to an eleven-minute tirade, repeatedly ranting “I AM DONE WITH CREWZERS.” “I AM DONE WITH CREWZERS.” “I AM SO DONE WITH CREWZERS.”

37. Once again, the facts are at odds with USFS Contracting Officer Deborah Wesselius’ account in her Decision of November 8th, 2011. Yes, the date and time needed for Tents to arrive at the Granite I Base Camp was set out in the Order as 3:00 p.m. on August 30th, 2011, but Crewzers could not make this time, and the Order reflects that Crewzers’ estimated time of arrival at the Granite 1 Base Camp was 5:30 p.m. on August 30th, 2011—so even though Crewzers could not meet the date and time needed, the Grangeville, Idaho Interagency Dispatch Center had issued the Order anyway.

38. Crewzers arrived at the Granite Pass 1 Base Camp at 7:00 p.m. but it was getting dark and the sites where the Tents were to be set-up had not been completed by a USFS-hired Camp Crew. So Crewzers was told to commence work the following day, at 6:00 a.m. on August 31st, 2011. And it turned out that one of the Tents which had been Ordered needed to be set-up at a remote location twelve miles away—this directive was not issued until midday on August 31st, 2011 and when Crewzers found someone at the Granite Pass 1 Base Camp so as to be shown to the remote location late that afternoon, Crewzers had to wait for a USFS-hired Camp Crew to take down a USFS-owned Tent at that remote location before Crewzers could set-up one of its Tents in its place. This they did not do until the following day, the morning of September 1st, 2011.

39. Crewzers delivered swamp coolers for use with the Tents at the Granite Pass 1 Base Camp. The swamp coolers worked but they were not needed because the outside air temperature, as recorded at a nearby National Weather Service remote sensor, did not go above eighty degrees until

the very day that USFS personnel began vacating the Base Camp on September 4th, 2011. Temperatures sunk to thirty-three degrees at night. Personnel at the Granite Pass 1 Base Camp were clad in coats and jackets and ordered propane heaters to keep the Tent interiors warm. Crewzers delivered with each Tent a one-hundred foot, twelve-gauge, three-wire extension cord, and a commercial grade surge protector with a ground-fault interrupter and either seven or eight protected outlets. In only one instance was electrical power not supplied to the Crewzers Tents, and that happened because USFS personnel decided not to supply electrical power from a light tower which was not turned on during the day and at night did not have sufficient capacity to run little more than a single electrical device from its single electrical outlet.

40. Monday, September 5th, 2011, the day USFS Contracting Officer Deborah Wesselius subjected Crewzers to an eleven-minute telephone tirade, was an eventful day because that was also the day that USFS Contracting Officer Deborah Wesselius directed USFS personnel at the Granite

Pass 1 Base Camp to breach the payment terms of the USFS Region 1 Tent BPA, and to pay Crewzers round-trip mileage only to and from the Interagency Dispatch Center in Grangeville, Idaho, and not to and from the point of hire, Crewzers' facility in Nyssa, Oregon. This directive was recorded at the Granite Pass 1 Base Camp on a "General Message" multipart form, and this is the document USFS Contracting Officer Deborah Wesselius accused Crewzers of removing without authorization. Nothing could be further from the truth, for the truth is that USFS personnel at the Granite Pass 1 Base Camp willingly gave one of the copies of this document to Crewzers. Crewzers did not without authorization from USFS personnel at the Granite Pass 1 Base Camp remove one of the copies of the General Message.

41. Crewzers received on September 6th, 2011 its USFS Performance Evaluation for the Tents delivered, set-up, and then taken-down at the Granite Pass 1 Base Camp. Crewzers was rated "Excellent" on "Quality of Product or Service," was rated "Good" on "Timeliness of Performance," and was rated "Excellent" on "Business Relations." The "Good" rating for Timeli-

ness of Performance does not consider that the Order was issued to Crewzers even though Crewzers could not meet the date and time needed. Nor does this “Good” rating acknowledge the directive issued the day after Crewzers had arrived to set-up a Tent at a location twelve miles distant from the Granite Pass I Base Camp. There is no consideration in this USFS Performance Evaluation of USFS-hired Camp Crew delays in readying the Granite Pass I Base Camp site for placement of Tents, and no consideration of the USFS’s inability to supply electrical power to all Tents.

42. Whether Government Claims or Contractor Claims, when either sort of Claim is made under the Contract Disputes provisions, there must be a diligent investigation of basic facts, *Daewoo Engineering and Construction Co., Ltd. v. United States*, 73 Fed. Cl. 547, 579 n. 53 (2006), and such Claims are “not intended to be a negotiating game” where one party takes an outrageous position “to gain leverage” over the other, *Moreland Corp.*, 76 Fed. Cl., at 292. But that is what happened here: USFS Contracting Officer Deborah Wesselius did not consider Crewzers’ performance at the “Stewart

Fire;” did not read, else ignored, the Order issued by the Grangeville, Idaho Interagency Dispatch Center for the Granite Pass I Base Camp; issued directives to personnel at the West Riverside Fire Base Camp and at the Granite Pass 1 Base Camp to breach the payment terms of Crewzers’ Tent BPA with USFS Region 1; and without explanation ignored the USFS Performance Evaluations generated at the Stewart Fire Base Camp, at the West Riverside Fire Base Camp, and at the Granite Pass 1 Base Camp. Just as this Court observed in *Moreland Corp.*, 76 Fed. Cl., at 290-291, this was “bureaucratic ineptitude” and here as well this bureaucratic ineptitude is the only way “to account for such a senseless decision.”

43. While Crewzers did not learn of USFS Contracting Officer Deborah Wesselius’ Decision of November 8th, 2011 terminating the USFS Region1 Tent BPA for the convenience of USFS Region 1 until Tuesday, December 13th, 2011, Crewzers did receive an automated electronic notice on November 10th, 2011 that the USFS Region 1 Tent BPA “has been terminated in accordance with the Government’s right to terminate for convenience” An

hour later, Crewzers' Tents were removed from the DPLs. Without listings on these Tent DPLs, Crewzers was then no longer able to compete under the Ordering Protocol, and Crewzers was shut out of the Tent business at USFS Region 1 through April 11th, 2014. Crewzers challenged on November 22nd, 2011 the termination for convenience by submitting a Contract Disputes Claim seeking reinstatement and the appointment of a new USFS Contracting Officer to replace Deborah Wesselius, this due to her expressions of animosity, her lies, and her obvious disregard of the payment terms of the USFS Region 1 Tent BPA.

The Termination for Cause Of December 7th, 2011 And Further USFS Displays Of Animus.

44. On December 7th, 2011 USFS Contracting Officer Deborah Wesselius prepared a Contract Disputes Final Decision, this in response to Crewzers' Contract Disputes Claim of November 22nd, 2011. In this Contract Disputes Final Decision USFS Contracting Officer Deborah Wesselius "revoke[s] the termination for convenience issued November 10, 2011 and replace[s] this termination with a termination for cause for the reasons stated in my let-

ter of November 8, 2011.” Following this sentence is a brief recitation of the assertions earlier made. USFS Contracting Officer Deborah Wesselius next denies Crewzers’ request to appoint a new USFS Contracting Officer:

As to the request to appoint a new Contracting Officer, this request is denied. The above termination of this blanket purchase agreement is solely based on Crewzers failure to comply with contract terms and conditions; and is adequately documented by incident personnel on performance evaluations.

45. The USFS Performance Evaluations for the West Riverside Fire Camp, the Granite Pass 1 Base Camp, and the Stewart Fire Base Camp do not support the assertions made by USFS Contracting Officer Deborah Wesselius in this Contract Disputes Final Decision (they contradict her statements), and these on-site USFS Performance Evaluations were in fact ignored by USFS Contracting Officer Deborah Wesselius in her previous termination for the convenience of USFS Region 1 issued on November 8th, 2011. In this termination for cause of December 7th, 2011 USFS Contracting Officer Deborah Wesselius carefully omits mentioning her directives to Montana DNRC personnel at the West Riverside Fire Base Camp, and to USFS per-

sonnel at the Granite Pass 1 Base Camp, to breach the payment terms of the USFS Region 1 Tent BPA.

46. On January 25th, 2012 USFS Contracting Officer Deborah Wesselius issued “VIPR_MOD_02” to the USFS Region 1 Tent BPA. This proposed Modification seeks Tent Contractor signature and assent to a new USFS Region 1 Tent BPA, and this proposed Modification asserts that “[a]ll of the agreement information has been preserved” What is not mentioned is that two provisions have been added and that these two provisions conflict with the existing payment terms. These provisions are:

D.6.5.4 The vendor will be paid for travel to and from the incident from the equipment City and State they designated in their offer. Vendor must meet the date and time needed.

D.21.8.1.1 The vendor will be paid for travel to and from the incident from the equipment City and State they designated in their offer. Vendor must meet the date and time needed.

These added provisions confirm the scheme—the point of the Decisions of the USFS Contracting Officer Deborah Wesselius was to eliminate Crewzers

from the USFS Region 1 Tent BPA in order to squelch Crewzers' insistence on USFS adherence to agreed-upon payment terms, and this is bad faith.

COUNT I
THE TERMINATIONS WERE ASSERTED IN BAD FAITH.

47. Plaintiff Crewzers incorporates and re-alleges paragraphs numbers 1. through 46. hereinabove as if fully set forth herein.

48. USFS Contracting Officer Deborah Wesselius abused her discretion and later acted in bad faith by asserting these Government Claims terminating Crewzers' USF Region 1 Tent BPA because Tents are still required by USFS Region 1 and will be used in 2012, 2013, and early 2014 for Base Camps established by USFS and others to combat wildland fires and because a later termination for cause cannot be substituted for a previous termination for convenience.

COUNT II
USFS REGION 1 INTERFERED WITH CREWZERS' PERFORMANCE
WITH A SPECIFIC INTENT TO DEPRIVE CREWZERS OF ITS CONTRACTUAL RIGHTS

49. Plaintiff Crewzers incorporates and re-alleges paragraphs numbers 1. through 46. hereinabove as if fully set forth herein.

50. USFS Contracting Officer Deborah Wesselius, employees of the Montana DNRC acting under the direction of USFS Contracting Officer Deborah Wesselius, and other USFS employees interfered with Crewzers' performance of the USFS Region 1 Tent BPA with a specific intent to deprive Crewzers of its contractual rights when they purposely denied Crewzers' proper mileage payments under the agreed-upon payment terms of the USFS Region 1 Tent BPA.

COUNT III
USFS REGION 1 BREACHED THE IMPLIED IN-FACT CONTRACT
OF GOOD FAITH AND FAIR DEALING.

51. Plaintiff Crewzers incorporates and re-alleges paragraphs numbers 1. through 46. hereinabove as if fully set forth herein.

52. USFS Contracting Officer Deborah Wesselius breached the implied in-fact Contract of good faith and fair dealing when, without her proper supervision, she allowed USFS Trainee Roylene Gaul to issue a USFS Performance Evaluation for the Forty-One Complex Base Camp which manifestly did not comply with the requirements of the USFS Region 1 Tent BPA and then

when USFS Contracting Officer Deborah Wesselius relied on this manifestly improper USFS Performance Evaluation in her Decisions terminating Crewzers' Tent BPA with USFS Region 1.

COUNT IV

THE USFS REGION 1 DECISIONS TO TERMINATE WERE NOT HONESTLY RENDERED.

53. Plaintiff Crewzers incorporates and re-alleges paragraphs numbers 1. through 46. hereinabove as if fully set forth herein.

54. USFS Contracting Officer Deborah Wesselius' Decisions to terminate Crewzers' Tent BPA were not honestly rendered because there she did not undertake the required diligent investigation of basic facts and because she issued these Decisions as part of a "negotiating game" where she took outrageous positions on the part of USFS Region 1 "to gain leverage" over Crewzers and other Tent Contractors.

COUNT V
THERE WERE NO MATERIAL DEVIATIONS FROM
USFS REGION 1 TENT BPA REQUIREMENTS.

55. Plaintiff Crewzers incorporates and re-alleges paragraphs numbers 1. through 46. hereinabove as if fully set forth herein.

56. The actions of Plaintiff Crewzers upon which USFS Contracting Officer Deborah Wesselius relies to support her Decisions are not deviations from USFS Region 1 Tent BPA requirements imposed on Crewzers. Instead, these are concoctions of USFS Contracting Officer Deborah Wesselius' own making and reflective of her own mismanagement of agreed-upon Tent BPA requirements imposed on USFS Region 1, not on Crewzers. That these circumstances are not material deviations from Tent BPA requirements is amply demonstrated by the USFS Performance Evaluations issued on-site at the Stewart Fire Base Camp, at the West Riverside Fire Base Camp, and at the Granite Pass 1 Base Camp. The Decisions by USFS Contracting Officer Deborah Wesselius served only "as a useful pretext" to get rid of Crewzers. *Schlesinger v. United States*, 390 F.2d 702, 709 (Ct. Cl. 1968).

PRAYER FOR RELIEF

WHEREFORE, premises considered, Plaintiff Crewzers respectfully requests the Court to grant Judgment for Plaintiff Crewzers in this Civil Action, and to Order the following relief:

(a) a Declaration that USFS Contracting Officer Deborah Wesselius and other USFS Region 1 personnel acted in bad faith in asserting these Government Claims terminating Crewzers' Tent BPA, RCFC 57, and;

(b) a Declaration that USFS Contracting Officer Deborah Wesselius and other USFS personnel interfered with Crewzers' performance of the Tent BPA with specific intent to deprive Crewzers of its agreed-upon contractual rights under the USFS Region 1 Tent BPA, RCFC 57, and;

(c) a Declaration that USFS Contracting Officer Deborah Wesselius and other USFS personnel breached the covenant of good faith and fair dealing which USFS Region 1 owed to Crewzers under the USFS Region 1 Tent BPA, RCFC 57, and;

(d) a Declaration that USFS Contracting Officer Deborah Wesselius' Decisions to terminate Crewzers' Tent BPA were not "honestly rendered" and were therefore arbitrary, or capricious, or an abuse of discretion, RCFC 57, and;

(e) a Declaration that Crewzers has in no way materially breached any of Crewzers' obligations under the Tent BPA with USFS Region 1, RCFC 57, and;

(f) reinstatement of the USFS Region 1 Tent BPA under the broad authority of Federal Acquisition Regulation 2.101, "Definitions," 48 C.F.R. § 2.101 (October 1st, 2010), *Todd Construction, 2011 U.S. App. LEXIS 17980, *11*, and

(g) alternatively, a Declaration that Crewzers is now entitled to recover breach of contract damages, including expectation damages, these for the remainder of the three-year term of the Tent BPA with USFS Region 1, else for the period beginning on Saturday, December 10th, 2011 through the date

of reinstatement and restoration of Crewzers to the DPLs for the USFS Region 1 Tent BPA, RCFC 57, and;

(h) such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Cyrus E. Phillips IV

Cyrus E. Phillips IV
Virginia State Bar Number 03135

February 3rd, 2012

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