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October 17, 2008

BY E-MAIL AND UPS OVERNIGHT MAIL

Mr. Frank Gomez
Contracting Officer
U.S. Forest Service
National Interagency Fire Center
3833 S. Development Avenue
Boise, ID 83705-5354

CONTAINS CONFIDENTIAL INFORMATION—DO NOT RELEASE

Re: Contract Nos. AG-024-B-C-08-9340 and AG-024-B-C-08-9354;
Response to Cure Notices

Dear Mr. Gomez:

This firm is counsel to Carson Helicopters, Inc. ("Carson").

This letter is in response to the Forest Service's Cure Notices dated September 29, 2008 regarding Contract No. AG-024-B-C-08-9340 for National Exclusive Use Large Fire Support Helicopter Services and October 1, 2008 regarding Contract No. AG-024-B-C-08-9354 for National Exclusive Use Initial Attack Helicopter Services (collectively, the "Contracts").[1] Carson appreciates the gravity of the concerns raised by the Cure Notices and, as detailed below, has developed and implemented a comprehensive plan to fully address those concerns in the best interests of the Forest Service.

The Fire Support Contract is a one year contract that was entered into on or about June 27, 2008 and contains a separate Mandatory Availability Period for each aircraft subject to the contract, with the final Mandatory Availability Period expiring on November 27, 2008. The Fire Support Contract contains a total of three successive one year options to extend the term of the contract through the end of the 2011 fire season. The Initial Attack Contract is a one year contract that was entered into on or about June 30, 2008 and contains a separate Mandatory Availability Period for each aircraft subject to the contract, with the final Mandatory Availability Period expiring on November 5, 2008. The Initial Attack Contract contains a single one year option to extend the term of the contract through the end of the 2009 fire season.

Upon being advised of the weight discrepancies identified in the Cure Notices, Carson immediately started re-weighing all of its helicopters under the Contracts. This re-weighing was conducted using jack scales and pursuant to the manufacturer's procedures for weighing Sikorsky S-61 helicopters. Upon re-weighing, it was determined that three of Carson's

[1] The Forest Service granted an extension to October 17, 2008 to submit this consolidated response to the Cure Notices.

helicopters – N116AZ, N3173U and N725JH – are in fact at or below original aircraft equipped weight as set forth in the Contracts. Two additional aircraft – N612RM and N7011M – are within one percent (1%) of the original aircraft equipped weight as set forth in the Contracts. While the remaining five aircraft under contract – N905AL, N410GH, N4503E, N103WF and N61NH – are overweight, the overages have never adversely affected the ability of these aircraft to meet and, in many instances, exceed the minimum performance specifications of the Contracts. Nor have the overages ever posed a risk or threat to the operational safety of the aircraft or their passengers. Accordingly, the overages are not grounds that warrant a termination for default.

The overages were caused by Carson's reliance on a Federal Aviation Administration ("FAA") certified roll-on scale which, although properly certified for the weighing of aircraft, was defective. Immediately upon learning of the weight overage issue, Carson contacted the FAA and, after working with the FAA to review aircraft performance, load calculations and Carson's weighing procedures, was assured that the weight overages are not a safety concern. *Importantly, the aircraft involved in the Shasta-Trinity accident was not overweight.* We understand that the Forest Service has customarily addressed weight overage issues with other operators though contract price adjustments. Indeed, we understand that the Forest Service has never terminated a contractor for default based on a weight overage issue where, as here, the overage did not compromise the performance or safety of the aircraft. Under these circumstances, it would be inherently inappropriate to substitute the blunt instrument of a default termination to resolve contract administration issues.

As you know, Carson has provided helicopter services to the Forest Service with a high degree of professionalism and excellence for many years. We look forward to working with you to address and resolve the Forest Service's concerns.

I. The Weight Overages Were Caused By A Defective Roll-On Scale

The five overweight aircraft were recently acquired by Carson in an effort to increase the number of unrestricted category aircraft in Carson's fleet for the sole benefit of the Forest Service. Carson purchased the defective Jackson Air Weight Service scale as part of the overhaul and preparation of these new aircraft. Subsequent to the Forest Service's weighing of the three aircraft identified in the Cure Notices, Carson immediately began bringing all of the aircraft in its fleet – not just those identified as overweight in the Cure Notices – to its facility for re-weighing. Shortly after beginning the process of re-weighing these aircraft, it was determined that the scale used to weigh the aircraft, a roll-on scale manufactured and calibrated by Jackson Air Weight Service, was defective and producing consistently low weight readings, that is, weight readings on that scale were uniformly about 400 pounds lower than actual weight. Upon discovering this defect, Carson contacted Jackson Air Weight Service to discuss this matter. After reviewing the scale, Jackson Air Weight Service agreed that the scale was out of calibration and not functioning properly. Attached as Exhibit A is an email from Larry Jackson, President of Jackson Air Weight Service, confirming that the scale was defective. Notwithstanding this

defect, the Jackson Air Weight Service scale was properly certified by the FAA for use as an aviation scale at the time that Carson originally used it to weigh its aircraft.

It is clear that this defective Jackson Air Weight Service scale was the ultimate source of the weight overage problem. All of the aircraft that have now been determined to be overweight were originally weighed on this defective scale. The other aircraft, that are not overweight, were weighed on jack stands in Carson's Perkasie, Pennsylvania facility. Historically, prior to Spring 2008, Carson had never used roll-on scales to weigh its aircraft and had always used jack stands. Carson made the decision to start using roll-on scales primarily because weighing an aircraft on jack stands requires the removal of the installed water tank while a roll-on scale allows both the aircraft and the water tank to be weighed together. In addition to reviewing the performance of the defective scale with the manufacturer, Carson contacted the FAA for its guidance on this issue. After investigating the issue and exploring Carson's aircraft weighing procedures with the FAA, it is Carson's understanding that scale problems of this type are typical with roll-on scales. Carson has ceased using roll-on scales to weigh its aircraft.

II. The Accident Aircraft (N612AZ) Was Not Over Contract Weight

Although the National Transportation Safety Board ("NTSB") has yet to issue its final report on the August 5, 2008 Shasta-Trinity accident, it is clear that the aircraft involved was not overweight and that such aircraft's weight was not a contributing factor to the causes of that accident. The NTSB's preliminary report, a copy of which is attached as Exhibit B, states that N612AZ experienced "a loss of power to the main rotor during takeoff" – a condition having nothing to do with the aircraft's weight. Moreover, N612AZ was never weighed on the defective Jackson Air Weight Service roll-on scale but, like the other aircraft that are at or under bid weight as set forth in the Contracts, was weighed on jack stands at Carson's Perkasie, Pennsylvania facility.

The data recovered from N612AZ's cockpit voice recorder also evidences that the aircraft was not overweight when it crashed. It is proper procedure for the co-pilot to announce engine torque instrument readings as an aircraft takes off. These verbal torque readings are audible on the N612AZ cockpit voice recorder and have allowed Carson to mathematically calculate the aircraft's weight on takeoff. Analysis of these torque readings conclusively evidences that N612AZ was not overweight.[2]

III. Carson Uses A Comprehensive, FAA-Approved Weighing Process

As stated previously, immediately after learning that there might be a weight problem with some of its aircraft, Carson assembled its fleet at its Grants Pass facility for re-weighing. After learning that its roll-on scales were defective, Carson brought in an independent aircraft

[2] The results of the NTSB review of N162AZ's cockpit voice recorder are not public at this time but Carson was a party to that review.

weighing technician and formulated a new internal procedure for weighing its aircraft. First, all aircraft are to be weighed on jack stands, rather than on less reliable roll-on scales. Second, the aircraft is to be emptied of all individual items of equipment which are to be separately weighed. The less precise industry practice followed by virtually all other helicopter operators is to simply use the manufacturer's list weight for a particular piece of equipment when determining overall aircraft weight. Carson has discovered that the actual weight of individual pieces of equipment can vary considerably from manufacturer's listed weight. Carson's new process, thus, will significantly improve the accuracy of its aircraft weight calculations relative to industry standards.

Third, the stripped down aircraft is weighed three separate times, rotating each of the three individual jack stands through each of the three jack points on the aircraft being weighed. Although there may be a slight difference between the weights produced by different jack stands as the aircraft is weighed multiple times, major differences will indicate a problem with the jack stands.[3] Rotating the three jack stands through the three jack points on the aircraft will provide an embedded quality control safeguard and result in Carson being able to identify, and have an opportunity to correct, any defect or irregularity in the jack stands to obtain an accurate weight before the aircraft is put into operation. Fourth, barring any material discrepancy between the three weighings, the results of the three weighings are to be averaged and that number is added to the sum of the weight of individually weighed equipment to determine aircraft weight.

As it has always done, Carson weighed its aircraft using the procedure established by Sikorsky, the manufacturer of the S-61. These manufacturer-mandated procedural steps include: (i) weighing the aircraft in a flat, level hangar with the hangar doors closed to eliminate wind-driven weight variances; (ii) leveling the jack stand weighing surfaces prior to weighing; (iii) using a weight distribution cup to insure even distribution of aircraft weight on all jack stand weighing surfaces; (iv) leveling the aircraft when hoisted on the jack stands; and (v) setting up the aircraft pursuant to the weighing procedures set forth in Sikorsky's maintenance manual for the S-61. It is Carson's understanding that these manufacturer-mandated procedures *were not* followed when the Forest Service weighed Carson's aircraft prior to issuing the Cure Notices.

Carson contacted the FAA as soon as it learned that there might be a weight overage issue with some of Carson's aircraft. In the process of reviewing these issues with Carson, the FAA also reviewed Carson's aircraft weighing procedures. The FAA has stated to Carson that Carson's aircraft weighing procedures are proper. Carson has reviewed its aircraft weight and balance procedures. To alleviate the possibility of future similar errors we have implemented a

[3] The process of weighing aircraft on the scale of Carson's S-61s is a painstaking and detailed process. Because of the many variables inherent in the process, positive or negative weight swings of 20-40 pounds between individual weighing sessions are not uncommon. A variance at this level could be caused by any number of difficult to control factors such as humidity, fuel or other residue, air movement and slight variations in aircraft pitch.

procedure to verify scale accuracy to be followed during all aircraft weighings and that will become part of our Operational General Maintenance Manual.

Re-weighing Carson's aircraft pursuant to these new, FAA-approved protocols has resulted in the following aircraft equipped weight for each aircraft in Carson's fleet of S-61s:
Table 1. Revised Aircraft Equipped Weight (lbs.)

Aircraft	Applicable Contract	Current Aircraft Equipped Weight	Contract Aircraft Equipped Weight	Weight Overage
N612RM	Fire Support	11,063	11,026	37
N116AZ	Fire Support	11,016	11,023	AT OR BELOW
N905AL	Fire Support	11,880	11,283	597
N410GH	Fire Support	12,173	11,526	647
N3173U	Fire Support	10,788	10,837	AT OR BELOW
N7011M*	Initial Attack	11,445	11,347	98
N4503E*	Initial Attack	11,581	11,356	225
N103WF*	Initial Attack	11,771	11,341	430
N61NH*	Initial Attack	11,653	11,353	300
N725JH*	Initial Attack	12,014	12,023	AT OR BELOW

The aircraft marked with an asterisk are Carson's Part 135 passenger-bearing aircraft. The weights of each of these Part 135 aircraft have been reduced by 125 pounds to account for aircraft interiors that the Forest Service required to be installed after initial bid weights were submitted and which were not included in the initial bid calculation. The weight figures in Table 1 are summaries of the detailed weight data compiled for each individual aircraft. Attached as Exhibit C is detailed weight data broken out on an aircraft-by-aircraft basis and on an individual piece of equipment basis. Exhibit C also includes, under the "Performance" tab, the relevant FAA-approved performance charts for Carson's aircraft.

Thus, when Carson's aircraft are weighed using the proper, FAA-approved weighing procedure, aircraft N116AZ, N3173U and N725JH are at or below original aircraft equipped weight as set forth in the Contracts. Aircraft N612RM and N7011M are within 1% of the original aircraft equipped weight as set forth in the Contracts. Aircraft N905AL, N410GH, N4503E, N103WF and N61NH are overweight in an amount greater than 1% of the original aircraft weight as set forth in the Contracts.

IV. The Weight Overages Are Not A Safety Or Performance Issue

Although certain of Carson's aircraft are heavier than the relevant aircraft equipped weight set forth in the Contracts, at no point during Carson's performance under the Contracts have these aircraft been operated in an unsafe manner. Pursuant to the Contracts and FAA requirements, Carson has operated these aircraft at all times within the parameters set forth in the relevant FAA-approved flight manual, the FAA Type Certificate for Sikorsky S-61N aircraft, and the

relevant FAA airworthiness certificates for each individual aircraft. During its discussions with the FAA, before it discussed and received approval for its new weighing procedures, Carson brought the overages in the Cure Notices to the FAA's attention to determine whether the FAA had any concerns and whether there were any immediate actions required of Carson. After discussing the matter with the FAA and informing it that the subject aircraft did not exceed the relevant gross aircraft weight limits, and that the subject aircraft did not exceed center of gravity limitations, Carson was assured by the FAA that there were no safety issues to be addressed.

The Contracts require that all of the subject aircraft be capable of hovering out of ground effect at 7,000 feet altitude and 20° Celsius with a non-jettisonable payload of 3,000 pounds using a standard pilot weight of 200 pounds and fuel for one hour and 30 minutes. Notwithstanding the weight overages discovered by the Forest Service, and even without the proposed modifications and improvements detailed above, the aircraft have been able to exceed these minimum performance requirements throughout their time of service to date.

An analysis of why none of the weight overages has any adverse impact on the safety of the operation of Carson's aircraft requires that a distinction be drawn between the Carson aircraft that carry water only and Carson's Part 135 passenger-bearing aircraft. Carson's water-only aircraft are safe until they carry a payload which causes the combined weight of the aircraft and payload to exceed 22,000 pounds – the manufacturer established and FAA type-certificated gross weight limit for an S-61 operating at 7,000 feet and 20° Celsius. Table 2, below, shows the tank equipped weight of Carson's overweight water only aircraft along with an estimated crew weight of 400 pounds and estimated fuel weight of 1,785 pounds (both estimates are within the norm for Forest Service missions and are taken from the Interagency Helicopter Load Calculation forms contained in Exhibit C) and compares the aggregate aircraft weight to the gross weight limit to determine the maximum safe payload.

Table 2. Maximum Safe Payload of Carson's Overweight Water Only Aircraft

	Aircraft Tank Equipped Weight	Model Crew Weight	Model Fuel Weight	Gross Weight Before Payload	Gross Weight Limit	Maximum Safe Payload
N612RM	12,187	400	1,785	14,372	22,000	7,628
N905AL	12,866	400	1,785	15,051	22,000	6,949
N410GH	13,159	400	1,785	15,344	22,000	6,656

In order to be considered by the FAA to be operating unsafely, each of Carson's water only aircraft would have to be loaded with a payload weighing significantly more than twice the 3,000 pound payload found in the minimum performance specifications set forth in the Contracts. At no time during the 2008 fire season has Carson carried, or even been asked to carry, water loads approaching these levels. Further, Carson's FAA-approved pilot manual sets forth a procedure

for loading water which requires the pilot and co-pilot to monitor engine torque while loading water. Following these procedures, an aircraft will stop loading water well before load stress begins to affect aircraft safety.

In the case of Carson's Part 135 passenger bearing aircraft, maximum allowable payload is determined with reference to aircraft gross weight – a figure that it calculated according to the aircraft's performance charts and reflects the base pounds of lift generated by the aircraft's engines, which are assumed to be operating at +0 engine performance (torque/shaft horsepower). The aircraft gross weight is then reduced by a 550 pound "download" or weight reduction factor established by the Forest Service and used to put a safety buffer in place to ensure that no aircraft carrying people becomes dangerously overloaded. As illustrated in Table 1 above, none of Carson's overweight Part 135 aircraft – N7011M, N4503E, N103WF and N61NH – are overweight by more than this download factor. Additionally, while the aircraft gross weight for these aircraft is calculated assuming +0 engine performance, during the 2008 fire season Carson's engine performance averaged +3.7, which increases the actual load capacity of Carson's aircraft by 400 pounds on average. Thus, the superior average engine performance enjoyed by Carson produced greater lift (in pounds) than the amount of all of the weight overages in Carson's Part 135 aircraft except for N103WF and more than all but 30 pounds of that helicopter's overage.

Moreover, load calculations are made assuming a full aircraft at the very beginning of a mission – an assumption that does not reflect the everyday realities of actual operations. Full startup and preflight preparation of an S-61 requires 10 minutes of engine run time. Loading a full complement of passengers requires an additional 12 minutes of engine run time. Together, these 22 minutes of engine operation burn approximately 432.26 pounds of fuel, fuel weight which no longer burdens aircraft lift capacity and which is freed up for use in carrying other cargo or passengers. The aircraft startup and passenger loading processes alone make up for all of the overage on all of Carson's overweight Part 135 aircraft. As with Carson's water only aircraft, the weight overages are not, and have not at any time been, a safety concern.

V. Termination Of The Contracts Is Not Appropriate

In its 50 year operational history, Carson has never experienced a problem with weight overages, let alone ones similar to those set forth in the Cure Notices. Certain Carson employees have dealt with similar overages while in the employ of other helicopter operators. From these employees' experiences, we understand that the typical and customary approach taken by the Forest Service in such cases has been to assess a penalty against the contractor on account of the overage and to adjust the financial terms of the contract accordingly. Given our understanding of the history of the Forest Service's actions in similar situations, terminating Carson for default would constitute a plainly drastic, disproportionate, and unsustainable contract action. Indeed, singling Carson out for such disparate treatment would be particularly inappropriate where the overages have had no impact on the safety of the subject aircraft, their passengers and crew, and

where the overages have never rendered the subject aircraft unable to meet or exceed the minimum performance specifications set forth in the Contracts.

Moreover, there is no basis in the Contracts which would permit the Forest Service to terminate Carson for default. A fixed-price services contract may be terminated for default only pursuant to the Default clause under the Federal Acquisition Regulation ("FAR") at FAR 52.249-8. This Default clause is specifically *not* among those provisions listed as being applicable to the Contracts. *See* Contracts at § D. Accordingly, there is no contractual authority by which the Forest Service may terminate Carson under the Contracts for default, and any attempt to do so would constitute a breach of contract.

Even assuming that the Default clause applies to the Contracts, the overages present an issue of contract administration which does not warrant termination for default. The draconian remedy of termination for default is reserved only for egregious instances of contract breach where a contractor fails to perform the contract or has performed it poorly. That certainly is not the case here. Aside from the tragic Shasta-Trinity accident, which again, had absolutely no connection to the weight overage issues, Carson has timely completed each and every mission to the Forest Service's satisfaction, and notwithstanding the overages, Carson's performance has been exemplary. In addition, the only ground identified in the Contracts as warranting a default termination is where the contract nonconformance impacts the operational safety of the contracted aircraft. *See* Contracts § C-17. That is patently also not the case here. As noted, aircraft weight was not a contributing factor in the Shasta Trinity accident, and the FAA, the very agency charged with enforcing aviation safety, has advised that none of the weight overages have affected the operational safety of any of the aircraft at issue. Accordingly, under these circumstances, there are no grounds for terminating Carson for default. *See Keeter Trading, Co. v. United States*, 79 Fed. Cl. 243 (2007) (termination for default is improper where imposed for reasons other than the contractor's performance of the contract); *cf. Schlesinger v. United States*, 182 Ct. Cl. 571 (1968) (termination for default is not warranted simply because a technical or bare nonconformance with the contract has occurred).

Likewise, the present circumstances do not support a default termination. Under the FAR, a termination for default is a measure of last, not first, resort. Specifically, FAR 52.246-4 provides a reasonable and prudent course for addressing precisely the contractual nonconformance here at hand. Finally, even if the weight overages constitute a basis for default, a termination for default would be inherently unsustainable under the circumstances here. FAR 49.402-3 requires that the Forest Service first engage in an exhaustive multi-factored analysis before a contractor may be defaulted, including consideration of: (i) the terms of the contract and applicable laws and regulations; (ii) the specific failure of the contractor and the excuses for the failure; (iii) the availability of the supplies or services from other sources; (iv) the urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor; (v) the degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts; (vi)

the effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments; and (vii) any other pertinent facts and circumstances. Each of these factors militates in favor of accepting Carson's proposal and against terminating the Contracts.

First, Carson has at all times abided by the Contracts' requirements and applicable federal law regarding the safe operation of its aircraft. In this regard, the Contracts require the contractor, in performing any mission for the agency, to comply with the obligations and requirements for commercial operators set forth in the FAA regulations, including those contained in Part 133, Part 135, and in the aircraft's type certificate and FAA-approved flight manual. Carson has fully complied with these FAA regulations to ensure and maintain the operational safety of its aircraft and it fully disclosed the weight overages to the FAA immediately upon being advised of the issue by the Forest Service. Moreover, the circumstances underlying the overages do not warrant the imposition of a default termination since the cause of the error is solely attributable to a manufacturer's defect in the scale used to weigh the aircraft, which error Carson had no reason to know or suspect, and which Carson promptly addressed upon discovery.

A termination for default would be particularly unfair given Carson's performance history and the significant investment of time and money the company has made developing tools usable only by, or for the benefit of, the Forest Service. Carson has fought fires for the Forest Service since 1979 without any incidents or accidents until N612AZ crashed in August 2008. Carson has logged more than 54,000 flight hours fighting wildfire over the past 10 years and has logged more than 18,000 hours on wild land firefighting missions since 2005. Its crews and aircraft have consistently received superb reviews from the agency's helicopter managers and incident commanders during fire support missions. Attached as Exhibit D are performance evaluations Carson has received on wildfire missions since 2005. These reviews are uniformly excellent and reflect the unparalleled quality, commitment and professionalism of Carson's crews and aircraft.[4] Our aircraft availability rate for tactical missions during contract periods is among the best in the industry.

[redacted]

[4] Carson's history of excellence transcends its almost 20 years of work with the Forest Service. Carson has a 50 year history as a leading innovator in the area of rotary wing flight and was the developer of the composite fiber rotors now used by all S-61s under contract to the Forest Service, throughout the oil and gas industry and by the British Royal Navy in all of its S-61 "Sea King" helicopters.

[redacted]

[redacted]

As discussed above, there simply is no legal basis for the Forest Service to terminate the Contracts for default on account of any aircraft weight overages. Even if there were such a basis, any decision to terminate the Contracts for default would be unsustainable given the particular factual circumstances of these overages and Carson's history of innovation and operational excellence. Because of the significant impact that such a determination would have on Carson's business, Carson would have no alternative but to challenge the propriety of any decision by the Forest Service to terminate the Contracts for default. The time, expense, and potential collateral damage associated with any such litigation would be substantial for both parties. For this reason, and in light of the unfortunate recent deterioration in the parties' working relationship, we believe that it would not be constructive – for either the Forest Service or for Carson – for the Contracts to be continued beyond the expiration of their last Mandatory Availability Period, which is November 27, 2008. Accordingly, Carson proposes that the Contracts be allowed to expire by their own terms with the end of ~~the last Mandatory~~ Availability Period under the Contracts and that the Forest Service not exercise any of its options to extend the Contracts beyond the 2008 fire season. Pursuant to this proposal, Carson would fulfill its obligations through and including the end of the last Mandatory Availability Period.

[redacted]

[redacted]

Carson is aware of the gravity of this situation and the importance of these issues to the Forest Service. Accordingly, Carson would appreciate the opportunity to meet with you at your earliest opportunity to discuss the matter and to provide any further information that the Forest Service may desire.

Sincerely,

[redacted]

David M. Nadler
Counsel to Carson Helicopters, Inc.

cc: Marc Kesselman,
General Counsel, U.S. Department of Agriculture
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December 10, 2008

BY E-MAIL AND UPS OVERNIGHT MAIL

Mr. Frank Gomez
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Re: Contract Nos. AG-024-B-C-08-9340 and AG-024-B-C-08-9354;
Response to Cure Notices

Dear Mr. Gomez:

This firm is counsel to Carson Helicopters, Inc. ("Carson").

This letter is in response to the Forest Service's Cure Notice dated November 7, 2008 (the "November Cure Notice," and, collectively with the September 29 and October 1 Cure Notices, the "Cure Notices") regarding Contract No. AG-024-B-C-08-9340 for National Exclusive Use Large Fire Support Helicopter Services and Contract No. AG-024-B-C-08-9354 for National Exclusive Use Initial Attack Helicopter Services (collectively, the "Contracts").[1]

Carson has a 50-year history of excellence and innovation in commercial helicopter operations and a 25-year record of conducting fire suppression missions for the Forest Service. In addition to being one of the oldest helicopter companies, Carson is one of the largest domestic commercial helicopter operators in the United States.

The Forest Service has raised two areas of concern in the Cure Notices, first, that the actual weights of Carson aircraft exceeded their respective contract bid weights, and second, that a performance chart submitted as part of Carson's proposal contained erroneous data. Neither of these grounds warrants a termination for cause under the circumstances presented here. First, regarding the weight overages, three of Carson's ten aircraft are at or below bid weight, and two of Carson's ten aircraft are within 1% of original bid weight and, therefore, within the allowable weight variance permitted under the Contracts for 2009. The Forest Service should have no concerns regarding the weights of these five aircraft. As to the remaining five aircraft, the primary cause of the weight overages stems from a defective roll-on scale which, through no fault of Carson, was utilized to weigh those aircraft. At all relevant times, however, Carson was

[1] The Forest Service granted an extension to December 10, 2008 to submit this response to the November Cure Notice.

unaware that the scale was miscalibrated and reasonably relied upon the equipment's Federal Aviation Administration ("FAA") certification for its intended purposes. The scale was within its calibration renewal date during use, but was not delivering correct data.

Upon learning of the issue, Carson immediately reported the matter to the FAA, which advised that the overages posed no safety concerns. The Forest Service has neither disputed the FAA's expertise and authority over aviation safety, nor identified any basis for departing from the FAA's determination. Carson has since taken comprehensive corrective action to ensure that further such incidents will not occur, including the adoption and implementation of new detailed weighing procedures for the S-61 aircraft, which have either already been approved by the FAA or are pending approval.

Second, Carson did not knowingly submit the incorrect performance chart identified by the Forest Service. The submission of the chart was the apparent result of unsanctioned misconduct or tampering by an entity or individual outside of Carson. Immediately upon becoming aware of the matter, Carson retained a leading forensics investigative firm to investigate the source of the erroneous information. This investigation, which is ongoing, has found no indication of wrongdoing by any current Carson employee. Indeed, Carson had no incentive to submit an erroneous performance chart given its competitive dominance in the S-61 marketplace and its reasonable expectation of award. Carson has implemented enhanced security protocols to protect sensitive company materials and changed personnel access to company records, including aircraft performance charts.

Moreover, Carson submitted the correct performance chart with its October 20, 2008 response to the initial Cure Notices. Pursuant to that chart, it is clear that seven of the ten aircraft meet the minimum performance specifications in the Contracts, and an eighth aircraft would meet the performance specifications using Carson's actual average engine performance during the 2008 fire season. As shown by the public version of the Forest Service's briefs to the U.S. Government Accountability Office ("GAO") filed in connection with a June 2008 protest by another operator, involving the same or substantially similar helicopter services, a proposed aircraft's capability to exceed specifications was immaterial to the agency's award decisions. Accordingly, as to these eight aircraft, the Forest Service has sustained no actual harm from the incorrect performance chart that was submitted with Carson's proposal. Although the remaining two aircraft do not meet contract specifications, they have successfully complied with the Forest Service's actual needs during the 2008 fire season by performing each mission on time and to the agency's satisfaction.

Under these circumstances, it is clear that terminating Carson for cause would be inherently improper. This conclusion takes on added significance where, as here, the Forest Service has never (to Carson's knowledge) terminated an operator for cause due to similar weight overages or performance chart issues, but has instead pursued more measured resolutions of any nonconformance, such as a modification to contract price. Although the relevant provisions in the Federal Acquisition Regulation ("FAR") afford the Government discretion to terminate a contract for cause, that discretion is limited to instances where termination would be consistent

with customary commercial practice. In this regard, the Forest Service's termination authority is confined to instances where a material breach of contract has occurred. Moreover, it is well settled that the basis for any termination must be tethered to an actual matter of contract performance. Finally, because the Forest Service bears the burden of showing the propriety of any termination that is pursued, it must prove that the action is founded upon "good grounds" and "solid evidence" and is in the best interests of the Government.

Neither the weight overages nor the performance chart issues have adversely impacted the safe operation of any of the aircraft at issue nor precluded those aircraft from timely and successfully completing each mission requested by the Forest Service during the 2008 fire season. Carson has taken all reasonable and appropriate corrective measures to prevent the occurrence of any further incidents. Accordingly, because there is no reasonable basis to conclude that Carson has materially breached the Contracts, terminating Carson for cause under these circumstances would be inherently unsustainable. The nonconformances identified in the Cure Notices should instead be treated as matters of contract administration, and addressed pursuant to Carson's proposal set forth in Exhibit A, which provides a measured and proportional response that will enable the parties to resolve outstanding issues to their mutual satisfaction. In the event that the Forest Service determines not to negotiate such a resolution, or otherwise does not wish to continue its relationship with Carson, we respectfully request that the Contracts be allowed to expire by their terms.

[redacted]

Carson understandably is concerned that the Cure Notices were precipitated by the August 5, 2008 accident at Shasta-Trinity National Forest. Under applicable law, any termination determination must be well reasoned and predicated upon actual contract performance. Accordingly, it is critical that the accident not be utilized as an impermissible pretext to terminate Carson for cause, as that incident bears no rational relation to the issues presented in the Cure Notices. Carson's concerns are not without historical support. Indeed, as recently as May 2004, the Forest Service terminated all fixed-wing aerial tanker contracts after the occurrence of a series of accidents, without a prior determination as to whether particular aircraft were airworthy, whether contract performance had been acceptable, or whether termination was an appropriate measure as applied to individual contracts. The Forest Service was the subject of considerable Congressional criticism for its broad-brush cancellation of the procurement and admonished for its rush-to-judgment as to the termination decisions.

I. Carson's Management Has Responded To The Forest Service's Concerns With Excellence And Professionalism

The weight overages in Carson's aircraft identified by the Forest Service were caused by Carson's reliance on a defective roll-on scale which was used to weigh the overweight aircraft for purposes of submitting the aircraft equipped weight prior to the start of service under the Contracts. Notwithstanding the subsequently discovered defect, the scale in question was properly certified by the FAA to weigh aircraft at the time Carson used it for those purposes. Carson's reliance on that scale was justified and proper and is in no way indicative of a management or operational failure by Carson.

Immediately upon learning of its reliance on the defective scale and the weight overages, Carson engaged an independent aircraft weighing expert to work with the Company's management and technical staff to formulate a new set of weighing procedures. These new weighing procedures follow the procedures established by Sikorsky, the S-61's manufacturer, and have been reviewed and approved by the FAA. These new weighing procedures embed multiple checks and cross-checks in Carson's weighing procedures, thereby greatly increasing the accuracy of its aircraft weight determinations as well as minimizing the likelihood that errors such as those caused by the defective scale will go undetected. Attached as Exhibit B is the relevant portion of Carson's General Maintenance Manual detailing Carson's new FAA-approved weighing procedures.

Carson's new weighing procedures focus on two main areas:

1. Jackstand Scales Only. In addition to being the ultimate source of the weight overages here, there are many uncontrolled variables in using roll-on scales – including tire pressure variances, incorrect centering of wheels on pads, and uneven weighing surfaces – any of which can cause material discrepancies in aircraft weight readings. Because of this, Carson's new weighing procedures require the use of jackstand scales. For an additional quality check, Carson will be weighing each aircraft three times and rotating individual jackstands between the different hardpoints on the aircraft. Comparison of these separate weighings will highlight potential problems so Carson will be able to immediately correct them.

2. Concise Equipment Management. In conjunction with the new weighing procedures, Carson has put a more detailed system in place for managing the equipment installed in particular aircraft. If a new piece of equipment is added to a particular aircraft, or if a piece of equipment is replaced, the new and replaced items will be individually weighed and the actual weights will be recorded in the aircraft's equipment list. For example, if an aircraft is weighed as equipped with four double passenger seats and four single passenger seats and one of the double seats is removed and replaced with two single seats, the removed double seat is physically weighed and that weight is

subtracted from the aircraft's overall weight and the actual weight of the two newly installed single seats is added to aircraft's overall weight. Manufacturer's listed component weights will not be acceptable.

The new weighing procedures designed and implemented by Carson in the wake of the discovery of the weight issues will dramatically decrease the likelihood that these or similar problems occur in the future.

Upon learning of the weight issues Carson immediately, and voluntarily, re-weighed every aircraft in its fleet multiple times and instituted revised and more stringent procedures for weighing aircraft and components. Carson further revised its chain of command for reviewing aircraft and component weights. Throughout its entire 50-year operational history, Carson has never experienced weight overages similar to those at issue here. The speed with which Carson was able to address these concerns, and the speed and effectiveness with which Carson was able to design and implement these new weighing procedures, highlight the excellence and professionalism of Carson's management team.

II. The Aircraft Should Be Weighed Using Carson's New Weighing Procedures

The aircraft weights presented in this letter and in Carson's October 20 letter are the weights that should be used for purposes of evaluating the Forest Service's concerns in the Cure Notices. Carson does not dispute the intrinsic accuracy of the scales utilized by the Forest Service in Redmond. However, the weighing in that instance was not conducted in accordance with Sikorsky-approved maintenance procedures, which Carson provided to the Forest Service the day before the Redmond weighings. To obtain correct weights, these Sikorsky-approved procedures require, among other things, the use of properly-sized cup adapters on each jackstand weigh point and the proper leveling of the subject aircraft along two planes. Failure to follow these procedures can and will result in weights that are not accurate. Improper weight distribution on jackpoints and/or improper aircraft leveling can result in variances greater than 100 pounds.

Carson used its new FAA-approved process to re-weigh all of its aircraft. The results of this re-weighing are summarized below:

Aircraft	Contract Aircraft Equipped Weight	Current Aircraft Equipped Weight	Weight Overage
N612RM	11,026	11,063	37
N116AZ	11,023	11,016	AT OR BELOW
N905AL	11,283	11,880	597
N410GH	11,526	12,173	647
N3173U	10,837	10,788	AT OR BELOW
N7011M*	11,347	11,445	98
N4503E*	11,356	11,581	225
N103WF*	11,341	11,754	413
N61NH*	11,353	11,653	300
N725JH*	12,023	12,014	AT OR BELOW

The aircraft marked with an asterisk are Carson's Part 135 passenger-bearing aircraft. The weights of each of these Part 135 aircraft have been reduced by 125 pounds to account for aircraft interiors that the Forest Service required to be installed after initial bid weights were submitted and which were not included in the initial bid calculation.

Attached as Exhibit C is detailed information, in the format supplied by the Forest Service in the November Cure Notice, showing the actual weight of the equipment that was removed from and added to the individual aircraft. Exhibit C also includes, as requested, revised load calculation forms for each aircraft along with copies of the maintenance logs documenting the equipment installed or removed since September 29, 2008.

Contrary to the November Cure Notice, Carson's revised weighing procedures do not require that every single item installed in a particular helicopter be weighed. If a particular item of equipment is installed on an aircraft when that aircraft is weighed, that piece of equipment is considered part of the basic aircraft weight and not separately weighed. However, if an item is removed, that item will be individually weighed and the actual weight of the item will be subtracted from the base aircraft weight. Prior to re-installing or installing a component, the component will be weighed and the actual weight will be used in the Chart A aircraft equipment list, even if the actual weight varies from the manufacturer's list weight. Thus, aircraft N116AZ, N3173U, and N725JH are at or below original aircraft equipped weight in the Contracts. Aircraft N7011M and N612RM are within 1% of the original aircraft equipped weight in the Contracts. This variance would be allowed pursuant to the terms of the Contracts after the expiration of the initial one-year mandatory availability period ("MAP") for these aircraft. Given that the relevant MAP for these aircraft expired on November 4 and 27, 2008, respectively, the weights of these aircraft are in conformance with the terms of the Contracts. Thus, only aircraft N905AL, N410GH, N4503E, N103WF, and N61NH are overweight in an amount greater than 1% of the original aircraft weight as set forth in the Contracts.

The weight error documented upon discovery of the defective scales averaged approximately 400 pounds. The error was not 400 pounds for every aircraft during each weighing since they were weighed at different times and under different circumstances, and there is no way to know exactly when the defective scales began to read improperly and to what degree. It is clear that all of the aircraft that are significantly overweight were weighed on the defective roll-on scales and that the defective roll-on scale was the root cause of most of the aircraft weight errors.

III. The Weight Issues Are Not A Safety Or Performance Issue

Although some of Carson's aircraft are heavier than the aircraft equipped weight set forth in the Contracts, these aircraft have never been operated in an unsafe manner. As required by the Contracts and the FAA, Carson has operated these aircraft at all times within the parameters of the relevant FAA-approved flight manual, the FAA Type Certificate for Sikorsky S-61 aircraft, and the FAA airworthiness certificates for each individual aircraft. During Carson's most recent discussions with the FAA, after Carson self-disclosed information on the weight issues and before it received approval for its new weighing procedures, Carson asked the FAA whether it had any concerns and whether there were any immediate actions required. Following this discussion, during which the FAA found that the aircraft did not exceed the relevant gross aircraft weight limits and that the aircraft did not exceed center of gravity limitations, the FAA determined that there were no safety issues to be addressed.

At no time during the 2008 fire season Carson carry water loads approaching overweight levels. Additionally, while none of the weight overages on Carson's overweight Part 135 aircraft exceeds the Forest Service's 550 pound download factor, those aircraft's lift capacity was determined assuming +0 engine performance while those aircraft actually averaged +3.7 engine performance during the 2008 fire season. This increased engine performance – the result of the superior condition of Carson's aircraft and the excellence of Carson's technical staff – produced 400 pounds of additional load capacity on average, enough load capacity to make up for all or virtually all of any weight overages on Carson's Part 135 aircraft.

IV. Carson Had No Incentive To Submit The Incorrect Performance Charts, Which Were The Result of Tampering, And Which Were Irrelevant To The Agency's Award Decision

Carson first learned that an incorrect performance chart had been submitted with its initial proposal to the Forest Service shortly after the Shasta-Trinity accident on August 5, 2008. Upon that discovery, Carson immediately contacted the FAA and self-disclosed the improper performance chart. The RFMS charts that were submitted and used for load computations in Carson's October 20 letter are the correct charts. It is Carson's understanding that Forest Service personnel were (and remain) in close communication with the FAA and that the fact of the improper performance chart was communicated to those Forest Service personnel within days of the FAA's learning of this matter.

As a preliminary matter, the improper performance chart and the submission of such chart with Carson's initial proposal appears to be the product of intentional tampering. Carson did not intend to submit an incorrect performance chart with its initial proposal and had no incentive to do so from a competitive standpoint. In fact, Carson had every incentive not to submit any incorrect documentation with its initial proposal because any irregularity would endanger its ability to be awarded contracts which it was in a strong position to win based on the Type 1, heavy lift helicopter services market. The Forest Service's requirements under the Contracts call for Type 1 helicopters with Part 135 certification able to carry 16 passengers. This requirement essentially limited the helicopter models capable of performing under the Contracts to the S-61 and the Chinook. Other than a single S-61 aircraft operated by Construction Helicopters, Inc., Carson is the only S-61 operator flying S-61s with Part 135 certification. Furthermore, the performance specifications in the Contracts could only be met by S-61s utilizing composite rotor blades. Carson had every expectation that multiple individual aircraft from its fleet would be awarded under the Contracts. Indeed, the Forest Service's strong encouragement to Carson to submit a proposal further supported Carson's reasonable expectation of an award under the Contracts. Because of this reasonable expectation, Carson had no incentive to submit an initial proposal with an incorrect performance chart.

Immediately upon learning that an incorrect performance chart had been submitted with its initial proposal, Carson retained Jones Dykstra & Associates ("Jones Dykstra"), an independent computer forensic and incident response consulting firm, to investigate this matter. The investigation, which is ongoing, included interviewing all of the Carson employees connected to the creation and management of performance charts and all of the employees having any involvement with the creation and submission of Carson's initial bid for the Contracts. In addition to investigating the source of the incorrect performance chart, Jones Dykstra made a bit-by-bit mirror image copy of six computers and two backup hard drives used by Carson.

Jones Dykstra concluded that Carson had initially compiled its bid proposal using the correct performance chart, but that at some point the correct chart was switched with an incorrect chart. The incorrect performance chart was also subsequently propagated into Carson's internal flight manuals. The proper performance chart was not modified electronically, but was physically modified (for example, through the use of scissors, glue, and a photocopier). The modification consisted of taking a 2 1/2 minute horse power performance chart, physically superimposing it over the 5 minute chart while leaving the header and footer of the page containing the 5 minute chart unchanged. The improperly modified chart was then photocopied to create a new document with the proper heading and the incorrect chart. The improperly modified performance chart was then physically substituted for the correct chart in the hardcopy document binders used to assemble Carson's initial proposal for submission to the Forest Service. The switch of the performance charts was done by someone with knowledge of Carson's process for bidding on government contracts and with physical access to Carson's Grants Pass offices between April 1 and 5, 2008, the range of dates during which Jones Dykstra concluded the switch was made. Of the current Carson employees involved with submitting bids on government contracts, only two had sufficient knowledge about performance charts to be able to make the substitution. After interviewing both of those individuals, Jones Dykstra concluded

that neither had the means, motive, and opportunity necessary to insert the improper performance chart into the Carson initial proposal.

The inclusion of the improper performance chart with Carson's initial bid was admittedly an unfortunate occurrence. However, contrary to the November Cure Notice, the incorrect performance chart had no impact on the Forest Service's award recommendations.

The public version of the Forest Service's briefs to GAO in connection with a June 2008 protest by another operator for the same, or substantially similar, firefighting services, show that the agency evaluated Aircraft Technical Capability, though stated to be the most important technical discriminator, as only a pass/fail criterion, and refrained from any qualitative assessment of aircraft performance beyond the minimum specifications in the solicitations. In this regard, the same Contracting Officer who issued the Cure Notices swore in support of the protest that:

> The purpose of this factor was not to identify an aircraft's increased performance over and above the minimum standards; it was simply to identify that the aircraft met the standard performance specifications as stated in the solicitation.

(Exhibit D: B-400295.2: Contracting Officer's Supp. Stmt. of Relevant Facts ¶ 6. Based solely upon the Contracting Officer's testimony, the Forest Service asserted in that litigation that it was "[c]ompletely irrelevant . . . whether any helicopter exceeded the Agency's performance specifications" and that the agency "did not consider, or care, whether a helicopter exceeded the Agency's requirements." (Exhibit E: B-400295.2: Supp. Mem. Law, at 2 (emphasis in original)).

When the Forest Service's actual evaluation approach for technical capability is applied using the actual aircraft weights as weighed by Carson using Carson's new FAA-approved weighing procedures and the corrected performance chart, it is clear that seven of Carson's aircraft (N612RM, N116AZ, N3173U, N7011M, N4503E, N103WF, and N61NH) conform to the Contracts' minimum performance specifications. Accordingly, as to these aircraft, the submission of the incorrect performance chart did not prejudice the Government. To the extent the Forest Service contends that aircraft performance was material to the agency's evaluation of price among competing proposals, that position must also be rejected, since under the solicitation's evaluation scheme, price was significantly less important than technical considerations. In this regard, the Forest Service confirmed in its briefs in the protest that price was not a material discriminator in the agency's award determination. (*See, e.g.*, Exhibit F: B400295.2: Mem. Law at 14 ("Agency . . . considered price to be significantly less important than technical factors" (emphasis in original), at 15 ("technical proposals were significantly more important than price in the evaluation process")).

Of the remaining three aircraft that would not have met the performance specifications under the Contracts, one of those aircraft, N725JH, is within 250 pounds of meeting the performance specifications and thus would have met the performance specifications had performance been determined using Carson's actual average +3.7 engine performance during the 2008 fire season.

Because this aircraft's actual performance during the 2008 fire season was well within the performance specifications in the Contracts, this aircraft should be deemed to have met those performance specifications. Although the remaining two aircraft (N905AL and N410GH) do not meet the Contracts' minimum specifications, they timely and successfully completed each mission directed by the Forest Service during the 2008 fire season. One of these two aircraft, N410GH, was only put into service under the Contracts as a replacement for N612AZ and, thus, only flew Forest Service missions during the time after the Shasta-Trinity accident through October 2, 2008. As discussed more fully below, because the aircraft capably performed the agency's actual mission needs, they cannot support a material breach of contract in furtherance of a termination for default. Moreover, the Forest Service has not argued, and cannot argue, that there was any safety or performance issue with any of the missions that these aircraft flew during the 2008 fire season. Carson believes that this issue should be addressed through a modification as proposed by Carson below.

V. Termination Of The Contracts Is Not Appropriate

The weight overages and performance chart issues present matters of contract administration that do not warrant a termination for cause. A termination for cause is a drastic remedy of last resort reserved only for egregious instances of contract breach where a contractor fails to perform the contract or has performed it poorly. As discussed below, neither circumstance is applicable here. FAR Part 52.212-4(m) governs terminations for cause in commercial item procurements. Accordingly, the propriety of a termination under the provision is predicated upon the reasonableness of the action had the nonconformance occurred in a standard commercial setting. As the provision is intended to mirror customary commercial practices, FAR Part 52.212-4(m) permits a termination for cause only where the nonconformance would constitute a material breach of contract. *Cf. Radiation Tech., Inc.*, 366 F.2d 1003 (Ct. Cl. 1966) (termination improper because defective supplies delivered on time nevertheless substantially complied with contract requirements); *Brandywine Prosthetic-Orthotic Svc., Ltd.*, VABCA No. 3441, 93-1 BCA ¶ 25250, June 30, 1992 (termination improper because breached provision was not material requirement of contract).

Moreover, an agency is cautioned to terminate a contract for cause only where such a termination would be in the Government's best interests, and to do so only after consultation with counsel. *See* FAR Part 12.403(b). The agency bears the burden of proving the propriety of a termination for cause. *Rowe Inc. v. Gen. Servs. Admin.*, GSBCA No. 14136, 00-1 BCA ¶ 30668, Nov. 30, 1999 ("Government must prove by a preponderance of the evidence that its decision to terminate a contract for cause is proper."); *House v. Gen. Servs. Admin.*, GSBCA No. 14665, 99-1 BCA ¶ 30279, Mar. 3, 1999 (same). In this regard, "a termination for cause is a drastic sanction and should only be undertaken upon good grounds and solid evidence." *Falls Mfg., Inc.*, DOTCAB No. 4149, 04-2 BCA ¶ 32,632, May 14, 2004; *see also Bus. Mgmt. Research Assocs., Inc. v. Gen. Servs. Admin.*, CBCA No. 464, 07-1 BCA ¶ 33,486, Jan. 18, 2007 (same); *Divecon Servs., LP v. Dep't. of Commerce*, GSBCA No. 15997-Com, 04-2 BCA ¶ 32,656, June 22, 2004. A cause termination "will be set aside if it is arbitrary or capricious, or constitutes an abuse of the

contracting officer's discretion." *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1326 (Fed. Cir. 1987), *cert. denied*, 529 U.S. 1097 (2000).

It is well established that terminating a contractor for cause is prohibited where the determination is a pretext and does not pertain to the contractor's actual performance under the contract. For example, in *Schlesinger v. United States*, 390 F.2d 702, 709 (1968), the court converted a termination for default to one for convenience because the "[p]laintiff's status of technical default served only as a useful pretext for the taking of action felt to be necessary on other grounds unrelated to the plaintiff's performance." Similarly, in *Walsky Construction Co.*, ASBCA No. 41541, 94-1 BCA ¶ 26,264, the board found the agency's default termination improper where the contractor's technical nonconformance was used as an excuse to terminate the contractor regardless of the relation it had to the contractor's actual performance under the contract. *See, e.g.*, *Specialty Transp., Inc. v. United States*, 57 Fed. Cl. 1, 12 (2003) ("[t]he government may not use default as a pretext for terminating contracts for reasons unrelated to performance; instead, there must be a nexus between the government's decision to terminate for default and the contractor's performance." (citation and internal quotation marks omitted)); *PCL Constr. Servs., Inc. v. United States*, 47 Fed. Cl. 745 (2000) (same).

Here, all of the aircraft timely and successfully completed their missions during the 2008 fire season. Moreover, in none of the Cure Notices has the Forest Service disputed the FAA's expertise over aviation safety, or demonstrated why the FAA's determination that the weight overages do not pose a safety issue is not conclusive of the matter. The Forest Service has identified no additional or different concerns that may have been violated or that may have otherwise impacted the operational safety of the aircraft. Finally, terminating Carson for cause predicated on the overages would be particularly improper since the Contracts provide that where a change in weight has occurred, the contractor is to notify the Contracting Officer and submit a revised weight and balance for the aircraft. *See* Contracts § C-5(A)(18). This confirms that weight variances under the Contracts are not contemplated to be grounds for drastic recourse, such as a termination for cause, but rather, represent a routine matter of contract administration.

In the absence of any evidence that Carson has committed a material breach of contract, terminating Carson for cause would be improper. In this regard, any rush-to-judgment without a proper basis as to how the weight overages and performance chart issues have actually compromised contract performance in any demonstrable manner would be inherently improper. Indeed, the Forest Service was admonished by the Senate Committee on Commerce, Science and Transportation in June 2004 for its broad-brush reaction to cancel all airtanker contracts after a handful of crashes involving some of the aircraft. The Forest Service was heavily criticized for its failure to determine whether particular aerial tankers were safe and airworthy and to allow those aircraft to continue in firefighting operations before terminating the contracts.[2]

[2] In particular, Senators McCain (R-Arizona) and Boxer (D-California) were highly critical of the Forest Service's unduly aggressive response, which left many communities in the West without sufficient coverage and vulnerable to wildfire. For example, Senator McCain observed that although the Forest Service stated that the "cancellations were

Accordingly, any similar action here without a proper predicate demonstrating how contract performance has been materially compromised by the issues identified herein would be equally improper and unsustainable.

Moreover, it would be an abuse of discretion to terminate Carson for cause based on nothing more than a technical nonconformance with contract provisions. As noted, a material deviation from contract performance is required in order to sustain a termination for cause. Here, however, it is clear that neither the weight overages nor the performance chart issues, either individually or in combination, constitute a material breach of contract since all of the aircraft at issue in the Cure Notices timely and successfully completed each mission during the 2008 fire season. Likewise, the incorrect performance chart poses no issue as to the Forest Service's award selections as to six of Carson's ten aircraft, since: (1) as to five of the helicopters, the corrected chart places them well within the minimum performance specifications in the Contracts, and the agency told GAO that it was not concerned with whether proposed aircraft could exceed those specifications; and (2) the single remaining helicopter also should be deemed to be within accepted parameters given the *de minimis* nature of its deviation from specifications. Although the remaining two aircraft do not meet contract specifications, it is undeniable that they met the Forest Service's actual needs during the 2008 fire season, and, therefore, they similarly do not support a termination for cause. Instead, these aircraft should be the subject of a contract modification as proposed below.

Finally, the provisions in FAR Part 49 remain relevant guidance that should not be ignored by the agency. Indeed, disregarding one or more of these prudential considerations may result in a termination determination being overturned as an abuse of discretion. In this regard, FAR Part 49.402-3 contemplates an exhaustive multi-factor analysis, including consideration of: (i) the terms of the contract and applicable laws and regulations; (ii) the specific failure of the contractor and the excuses for the failure; (iii) the availability of the supplies or services from other sources; (iv) the urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor; (v) the degree of essentiality of the contractor in the Government's acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts; (vi) the effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments; and (vii) any other pertinent facts and circumstances. All of these factors

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in response to a safety recommendation letter issued by the National Transportation Safety Board"—the "key recommendation in the NTSB letter was not for the agencies to cancel the contracts" but to "further develop a maintenance and inspection program that ensure[s] the safe operation of these planes," and that "[r]ather than instituting such a safety system, however, the agencies involved simply cancelled the contracts for the aircraft." U.S. Senate, Committee on Commerce, Science and Transportation, Hearing on Firefighting Aircraft Safety, dated June 2, 2004, Hearing Transcript at 3:11-13, 15-21, attached as Exhibit G. To take another example, Senator Boxer bluntly expressed that "[t]he bottom line is I have no confidence that you have any intention to allow these tankers to do their job." *Id.* at 68:13-14.

militate in favor of accepting Carson's proposal and against terminating the Contracts. All of these factors militate against terminating the Contracts.

Carson has at all times abided by the Contracts' requirements and applicable federal law regarding the safe operation of its aircraft. The circumstances underlying both the weight overages and the performance chart issues do not warrant the imposition of a termination for cause since the source of these errors is solely attributable to factors beyond Carson's control, which the Company had no reason to know or suspect, and which Carson promptly and effectively addressed upon discovery. Additionally, a termination for cause would be particularly unfair given Carson's performance history and the significant investment of time and money the Company has made developing tools usable only by, or for the benefit of, the Forest Service. Terminating the Contracts for cause also will have a potentially severe effect on Carson's prime and subcontractor work on numerous Government projects.

Moreover, Carson knows of no other instance when issues such as those raised in the Cure Notices have led to termination of a contract for cause. Nor is Carson aware of any instances during the 2008 fire season in which the Forest Service has taken similar steps to verify or confirm the weights of the aircraft of any of the Forest Service's other contracted helicopter service providers. While the Forest Service states in its November Cure Notice that the Shasta-Trinity accident has nothing to do with the issues and discussions addressed in the Cure Notices, those statements are belied by the clearly disparate treatment to which the Forest Service is subjecting Carson.

There simply is no legal basis for the Forest Service to terminate the Contracts for cause on account of any aircraft weight overages or the performance chart issue. Even if there were such a basis, any decision to terminate the Contracts for cause would be unsustainable given the factual circumstances of these issues and Carson's history of innovation and operational excellence. Because of the significant impact that such a determination would have on Carson's business, Carson would have no alternative but to challenge the propriety of any decision by the Forest Service to terminate the Contracts for cause. The time and expense associated with any such litigation would be substantial for both parties.

VI. Carson's Proposed Remedy

Since receiving the first cure notice, Carson's management team has devoted considerable time and attention to reviewing the weight overages and performance chart issues and Carson's overall relationship with the Forest Service. Carson has a 20-year history of flying fire suppression missions for the Forest Service and working closely with the Forest Service in fighting wildfire throughout the United States. Carson would like to continue working with the Forest Service and has formulated a proposal that the Company believes will properly address the Forest Service's concerns while presenting a way for the Forest Service and Carson to work together into the future. That proposal is attached as Exhibit A. While Carson has worked hard to fashion a proposal that it believes will be to the Forest Service's satisfaction, if this proposal is unacceptable, Carson invites and encourages the Forest Service to suggest an alternative. Although Carson hopes it is not the case, if the Forest Service does not want to continue to work with Carson, we believe that the proper course should be to allow the Contracts to lapse by their own terms. In this regard, the base periods under the Contracts end on April 20, 2009, but the Mandatory Availability Periods for all the aircraft at issue have already concluded. Accordingly, neither Carson nor the Forest Service has any present obligations to perform under the Contracts. Under these circumstances, if the parties are unable to negotiate an acceptable resolution, the Contracts should be permitted to expire on their own accord.

Carson is very aware of the seriousness of these issues and their importance to the Forest Service. Carson continues to be willing and interested in meeting with you to discuss these matters and to provide any further information or assurances you desire.

Sincerely,

[redacted]

David M. Nadler
Counsel to Carson Helicopters, Inc.

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