State of New Hampshire
Supreme Court

NO. 2023-0076

2023 TERM

AUGUST SESSION

Hate to Paint, LLC

v.

Ambrose Development, LLC
and John J. Flatley d/b/a John J. Flatley Company

RULE 7 APPEAL OF FINAL DECISION OF THE
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF DEFENDANTS/APPELLANTS

August 23, 2023

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Preserved: OBJECTION TO SUMMARY JUDGMENT ON LIABILITY (Dec. 3, 2020); INTERLOCUTORY APPEAL STATEMENT (Apr. 8, 2021); MOTION TO RECONSIDER (Mar. 5, 2021); REQUESTS FOR FINDINGS & RULINGS (Sept. 29, 2022).

II. Did the court err in using the covenant of good faith and fair dealing to reform a bargain between seasoned parties?

Preserved: OBJECTION TO MOTION FOR SUMMARY JUDGMENT ON LIABILITY (Dec. 3, 2020); INTERLOCUTORY APPEAL STATEMENT (Apr. 8, 2021); MOTION TO RECONSIDER (Mar. 5, 2021); REQUESTS FOR FINDINGS & RULINGS (Sept. 29, 2022).

III. Did the court err in ruling that getting a better price was an insufficient basis for invoking the "termination for convenience" clause?

Preserved: OBJECTION TO SUMMARY JUDGMENT ON LIABILITY (Dec. 3, 2020); INTERLOCUTORY APPEAL STATEMENT (Apr. 8, 2021); MOTION TO RECONSIDER (Mar. 5, 2021); REQUESTS FOR FINDINGS & RULINGS (Sept. 29, 2022).

IV. Did the court err by overstating plaintiff's profit, and thereby award excessive damages?

Preserved: Transcript of Damages Hearing, *passim;* REQUESTS FOR FINDINGS & RULINGS (Sept. 29, 2022).

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Preserved: Transcript of Damages Hearing, *passim;* REQUESTS FOR FINDINGS & RULINGS (Sept. 29, 2022).

VI. Did the court err by rejecting the defendants' ability to discover evidence of mitigation of damages?

Preserved: MOTION TO COMPEL (Oct. 6, 2021); MOTION CONCERNING TAX RETURNS (Aug. 11, 2022); OBJECTION TO MOTION IN *LIMINE* (Aug. 22, 2022); Transcript of Damages Hearing at 60-61, 67, *passim;* REQUESTS FOR FINDINGS & RULINGS (Sept. 29, 2022).

VII. Did the court err in rejecting the defendants' claim that plaintiff failed to mitigate its damages?

Preserved: MOTION TO COMPEL (Oct. 6, 2021); MOTION CONCERNING TAX RETURNS (Aug. 11, 2022); OBJECTION TO MOTION IN *LIMINE* (Aug. 22, 2022); Transcript of Damages Hearing at 16, 60-61, 67, *passim;* REQUESTS FOR FINDINGS & RULINGS (Sept. 29, 2022).

STATEMENT OF FACTS

This case concerns a commercial painting contract involving a multi-building residential construction project in Somersworth, New Hampshire, performance of which would have occurred in 2020 had the relationship not terminated.

I. Parties' Earlier Relationship

Plaintiff Hate to Paint is a commercial painting contractor based in Derry, New Hampshire. It specializes in multi-residential and commercial properties. *Trn*. at 7, 37. Founded in 1985, the company paints four to six projects a year, typically having more than one job at a time, and has subcontracted for dozens of building and construction companies. *Trn*. at 7-8. Hate to Paint employs painters, but also uses subcontractors when it needs "temporary help." *Trn*. at 8, 23, 29; JOB ACTUAL COST DETAIL (Sept. 16, 2020), Exh. 5, *Appx*. at 88. Its revenue runs about $900,000 per year, and had it performed the contract at issue here, 2020 would have been its "banner year." PLAINTIFF'S PROPOSED FINDINGS OF FACT AND RULINGS OF LAW ¶¶ 25, 26 (Sept. 29, 2022), *Appx*. at 56; *Trn*. at 66-67.

Ambrose[1] is a developer of residential and commercial real estate in New Hampshire and Massachusetts. *See* <https://flatleyco.com/>. The parties' first interaction was in 2018, when Hate to Paint bid on and secured a contract for a painting project at Ambrose's new development in Merrimack, New Hampshire. Known as "Gilbert Crossing," the project comprised four 48-unit residential buildings, a 10-bay garage, and a clubhouse. The contract price for painting was $568,000. FLATLEY CONTRACT PREP FORM (Aug. 2, 2018),

[1]The defendant John J. Flatley d/b/a John J. Flatley Company is the owner of building projects. The defendant Ambrose Development, LLC, is a developer. The nature of their relationship, while disputed in the record, *Trn*. at 69-74, is not relevant to this appeal. Because the contract was with the development company, they are collectively referred to herein as "Ambrose."

Appx. at 181; GILBERT CROSSING CONTRACT (Aug. 13, 2018), Exh. 3, *Appx*. at 86.

During performance of the Gilbert Crossing contract, the parties negotiated adjustments in the scope of work and its price, exchanging numerous cross-proposals, which resulted in contracted change orders. For instance, there were negotiations for added painting of a bump-out in the clubhouse for an additional $6,000, *see* EMAIL FROM AMBROSE TO HATE TO PAINT (Apr. 18, 2019), *Appx*. at 183; HATE TO PAINT PROPOSAL (Apr. 22, 2019), *Appx*. at 184; PROPOSED CHANGE ORDER (May 15, 2019), *Appx*. at 188; PROPOSED CHANGE ORDER PREP FORM (May 17, 2019), *Appx*. at 189; CONTRACT CHANGE ORDER (May 20, 2019), *Appx*. at 190, and for supplementary painting of added bathroom baseboards for an additional $16,200. *See* EMAIL FROM HATE TO PAINT TO AMBROSE (June 13, 2019), *Appx*. at 194; PROPOSED CHANGE ORDER PREP FORM (June 17, 2019), *Appx*. at 195; CONTRACT CHANGE ORDER (June 21, 2019), *Appx*. at 196.

The Gilbert Crossing contract was satisfactorily performed, *Trn.* at 73, and invoices were routinely paid. INVOICES (Nov. 24, 2018), Exh. A, *Appx*. at 170; INVOICES (Dec. 15, 2019), Exh. B, *Appx*. at 171; INVOICES (Mar. 11, 2020), Exh. C, *Appx*. at 172. Hate to Paint grossed $598,700 from the project, JOB ACTUAL REVENUE DETAIL (Sept. 16, 2020), Exh. 4, *Appx*. at 87, and claimed "net profit" of $242,491. PLAINTIFF'S ANSWERS TO INTERROGATORIES ¶8 at 3-4 (Sept. 15, 2020), Exh. 12, *Appx*. at 122.

Notably, the Gilbert Crossing contact contained a termination clause, which allowed Ambrose to quit the contract "for convenience" upon three days' notice; in the event of such termination, damages were stipulated as the cost of "labor and materials." GILBERT CROSSING CONTRACT ¶ 7 (Aug. 13, 2018), Exh. 3, *Appx*. at 86.

II. Current Contract

While painting was progressing at Gilbert Crossing in Merrimack in 2019, Ambrose solicited bids for a second project, to be built in Somersworth, New Hampshire, known as "Tara Fields." Ambrose listed the project on BidClerk, a commercial bidding website. *Trn*. at 75; *see* <https://www.bidclerk.com/>. With the exception of fewer residential buildings, three rather than four, Tara Fields was identical in design to Gilbert Crossing. *Trn*. at 32; DEFENDANT'S ANSWERS TO INTERROGATORIES ¶ 3 (Oct. 21, 2020), Exh. 13, *Appx*. at 162.

Beginning in the spring of 2019, Ambrose received bids from several painting contractors for the Tara Fields project in Somersworth. CAPRIOLI PAINTING PROPOSAL (May 3, 2019), *Appx*. at 185; CE PAINTING QUOTE (May 22, 2019), *Appx*. at 191; DEFENDANT'S ANSWERS TO INTERROGATORIES ¶ 2 (Oct. 21, 2020), Exh. 13, *Appx*. at 162. Knowing there are long lags, as much as eight to twelve months, between the time of an estimate and when work actually begins, Hate to Paint submitted a bid. *Trn.* at 34; HATE TO PAINT PROPOSAL (Mar. 27, 2019), Exh. F, *Appx*. at 174. Being the lowest price, it gained Ambrose's attention. FLATLEY CONTRACT PREP FORM (May 24, 2019), *Appx*. at 193. Over the course of five months, Ambrose insisted on a yet lower price, which Hate to Paint met. (REVISED) HATE TO PAINT PROPOSAL (July 16, 2019), Exh. D (lowering price from $522,000 to $500,000), *Appx*. at 173.

Hate to Paint understood that, because the two projects were of the same design, it had already surmounted a learning curve, and could complete the Tara Fields project efficiently. *Trn*. at 33, 49, 74, 77. In August 2019, apparently concerned negotiations were wilting, Hate to Paint contacted Ambrose, urging Ambrose to award Hate to Paint the contract. The Ambrose representative conducting the negotiations recommended a phone call higher up in his company, which evidently occurred. EMAILS BETWEEN HATE TO

PAINT AND AMBROSE (Aug. 8-9, 2019), *Appx*. at 197; FLATLEY CONTRACT PREP FORM (Aug. 12, 2019), *Appx*. at 198 (noting bid reduced from $522,000 to $500,000).

A week later, on August 20, 2019, the parties signed the contract here at issue. *Trn.* at 73. Ambrose and Hate to Paint agreed on a price of $500,000 to paint Tara Fields, with work anticipated to commence in October 2019 and finish by December 2020. TARA FIELDS CONTRACT (Aug. 20, 2019), Exh. 1, *Addendum* at 45.

In language nearly identical to the earlier Gilbert Crossing contract in Merrimack, the Tara Fields contract for Somersworth provided:

> TERMINATION FOR CONVENIENCE: [Ambrose] may terminate the Contract for convenience upon three (3) days prior written notice. In the event of such termination, [Hate to Paint] shall be entitled to receive payment for labor and materials furnished through the date of termination. [Hate to Paint] shall not be entitled to receive payment for any lost profits.

Id. at ¶7. The contract also provided:

> SEVERABILITY OF PROVISIONS: Should any provision of this Contract be declared invalid as a matter of law. such invalidity shall affect only such provision and shall not invalidate or affect remaining provisions of this Contract.

Id. at ¶13.

III. Invocation of Convenience Clause and Rebidding

Ambrose intended to follow through on its contract with Hate to Paint, ORDER ON MERITS at 7 (Jan. 9, 2023), *Addendum* at 65, but its solicitation lingered on the commercial bidding website. *Trn*. at 75. Following the August 2019 signing, Ambrose's accounting department continually conducted audits, and discovered that the per-unit price for painting in the then-executing Gilbert Crossing contract was lower than that for the new Tara Fields project. DEFENDANT'S ANSWERS TO INTERROGATORIES ¶¶ 4-5 (Oct. 21, 2020), Exh. 13, *Appx*. at 162; *Trn*. at 76-80. In addition, another painting company showed up on Ambrose's jobsite, with a credible recommendation, and offered to bid on the Tara Fields job. DEFENDANT'S ANSWERS TO INTERROGATORIES ¶¶ 2, 5 (Oct. 21, 2020), Exh. 13, *Appx*. at 162.

Consequently, on January 3, 2020, Ambrose wrote a letter to Hate to Paint explaining its audit, invoking the termination-for-convenience clause, and soliciting a rebid on the project. The letter said:

> An internal audit has been performed to review the line items … for Gilbert Crossing … as compared to Tara Fields.… As a result, due to the increase in cost per Building the Tara Fields painting contract requires a rebid.…
>
> [I]n accordance with the terms of Section 7 of the above referenced contract, namely TERMINATION FOR CONVENIENCE, this letter shall serve as [Ambrose's] three (3) day notice to Hate to Paint … terminating Contract … for the Tara Fields Project.…
>
> If you wish to rebid please submit no later than January 17, 2020.

TERMINATION LETTER FROM AMBROSE TO HATE TO PAINT (Jan. 3, 2020), Exh. 2, *Addendum* at 57 (emphasis and capitalization in original); *Trn.* at 38.

Ambrose was transparent that the reason for termination was a post-

audit better price from another contractor, and in giving Hate to Paint an opportunity to match or surpass it. TERMINATION LETTER FROM AMBROSE TO HATE TO PAINT (Jan. 3, 2020), Exh. 2, *Addendum* at 57; DEFENDANT'S ANSWERS TO INTERROGATORIES ¶ 6 (Oct. 21, 2020), Exh. 13, *Appx*. at 162; *Trn.* at 38, 81-82. Ambrose acknowledged that although pricing data existed earlier than the termination letter, it took several months to conduct its internal audit, *Trn.* at 80, and the court found there was no intent to deceive. ORDER ON MERITS at 8 (Jan. 9, 2023), *Addendum* at 65.

While Hate to Paint chafed at having to bid against itself, *Trn*. at 39, before the rebid deadline, Hate to Paint wrote to Ambrose noting that "[o]ur working relationship has been great up until this point." Hate to Paint indicated it was hoping that "we can find an agreement between us to continue working together," advising that "[i]f this work should fall through, I will be impacted financially," and suggesting "to meet in person … to discuss a revised arrangement." LETTER FROM HATE TO PAINT TO AMBROSE (Jan. 16, 2020), Exh. 6, *Appx*. at 114; *Trn*. at 38-39, 49. Hate to Paint nonetheless promised it would submit a rebid promptly. LETTER FROM HATE TO PAINT TO AMBROSE (Jan. 16, 2020), Exh. 6, *Appx*. at 114; *Trn*. at 38-39, 49.

Following this were a succession of three progressively lower rebids by Hate to Paint, each rejected by Ambrose.

The first, which appears to have been informal and before the deadline, was down from $500,000 to $465,400. *Trn*. at 39-40.

Hate to Paint told Ambrose that rejection of its bid would have a direct impact on the company because it had been allocating manpower to the Tara Fields project and forgoing other opportunities. EMAIL FROM HATE TO PAINT TO AMBROSE (Jan. 25, 2020), Exh. 8, *Appx*. at 117; *Trn*. at 40. Ambrose then informed Hate to Paint that it had in hand "our lowest proposal" from another contractor for $423,800, EMAIL FROM AMBROSE TO HATE TO PAINT (Jan. 20,

2020), Exh. 7, *Appx*. at 115, causing Hate to Paint to issue a second rebid, which it termed its "best and final proposal," for $418,400. EMAIL FROM HATE TO PAINT TO AMBROSE (Jan. 25, 2020), Exh. 8, *Appx*. at 117; HATE TO PAINT PROPOSAL (Jan. 28, 2020), Exh. 8 & Exh. G, *Appx*. at 117 & 175; *Trn*. at 41-42, 82-83.

The parties then had phone and "face to face" conversations, in which "there weren't very many kind words" between representatives of the two companies who had been working together for several years. *Trn*. at 82-83. Hate to Paint believed that the rejections were taking place above the level of its usual negotiating counterpart, *Trn*. at 43, and a phone call took place between top personnel at each company. *Trn*. at 43, 84; EMAIL FROM HATE TO PAINT TO AMBROSE (Jan. 29, 2020), Exh. M, *Appx*. at 180; EMAIL FROM AMBROSE TO HATE TO PAINT (Jan. 29, 2020), Exh. L, *Appx*. at 179; EMAIL FROM HATE TO PAINT TO AMBROSE (Jan. 31, 2020), Exh. 9, *Appx*. at 119. Hate to Paint asked, "what do I need to do to get the job?," to which Ambrose replied that its bid had to be "somewhere around the 400,000-dollar range." *Trn*. at 42-43.

Those communications resulted in a third rebid, which Hate to Paint called its "final proposal," for $403,500; HATE TO PAINT PROPOSAL (Jan. 31, 2020), Exh. 9, *Appx*. at 119; HATE TO PAINT PROPOSAL (Jan. 31, 2020), Exh. H, *Appx*. at 177; *Trn*. at 83-84.

While these negotiations were ongoing, Ambrose was also receiving bids from other contractors, who had also lowered their prices in an effort to secure Ambrose's job. EASTERN PAINTING ESTIMATE (Jan. 31, 2020), *Appx*. at 200; FLATLEY CONTRACT PREP FORM (Jan. 23, 2020), *Appx*. at 199 (comparing bids from Hate to Paint, Eastern Painting, and Action Jackson Painting).

Hate to Paint's third bid was rejected, *Trn*. at 84, and on February 4, 2020, the job was awarded to another contractor for a price of $392,500.

CONTRACT WITH EASTERN PAINTING COMPANY (Feb. 4, 2020), *Appx*. at 201. That contract, nearly identical to the August 2019 contract with Hate to Paint, also included a termination-for-convenience clause. *Id.* at ¶7.

Despite this, Ambrose and Hate to Paint continued cooperating at Gilbert Crossing until March 2020 when painting there reached completion. *Trn*. at 73; AFFIDAVIT OF PIETZ ¶6 (Dec. 3, 2020), *Appx*. at 20. In April, Ambrose paid Hate to Paint $1,360 to compensate for the cost of paint it had purchased for Tara Fields. AFFIDAVIT OF PIETZ ¶7.

Although Hate to Paint asserted that it stopped bidding on other projects "that would require a workforce in the calendar year 2020," PLAINTIFF'S ANSWERS TO INTERROGATORIES ¶14 at 4 (Sept. 15, 2020), Exh. 12, *Appx*. at 122; AFFIDAVIT OF SULLOWAY ¶4 (Nov. 4, 2020), *Appx*. at 9; *Trn*. at 37, it was unable to provide either a list of allegedly foregone bids or of substituted work that allowed its gross receipts to largely mirror prior years. AFFIDAVIT OF PIETZ ¶5 (Dec. 3, 2020), *Appx*. at 20. Nonetheless, Hate to Paint's founder and principal testified that the company painted at least four "sizable multi-residential project[s]" in 2020 in Pembroke, Raymond, Nashua, and one other New Hampshire town. *Trn*. at 62.

STATEMENT OF THE CASE

In January 2020, Ambrose invoked the parties' termination-for-convenience clause. In May, Hate to Paint sued Ambrose for breach of contract and other claims.

In November 2020, Hate to Paint filed a motion for summary judgment on liability, which was followed by an objection, memoranda, affidavits, and parties' statements of material facts. COMPLAINT (May 15, 2020), *Appx*. at 4; MOTION FOR SUMMARY JUDGMENT AND STATEMENT OF MATERIAL FACTS (Nov. 4, 2020), *Appx*. at 11; AFFIDAVIT OF SULLOWAY (Nov. 4, 2020), *Appx*. at 9; MEMO OF LAW (Dec. 3, 2020) (omitted from appendix); RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND STATEMENT OF MATERIAL FACTS (Dec. 3, 2020), *Appx*. at 22; AFFIDAVIT OF PIETZ (Dec. 3, 2020), *Appx*. at 20; REPLY TO OBJECTION TO SUMMARY JUDGMENT (Dec. 4, 2020), *Appx*. at 28.

In March 2021, the Rockingham County Superior Court (*Martin P. Honigberg*, J.) granted summary judgment in favor of Hate to Paint on liability for breach of contract. ORDER ON PARTIAL SUMMARY JUDGMENT (Feb. 26, 2021), *Addendum* at 58.

In September 2022, the court (*Mark D. Attorri*, J.) held a bench trial on damages. In January 2023, it awarded Hate to Paint damages in the amount of $219,200, and dismissed all remaining claims. ORDER ON MERITS (Jan. 9, 2023), *Addendum* at 65; NOTICE OF TYPOGRAPHIC ERROR (granted by margin order) (Jan 18, 2023), *Addendum* at 75. A motion for reconsideration was denied, MARGIN ORDER (Mar. 22, 2021), *Appx*. at 32, and this appeal followed.

SUMMARY OF ARGUMENT

After repeated bargaining, two sophisticated contractors in New Hampshire entered into a painting contract that included a termination-for-convenience clause, which is common in the commercial construction industry, and which they had used in a previous contract. In response to an internal audit and a subsequent lower bid, the developer terminated the contract in accord with its terms. The lower court erroneously held that termination-for-convenience clauses are not enforceable and that the developer breached.

This court should thus reverse, find no liability, and hold that termination-for-convenience clauses are enforceable in the commercial context.

In calculating damages, the lower court disallowed evidence that would have undermined the plaintiff's claim of lost profits, and then erroneously awarded damages based on the unquestioned claims. If there is liability, this court should remand for a recalculation.

ARGUMENT

I. There Was No Breach of Contract Because the Parties' Termination For Convenience Clause, Freely Entered and Properly Invoked, Should Have Been Enforced

A. Termination-for-Convenience Clauses Arose in Government Contracts and Migrated to the Private Sector

Termination-for-convenience clauses arose in government contracts after the Civil War in response to changing needs of the military – to prevent the Navy having to purchase ships it no longer needed. *United States v. Corliss Steam Engine Co.*, 91 U.S. 321 (1875). Termination-for-convenience clauses grew in use, and by the 1960s they became standard in non-military government contracts. *See, e.g., Linan-Faye Construction Co. v. Housing Auth. of City of Camden*, 49 F.3d 915 (3d Cir. 1995) (termination-for-convenience clause enforced in city contract for renovation of public housing); *Handi-Van, Inc. v. Broward Cnty.*, 116 So. 3d 530 (Fla. Dist. Ct. App. 2013) (termination-for-convenience clause enforced in county contract for disability transportation services).[2]

Termination-for-convenience clauses migrated to private contracts, and "are now a part of the ordinary course of business." Ryan P. Adair, *Limitations Imposed by the Covenant of Good Faith and Fair Dealing upon Termination for Convenience Rights in Private Construction Contracts*, 7 No. 2 J. AM. C.

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[2]The law concerning termination for convenience in government contracting is voluminous and circuitous. *See generally*, John Cibinic, Ralph C. Nash & James Nagle, ADMINISTRATION OF GOVERNMENT CONTRACTS 1049-72 (4th ed. 2007) (available in New Hampshire Law Library); *Krygoski Const. Co. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996); *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982); *Kalvar Corp. v. United States*, 543 F.2d 1298 (Ct. Cl. 1976)."While the history of the clause's development in the context of federal procurement is helpful to … consideration of the present case in that it illuminates the clause's purpose as a risk-allocating tool, the case-law supporting such a broad right in federal contracts obviously is of limited value when interpreting a contract between private parties.… [F]or political reasons, the federal government stands in a position entirely uncomparable to that of a private person." *Questar Builders, Inc. v. CB Flooring, LLC*, 978 A.2d 651, 669 (Md. 2009).

CONSTRUCTION LAW. 4 (Aug. 2013). *See generally,* Karen L. Manos, *Termination for Convenience*, 2 GOV'T CONT. COSTS & PRICING § 88:2 (July 2022); Deborah S. Ballati and Marlo Cohen, *Termination for Convenience Clauses: Are There Limitations on Using Them?* 14 No. 1 1 J. AM. C. CONSTRUCTION LAW. 1 (Winter 2020); Deborah S. Ballati and Marlo Cohen, *Termination for Cause or Convenience: What Happens if You are Wrong?* 13 No. 1 J. AM. C. CONSTRUCTION LAW. 4 (Winter 2019).

B. Purposes of Termination-for-Convenience Clauses Shifted With Their Migration to the Private Sector

Along with their journey from the public to the private sector, the purposes of and criteria for termination-for-convenience clauses have also shifted. *See Vila & Son Landscaping Corp. v. Posen Const., Inc.*, 99 So. 3d 563, 566-68 (Fla. Dist. Ct. App. 2012); *RAM Eng'g & Const., Inc. v. Univ. of Louisville*, 127 S.W.3d 579, 583-84 (Ky. 2003).

While at their inception termination-for-convenience clauses were for the purpose of accounting for governmental exigencies such as "changes in wartime technology or cessation of conflict," *SAK & Assocs., Inc. v. Ferguson Const., Inc.*, 357 P.3d 671, 674 (Wash. App. 2015), in private contracts courts now recognize they are a way to apportion risks between parties.

> There undeniably is utility in including a broad termination right in contracts in the context of rapidly changing industries and in contracts for large, long-term build-out projects. Such a right to terminate for convenience may serve as an effective tool, protecting one party from the risk of loss in markets where there is a substantial risk due to changing technology or where loss, if it occurs, could result in a financial Waterloo, as in the construction industry.

Questar Builders, 978 A.2d at 674.

The purposes of termination-for-convenience clauses in the public and private sectors, although expressed differently, are not altogether different. Adair, *supra* ("The use of such clauses by private contracting parties fulfills the original purpose of transferring risk.").

C. Notice Provision in Termination-for-Convenience Clause Constitutes Consideration

In early common law, a private contract with a termination-for-convenience clause may have been regarded as illusory for want of consideration. 3 WILLISTON ON CONTRACTS § 7:13 (4th ed. 2023) (A "promise is illusory [when] by its terms its performance is at the option of the promisor, and the promisor may exercise this option without depriving itself of anything to which it was entitled before the formation of the agreement."); *see, e.g., Studebaker Corp. of America v. Wilson*, 247 F. 403, 404-05 (3d Cir. 1918) (contract's "general effect was to create a relation between the parties which in reality neither obligated [the dealer] to order and buy any machines whatever from the manufacturer, nor did it obligate the manufacturer to deliver any machines to [the dealer].").

But "[t]he law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be instinct with an obligation, imperfectly expressed." *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (*Cardozo*, J.) (quotation omitted).

Today, because "courts generally prefer construction of a contract which will make the contract effective rather than one which will make it illusory or unenforceable," *Questar Builders*, 978 A.2d at 670 (quotations omitted), any condition or limitation on the rights of the promisor constitutes consideration. *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33, 37 (8th Cir. 1975) ("[A] cancellation clause will invalidate a contract only if its exercise is unrestricted."); *Questar Builders*, 978 A.2d at 670 ("If there is a restriction, express or implied, on the promisor's ability to perform, the promise is not illusory."); *SAK & Assocs.*, 357 P.3d at 675 ("Agreements that permit one party to cancel or terminate the undertaking are not illusory if there is some

restriction on the power to terminate."); 3 WILLISTON ON CONTRACTS § 7:13 (4th ed. 2023) ("Since the courts do not favor arbitrary cancellation clauses, the tendency is to interpret even a slight restriction on the exercise of the right of cancellation as constituting a legal detriment sufficient to satisfy the requirement of consideration.").

Thus, a provision requiring notice before termination is a sufficient condition to supply consideration. *See, e.g., Niagara Mohawk Power Corp. v. Graver Tank & Mfg. Co.*, 470 F. Supp. 1308, 1316 (N.D.N.Y. 1979) ("[A] notice provision, such as that contained in the termination clause in question here, prevents the promise, made by the party with the right of termination, from being regarded as illusory in nature."); *Smith, Batchelder & Rugg v. Foster*, 119 N.H. 679, 682 (1979) ("A provision that one party shall have the power to cancel by notice given for some stated period, such as notice for thirty days[,] should never be rendered invalid thereby for lack of mutuality or for lack of consideration.") (internal quotations and citations omitted); *Johnson Lakes Dev., Inc. v. Central Nebraska Pub. Power & Irrigation Dist.*, 576 N.W.2d 806, 817 (Neb. 1998) ("Even a slight restriction on the exercise of the right of termination, such as the requirement that advance notice be given, is sufficient to prevent a unilateral right of termination from being regarded as illusory in nature."); *Lund v. Arbonne Int'l, Inc.*, 887 P.2d 817, 820 (Or. App. 1994) ("[A] contract for an indefinite period may be terminated at will when reasonable notice is given."); *H. P. Hood & Sons v. Heins*, 205 A.2d 561, 566 (Vt. 1964) ("[I]t is the current tendency to regard even a slight restriction on the right of cancellation as a legal detriment, sufficient to satisfy the requirement of consideration.").

Even in the absence of a specified contractual term of notice, some period of actual notice also constitutes consideration. *See, e.g., Stern & Co. v. Int'l Harvester Co.*, 172 A.2d 614 (Conn. 1961) (contract specified only "written

notice" but terminating party gave 30 days' notice); *Philadelphia Storage Battery Co. v. Mut. Tire Stores*, 159 S.E. 825 (S.C. 1931) (contract specified only "written notice" but terminating party gave one day notice).

A very short duration of notice is sufficient. *See, e.g., SAK & Assocs*., 357 P.3d at 677 (effective immediately); *Ford Motor Co. v. Alexander Motor Co.*, 2 S.W.2d 1031 (Ky. 1928) (same day); *Questar Builders*, 978 A.2d at 651 (same day); *Philadelphia Storage Battery*, 159 S.E. at 825 (next day); *Lindner v. Mid-Continent Petroleum Corp.*, 252 S.W.2d 631 (Ark. 1952) (10 days); *Philadelphia Ball Club v. Lajoie*, 51 A. 973 (Pa. 1902); *deTreville v. Outboard Marine Corp.*, 439 F.2d 1099 (4th Cir. 1971) (30 days).

In the contract between Ambrose and Hate to Paint, the termination-for-convenience clause called for three-days' notification, with which Ambrose complied. That provision and Ambrose's compliance provided consideration. Accordingly, there was a valid contract, the termination-for-convenience clause was enforceable, the clause was properly invoked, and there was no breach.

D. Ambrose Exhibited No Bad Faith Preventing Enforcement of the Parties' Contract

In public contracts, good faith on the part of the governmental agency is presumed. *See, e.g., Torncello*, 681 F.2d at 770 ("[T]he government … is assumed always to act in good faith, subject only to an extremely difficult showing by the plaintiff to the contrary.").

In private contracts, while there is no presumption of good faith, bygone formalistic approaches to enforcement of termination-for-convenience clauses have been replaced with, at most, a general standard of good faith by the terminating party. *Niagara Mohawk Power Corp.*, 470 F. Supp. at 1317 ("[I]t is possible that the New York courts would place a good faith limitation upon the exercise of a convenience termination clause."); *Centronics Corp. v. Genicom Corp.*, 132 N.H. 133 (1989) (implied duties of good faith); *Smith, Batchelder & Rugg*, 119 N.H. at 682 (implied standard of good faith in termination of employment contract).

"[T]here cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms." *SAK & Assocs.*, 357 P.3d at 676.

An absence of good faith when exercising termination-for-convenience clauses in private contracts includes such underhanded conduct as a lack of intent at the time of execution to follow through with the contract, *see Salsbury Indus. v. United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990), self-dealing or an improper intent to benefit another contractor, *see TigerSwan, Inc. v. United States*, 110 Fed. Cl. 336, 347 (2013), exhibiting a "specific intent to injure" the contractor, *Torncello*, 681 F.2d at 770, having a "mere wish or caprice" to exit the relationship, *Questar Builders*, 978 A.2d at 672, or purposely tanking the contract. *See Lawton v. Great Southwest Fire Ins. Co.*, 118 N.H. 607 (1978) (insurance company delayed payment for purpose of coercing insured into

accepting less); *Seaward Const. Co. v. City of Rochester*, 118 N.H. 128 (1978) (city refused to accept federal funding); *but c.f. Centronics Corp.*, 132 N.H. at 133 (refusal to release portion of escrow funds did not violate duty of good faith).

In the relationship between Ambrose and Hate to Paint, there was no dishonest intent or corrupt conduct, and thus no bad faith to prevent enforcement of the parties' termination-for-convenience clause.

E. Getting a Better Price is Not Bad Faith

Although there are outlying federal government contract cases, *see, e.g., NCLN20, Inc. v. United States*, 99 Fed. Cl. 734, 758 (2011) (bad faith where contracting agency did not intend to honor bargain), finding a better price is not by itself bad faith that avoids the enforceability of a termination-for-convenience clause.

In *Vila & Son Landscaping Corp. v. Posen Const., Inc.*, 99 So. 3d 563 (Fla. Dist. Ct. App. 2012), the construction company sought and obtained a better price from another contractor, and invoked the termination-for-convenience clause in its contracts. The court held that "a provision requiring written notice, such as that contained in the termination clause in question here, prevents the promise made by the party with the right of termination from being regarded as illusory in nature." *Id*. at 568.

In *A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transportation Auth.*, 95 N.E.3d 547 (Mass. 2018), the MBTA terminated the contract of its fuel supplier for the express purpose of finding a better price through a state-wide buying arrangement. The court wrote: "We conclude that a State or municipal entity may terminate a procurement contract for its convenience in order to achieve cost savings, where, as here, the contractual language permits." *Id.* at 550-51.

In *Questar Builders,*, 978 A.2d at 674, a general contractor terminated the contract of a carpeting subcontractor when, post-signing, it solicited and received a better bid. *Id.* at 656.

In *Krygoski Const. Co. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996), the Army Corps of Engineers discovered it would cost more than expected to remove asbestos from a decommissioned airfield. The court held that a statute requiring transparency in contracting showed the agency was acting in good faith in terminating the contract.

In *Niagara Mohawk Power Corp.*, 470 F. Supp. at 1316, the owner of a nuclear power plant project terminated its construction contractor because it believed keeping the contractor "would result in increased costs and further delays." *Id.* at 1319. The court enforced the termination-for-convenience clause and found no breach of contract because the owner did not contribute to the increased costs and otherwise acted in good faith. *Id. at* 1322.

In *Colonial Metals Co. v. United States*, 494 F.2d 1355 (Ct. Cl. 1974), the Navy sought a quantity of copper ingot, and Colonial Metals was the only bidder. A week later, the Navy got a better price and terminated the contract with Colonial. The court enforced the termination-for-convenience clause because the government's contracting officer, although he knew of a better price elsewhere at the time the contract was signed, did not act maliciously.

F. Termination-for-Convenience Clauses are Routinely Enforced

Courts have had no hesitation enforcing termination-for-convenience clauses when there are changed circumstances. *See, e.g., EDO Corp. v. Beech Aircraft Corp.*, 911 F.2d 1447, 1449 (10th Cir. 1990) (technological concerns about feasibility of composite aircraft wing development); *Downeast Energy Corp. v. Frizzell*, No. 2010-0401, 2011 WL 13092668 (N.H. July 6, 2011) (unreported) (significant change in price of oil); Deborah S. Ballati and Marlo Cohen, *Termination for Convenience Clauses: Are There Limitations on Using Them?* 14 No. 1 1 J. AM. C. CONSTRUCTION LAW. 1 (Winter 2020).

Reflecting uncertainties about the potential for rapidly changing market conditions, termination-for-convenience clauses appear "notably in construction and high technology contracts." *SAK & Assocs*., 357 P.3d at 674; *EDO v. Beech Aircraft*, 911 F.2d at 1449 (contract for development of composite aircraft wing); *Questar Builders*, 978 A.2d at 668 ("Such clauses are popular in construction contracts."). Several segments of the construction industry include termination-for-convenience clauses in their standard form contracts. Adair, *supra* (noting inclusion in standard form contracts by the American Institute of Architects, the Associated General Contractors of America, the American Subcontractors Association, the Engineers Joint Contract Documents Committee, and the Design-Build Institute of America).

Outside of employment contracts and consumer insurance, unequal bargaining power does not appear to be a factor in the evaluation of termination-for-convenience clauses. *See* Charles Tiefer, *Forfeiture by Cancellation or Termination*, 54 MERCER L. REV. 1031 (2003). For example, most standard consumer credit card contracts allow at-will termination. *See, e.g.*, *Lapa v. JP Morgan Chase Bank, N.A.*, No. 21 CIV. 4737 (NSR), 2023 WL 4706827, at 3 (S.D.N.Y. July 22, 2023) (unreported) (covenant of good faith does not prevent enforcement of termination clause).

Both Ambrose and Hate to Paint are experienced in the commercial construction industry where termination-for-convenience clauses are common. The long lead time between Hate to Paint's estimate and when it expected to begin work suggests the purpose of the clause in their contract was ordinary – to account for potential market changes.

G. Ambrose and Hate to Paint Freely Entered Into a Contract That Included a Termination-for-Convenience Clause

Courts across the country enforce termination-for-convenience clauses based on the freedom of contract, and the provision in Ambrose's and Hate to Paint's contract is typical. *See, e.g., Smith, Batchelder & Rugg*, 119 N.H. at 682 (contract "terminable by either party on thirty days' written notice"); *SAK & Assocs.*, 357 P.3d at 676 ("contract provides for termination for convenience immediately upon written notice of termination").

In *SAK & Assocs.*, 357 P.3d at 671, Ferguson was the general contractor for building airport hangars, and SAK was to provide concrete for the job. Ferguson paid SAK for work done, and terminated SAK pursuant to a termination-for-convenience clause citing "site logistics, and basic convenience." The court held:

> Enforcing the termination for convenience provision here is … consistent with … the objective manifestations of intent of the parties. Ferguson and SAK objectively manifested their intent that the contract may be terminated for convenience by Ferguson upon written notice, requiring only a proportionate payment of the contract price. … The parties could have negotiated other limitations or terms of payment upon a termination for convenience, but they did not do so.

In *Handi-Van, Inc.*, 116 So. 3d at 541, the court similarly held:

> Here, [Handi-Van's] eyes were open when they entered into the contracts, as they knew, per the addendum, that their contract would be terminated at a later point based on the County's good faith economic reason for so acting.

In *EDO v. Beech Aircraft,* 911 F.2d at 1453, the court wrote:

> Absent the concern … that the obligations of the party possessing the unilateral right of termination

> are illusory due to want of consideration[,] we will enforce a contract freely entered into by two competent parties.

In *Augusta Med. Complex, Inc. v. Blue Cross of Kansas, Inc.*, 608 P.2d 890, 896 (Kan. 1980), the insurance company changed its hospital compensation system pursuant to a contract that contained a termination-for-convenience clause. The court wrote:

> When the right to terminate a contract is absolute under the clear wording in the agreement the motive of a party in terminating such an agreement is irrelevant to the question of whether the termination is effective.

In *S & F Corp. v. American Express Co.* 377 N.E.2d 73, 77 (Ill. App. 3d 1978), the credit card company terminated its contract with S&F, on nine days' notice, on grounds it did not approve of the nature of its business. The court held:

> We find no ambiguity in this contract and, therefore, no need to employ theories of construction. The contractual relationship between American Express and S & F was terminable by either party upon written notice. There was no requirement that cause be the basis for termination. In this instance, the terms of the agreement, rather than the nature of the business engaged in by either party, must control the result.
>
> Contractual provisions providing for termination of an agreement are generally enforceable according to their terms.… A contract may provide that it shall come to an end at the option of one or either of the parties.… Irreparable harm, in and of itself, is insufficient to prevent the otherwise lawful termination of a contract.

In *Philadelphia Storage Battery*, 159 S.E. at 826, the plaintiff invoked the termination-for-convenience clause in the parties' contract on one day's notice

and without explanation. The court held:

> It is a well-established rule of law that a contract may provide for its termination at the option of one or either of the parties, and such a stipulation, when fairly entered into, will be enforced if not contrary to equity and good conscience.

In *Ford Motor v. Alexander Motor*, 2 S.W.2d at 1032, Ford gave notice that it would stop supplying cars to a dealer, effective immediately, with no explanation. The court held:

> It is a well-settled rule of law that a right to cancel a contract, incorporated or reserved therein, is a part of the contract itself, and, upon the exercise of such contractual right, all obligations under the contract cease and determine, and no liability arises from the cancellation. …Parties may lawfully enter into agreements like the one here involved, and the courts enforce them as written. If parties agree that the rights, duties, and obligations arising from a contractual relation shall endure only at the will or pleasure of either, the courts have no right to substitute a different duration for such rights. Executory contracts, terminable at will, in so far as they are unexecuted at the time of termination, afford no basis for a cause of action to either party.

The contract between Ambrose and Hate to Paint contains a termination-for-convenience clause. The provision is unambiguous and manifestly a component of the parties' bargain. As such, it should be construed as written and enforced.

H. Hate to Paint Was Free to Not Bid on Ambrose's Project

"A breach of contract occurs when there is a failure without legal excuse to perform any promise which forms the whole or part of a contract." *Lassonde v. Stanton*, 157 N.H. 582, 588 (2008). "The interpretation of a contract is a question of law, which [this court] review[s] *de novo*." *Czumak v. New Hampshire Div. of Developmental Servs.*, 155 N.H. 368, 373 (2007).

> When interpreting a written agreement, we give the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole. Absent ambiguity, the parties' intent will be determined from the plain meaning of the language used in the contract.

Audette v. Cummings, 165 N.H. 763, 768 (2013).

Here, both parties were experienced in the construction industry, and signed a contract with a termination-for-convenience clause. Hate to Paint bid for Ambrose's work on an online platform while successfully completing a prior project, the contract for which contained an identical termination-for-convenience clause.

During the initial bargaining on the Tara Fields project, Hate to Paint first submitted a bid of $522,000, which it then lowered to the contract price of $500,000, showing that it knows how to bargain. In post-termination bidding, Hate to Paint again also showed its ability to make deals.

Painting for commercial building projects for 35 years, Hate to Paint could not have been unfamiliar with termination-for-convenience clauses. It conceded it was aware of the significant time-lag between estimating and painting, which creates the potential for interim market changes. There was no ambiguity in the contract, nor in the termination-for-convenience clause, and both parties freely entered into it.

At the time the Tara Fields contract was signed, Ambrose intended to

follow through with it. While Ambrose did not actively seek a lower price, its internal analysis revealed it may have been overpaying, and another contractor approached it with an offer that saved Ambrose $107,500. Before actual work began, Ambrose provided the contractually requisite three-days' notice of termination under the contract, and compensated Hate to Paint for its nominal costs up to that point.

When Ambrose terminated, it was acting in accordance with the contract. There was no breach.

In the commercial context, "[p]ersons may enter into whatever contracts they see fit." *Philadelphia Storage Battery*, 159 S.E. at 825. "If one does not wish to bid … with the conditions attached, his alternative is to make no bid." *United States v. Weisbrod*, 202 F.2d 629, 633 (7th Cir. 1953).

Enforcement of the termination-for-convenience clause here is not a novel issue as Hate to Paint alleges; it is controlled by *Smith, Batchelder & Rugg*, 119 N.H. at 679. In that case, the parties were an accounting firm and its employee, whose contract included a provision that it was "terminable by either party on thirty days' written notice." *Id.* at 682. This court held that the lower court "incorrectly determined that the notice requirement … was not sufficient consideration." *Id.* Although *Smith, Batchelder & Rugg* is mostly concerned with non-compete covenants in the employment context, it held that a termination-at-will provision is enforceable. Because contracts between employers and employees are likely to be given more scrutiny than experienced bargainers in the commercial context, *see* Charles Tiefer, *supra*, the contract here is well within the *Smith, Batchelder & Rugg* rule.

Hate to Paint did not prove any bad faith by Ambrose that might abrogate the termination-for-convenience clause, and this court should reverse the superior court's decision on liability.

II. The Court Awarded Damages Beyond the Amount Justified by the Evidence

In the event that this court does not enforce the unambiguous terms of the contract or does not find that there was mutual recission by Hate to Paint's rebidding in January 2020, *see Dulgarian v. City of Providence*, 507 A.2d 448, 452 (R.I. 1986), and instead finds that Ambrose breached, this court should nonetheless find that the trial court erred in its calculation of damages. Ambrose already paid Hate to Paint its nominal costs, which is all that was required by the terms of the contract. The trial court, however, overstated the amount of Hate to Paint's lost profits.

A. Lost Profits Damages Must be Based on Financial Data and Reliable Methodology

The purpose of damages is to give the plaintiff the benefit of the bargain – to put the plaintiff in the same position as if performance had occurred. *John A. Cookson Co. v. New Hampshire Ball Bearings, Inc.*, 147 N.H. 352, 359-60 (2001); *Peter Salvucci & Sons, Inc. v. State*, 110 N.H. 136, 154 (1970). The plaintiff has the burden of proving the amount of damages by a preponderance of the evidence. *Mahoney v. Town of Canterbury*, 150 N.H. 148, 154 (2003).

Only variable costs "specifically attributable" to the cancelled project, but not the plaintiff's fixed costs, may be considered in the damages calculation. *Mahoney v. Canterbury*, 150 N.H. at 154; *Cookson v. New Hampshire Ball Bearings,* 147 N.H. at 359-60.

Calculating lost profits damages with absolute certainty is rarely possible and is therefore likely to be an approximation. *Boyle v. City of Portsmouth*, 172 N.H. 781 (2020); *Great Lakes Aircraft Co. v. City of Claremont*, 135 N.H. 270 (1992); *Hydraform Prod. Corp. v. American Steel & Aluminum Corp.*, 127 N.H. 187 (1985). Yet damages must be "reasonably certain." *George v. Al Hoyt & Sons, Inc.*, 162 N.H. 123, 134-35 (2011); *Fitz v. Coutinho*, 136 N.H. 721, 726 (1993).

The formula for calculating lost profits damages is well-established:

> The measure of damages is the net value of the written contract – the difference between the stipulated price and the cost of doing the work – together with compensation for any incidental loss that could be reasonably anticipated by the parties as likely to result from the … breach of contract.

Hutt v. Hickey, 67 N.H. 411, 412 (1893); *Salem Engineering and Const. Corp. v. Londonderry School Dist.*, 122 N.H. 379 (1982).

Accordingly, lost profits damages must be based on "financial data," *Independent Mechanical Contractors, Inc. v. Gordon T. Burke & Sons, Inc.*, 138 N.H. 110, 116 (1993), sufficient to "indicat[e] that profits were reasonably certain to result." *George v. Al Hoyt*, 162 N.H. at 134.

Lost profits damages calculations must also be grounded in reliable methodology. *Danforth v. Freeman*, 69 N.H. 466, 43 A. 621, 623 (1899) (contract damages calculated with regard to "commercial value of the house for sale or use"). Any assumptions underlying a damages calculation must be reasonable. *Halifax-American Energy Co., LLC v. Provider Power, LLC*, 170 N.H. 569, 583 (2018) (assumptions regarding electricity purchases); *Whitehouse v. Rytman*, 122 N.H. 777, 780 (1982) (assumption about market price of chickens). There should be documentary corroboration of the plaintiff's damages claim. *Salvucci v. State*, 110 N.H. at 155.

Damages may not compensate for any "loss beyond an amount that the evidence permits," *Clipper Affiliates, Inc. v. Checovich*, 138 N.H. 271, 274 (1994), and must be reasonably related to the damages actually proved. *McNeal v. Lebel*, 157 N.H. 458, 466 (2008).

The factfinder has a duty to ensure all those things: that lost profits damages are reasonably certain, are based on sufficient financial data, are grounded in reliable methodologies and reasonable assumptions, are limited to

the actual loss incurred, and do not include fixed costs. *Robert E. Tardiff, Inc. v. Twin Oaks Realty Trust*, 130 N.H. 673, 679 (1988) ("It is not incumbent on the trier of fact to accept the damage schedule at face value.").

The defendant thus has a right to throughly test the plaintiff's claim to damages. *See Cole v. Hobson*, 143 N.H. 14 (1998) (trial on damages after judgment on liability); *McMullin v. Downing*, 135 N.H. 675 (1992) (damages based on defendant's subsequent estimate). This includes cross-examination on the plaintiff's damages claim, *Bezanson v. Hampshire Meadows Development Corp.*, 144 N.H. 298, 305 (1999) (plaintiff's damages claim undermined by competing testimony), which courts have found is crucial to establishing the requisite certainty in damage awards. *Arch Ins. Co. v. Broan-NuTone, LLC*, 509 Fed.Appx. 453 (6th Cir. 2012) (cross-examination on problems with repair estimate); *Triton Corp. v. Hardrives, Inc.*, 85 F.3d 343 (8th Cir. 1996) (contractor allowed to cross-examine on underlying calculations); *Olson v. Nieman's, Ltd.*, 579 N.W.2d 299 (Iowa 1998) (assumptions valid because tested by cross-examination); *Garrison v. CC Builders, Inc.*, 179 P.3d 867 (Wyo. 2008) (deficiencies in plaintiff's estimates uncovered during cross-examination).

B. Court Should Have Used Hate to Paint's Tax Forms in Testing the Reasonableness of its Claimed Profit Margin

The trial court arrived at its damages calculation by subtracting Hate to Paint's expected costs to perform, $280,800, from the contract price of $500,000, which results in "profits" of $219,200, which is the amount of damages the court awarded. ORDER ON MERITS at 4-5 (Jan. 9, 2023), *Addendum* at 65. The award doubles Hate to Paint's profit for 2020 without having doubled its work. 2020 SCHEDULE C, Exh. K, *Sealed Appx*. at 5.

In determining whether that amount was "reasonably certain," *George v. Al Hoyt*, 162 N.H. at 134, the court calculated Hate to Paint's percentage profit margin. By dividing Hate to Paint's "profits" of $219,200 by the contract price of $500,00, it calculated a 43.8% "profit margin." The court then compared that percentage "to the 40.5% profit margin" claimed by Hate to Paint "on the nearly-identical Gilbert Crossing project." ORDER ON MERITS at 5.

By doing this, however, the trial court used only one comparable project, meaning it limited itself to a single data-point, a suspect appraisal methodology. *See Appeal of Pennichuck Water Works, Inc.*, 160 N.H. 18, 38 (2010). The profit Hate to Paint was able to extract from Gilbert Crossing was likely higher than the market, considering a competitor's bid and what Ambrose found in its internal audit. Hate to Paint's final rebid, as well as the company who ultimately won the contract, was in the range of $100,000 lower than the initial contract, confirming that Gilbert Crossing was overpriced and thus a poor comparable.

Ambrose pointed to other evidence that could be used in addition to the single comparable, but the court ignored it. In discovery, Ambrose sought Hate to Paint's complete tax returns for 2018, 2019, and 2020, but was granted access only to its Schedule C filings, which provide only summary information. MOTION TO COMPEL (Oct. 6, 2021) (denied in margin, Oct. 20, 2021), *Appx*. at 33; OBJECTION TO COMPEL (Oct. 14, 2021), *Appx*. at 37; MOTION CONCERNING

TAX RETURNS (Aug. 11, 2022), *Appx*. at 41; OBJECTION TO MOTION CONCERNING TAX RETURNS (Aug. 19, 2022), *Appx*. at 49; MOTION IN *LIMINE* (Aug. 16, 2022), *Appx*. at 44; OBJECTION TO MOTION IN *LIMINE* (Aug. 22, 2022), *Appx*. at 51; ORDER ON PENDING MOTIONS (Sept. 2, 2022), *Appx*. at 55.

At trial, Ambrose attempted to undermine Hate to Paint's claimed margin by pointing to its much lower overall profit margins which can be readily calculated from the Schedule C forms. Using the forms, Hate to Paint had a net profit of 18.6% in 2018, 27.6% in 2019, and 20.4% in 2020. *See* 2018 SCHEDULE C, Exh. I, *Sealed Appx*. at 3; 2019 SCHEDULE C, Exh. J, *Sealed Appx*. at 4; 2020 SCHEDULE C, Exh. K, *Sealed Appx*. at 5; *Trn.* at 60-61, 67.

In offering the tax forms, Ambrose concedes that the Schedule C filings do not show disaggregated profits or Hate to Paint's project-by-project pricing, and that they do include fixed costs which are not part of the calculation of damages. *Cookson v. New Hampshire Ball Bearings*, 147 N.H. at 359-60. Ambrose also recognizes that Hate to Paint's other contracts and projects are different in nature, may involve different parties, and may generate higher or lower profit margins.

The Schedule C forms do show, however, the total aggregate profits Hate to Paint realized from three years of its contracts. Such aggregate data is relevant for two purposes. First, it would allow the court to compare Hate to Paint's general annual profits to the contract at issue, which helps to determine whether Hate to Paint's claim of damages is "reasonably certain." Second, regarding Gilbert Crossing, the comparable project, Hate to Paint collected $484,600, or 81%, of its revenues for the project in 2019, which represented over half of Hate to Paint's total gross receipts for that year. JOB ACTUAL REVENUE DETAIL (Sept. 16, 2020), Exh. 4, *Appx*. at 87; 2019 SCHEDULE C, Exh. J, *Sealed Appx*. at 4. Thus, Schedule C aggregate data would allow Ambrose to test the accuracy of Hate to Paint's claims regarding fixed and

variable costs for the Tara Fields project, and of its asserted lost profits.

The trial court nonetheless "reject[ed]" considering the Schedule C filings for these purposes, "because … [Ambrose] based their calculations on the *total* company … expenses [which] include fixed overhead expenses which are not properly considered for purposes of calculating damages." ORDER ON MERITS at 6 (emphasis in original). But just because Schedule C forms "include" fixed costs, *id.,* that does not make them irrelevant. By rejecting the tax forms altogether, the court renounced its duty to ensure that damages are limited to losses Hate to Paint actually incurred.

In trying to justify a profit margin of 40.5%, Hate to Paint asserted that its overall profit margins "vary between 40-50 percent on large jobs such as this one." ORDER ON MERITS at 5. Even though the court had no documentary evidence – beyond the one comparable – it found the testimony "reasonable and credible." *Id.* at 5 n.3. As noted, Hate to Paint's overall company profitability, demonstrated by the Schedule C forms, is much lower.

Without any documentary support, the court overstated Hate to Paint's profits anticipated from the Tara Fields project.

Moreover, despite claiming it did not consider the tax forms, the trial court calculated that Hate to Paint's "overall company profit margin" based on the tax schedules is "between 29.2% and 37.7%." It then found that "[t]his is not dramatically lower than the 43.8% margin claimed for this particular project."

But it is dramatically lower. The difference between the lower range on the tax forms as calculated by the court, and the court's accepted 43.8% margin, is nearly 15 percent. That amounts to a difference of $73,000 in damages, which is substantial, and should not have been dismissed as negligible by the court.

Based on these lapses, it is apparent that the trial court had scanty evidence with which to estimate Hate to Paint's anticipated profit, and overestimated it. If this court finds a breach, it should remand for recalculation of damages using all available evidence.

CONCLUSION

Termination-for-convenience clauses in commercial construction contracts are common and routinely enforced. Both parties here were sophisticated and bargained extensively. Hate to Paint was free to either not bid or negotiate different terms.

Ambrose gave notice of termination and paid Hate to Paint's out-of-pocket costs, as required by the contract. There was no bad faith by Ambrose, and this court should enforce the contract.

Respectfully submitted,

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By their Attorney,
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Dated: August 23, 2023

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CERTIFICATIONS & REQUEST FOR ORAL ARGUMENT

A full oral argument is requested.

I hereby certify that the decisions being appealed are addended to this brief. I further certify that this brief contains no more than 9,500 words, exclusive of those portions which are exempted.

I further certify that on August 23, 2023, copies of the foregoing will be forwarded to Frank P. Spinella, Jr., Esq., Wadleigh Starr & Peters, PLLC, through this court's efiling system.

Dated: August 23, 2023

Joshua L. Gordon, Esq.

ADDENDUM