No. 99-1134

In the Supreme Court of the United States

MELKA MARINE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
FRANKLIN E. WHITE, JR.
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the finding of the Court of Federal Claims that petitioner, a government contractor, failed to show that it was on "standby" under settled Federal Circuit case law or to prove that it was entitled to further compensation for idle equipment and labor.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

In the Supreme Court of the United States

No. 99-1134

MELKA MARINE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 187 F.3d 1370. The June 10, 1998 opinion of the Court of Federal Claims (Pet. App. A30-A49) is reported at 41 Fed. Cl. 122. The August 4, 1997 opinion of the Court of Federal Claims (Pet. App. A50-A56) is reported at 38 Fed. Cl. 545.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1999. A petition for rehearing was denied on October 7, 1999 (Pet. App. A57-A58). The petition for a writ of certiorari was filed on January 5, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of the Navy awarded petitioner a contract for various work items, including dredging in the Potomac River, construction of a breakwater, and repairs to an existing boat ramp, quaywall, and finger pier at the Naval Surface Warfare Center in Indian Head, Maryland. Pet. App. A3. The contract required the Navy to obtain a dredging permit from the Army Corps of Engineers prior to the commencement of the dredging and breakwater work, but not the repair work. *Ibid.*

On November 4, 1994, prior to petitioner's mobilization of its dredging and breakwater equipment to the project site, the Navy notified petitioner that the dredging permit had not been received and that the dredging work required by the contract could not proceed until the permit was approved. Pet. App. A3. The Navy also informed petitioner that "construction repairs [were] not dependent on this permit." *Ibid.* Accordingly, petitioner resequenced the contract work and began repairs to the boat ramp on November 21, 1994. *Id.* at A4. It suspended those operations the next day, however, when it discovered a six-inch pipe in the boat ramp and a prior boat ramp beneath the existing one. *Ibid.*

On November 29, 1994, the Navy issued a formal Suspension of Work order based on the discovery of the pipe and old boat ramp, the need for a boat ramp design review, and the Navy's failure to obtain the dredging permit. Pet. App. A4. Two days later, on December 1, 1994, the Navy partially lifted the suspension. *Ibid.* The Navy informed petitioner that, while the dredging permit was not expected for at least another month and a half, work could commence on the repairs to the

quaywall and finger pier and that "[a]ll equipment on site that will not be utilized on the repairs to the boat ramp, quaywall, or finger pier can be demobilized." *Id.* at A4-A5.

During December 1994, petitioner performed the boat ramp, quaywall, and other miscellaneous repair work required by the contract. Pet. App. A5. This work was substantially completed by January 4, 1995. *Ibid.*

Also during December 1994, petitioner demobilized its dredging and breakwater equipment as directed in the Navy's December 1, 1994 letter. By December 27, 1994, petitioner had completed the demobilization of this equipment from the Navy job site. Pet. App. A5. Petitioner later mobilized this same equipment for use on two private contracts. *Id.* at A5, A45.

On February 2, 1995, the Navy and petitioner met to discuss the future of the contract in light of the continuing delay in the Navy's receipt of the required dredging permit. Pet. App. A6. At the meeting, the Navy informed petitioner that in order for the contract to continue, the dredging and breakwater work would have to be postponed until October 15, 1995, and that petitioner would have to agree to perform the dredging and breakwater work at that time for the original contract price. *Ibid.* Petitioner agreed and proposed a February 29, 1996 contract completion date. *Ibid.*

The parties' agreement was incorporated as a bilateral modification of the contract, Contract Modification P00001, which extended the contract completion date to February 29, 1996, and provided petitioner $42,688 in compensation for its remobilization/demobilization costs associated with the postponement of the dredging and breakwater work until October 15, 1995. Pet. App. A6 n.1, A33. A second bilateral con-

tract modification, P00002, provided petitioner $7,163 as compensation for all costs arising from the changed condition of the quaywall and for the delay caused by the uncovered pipe at the boat ramp excavation. *Id.* at A6-A7 n.1, A33. Contract Modification P00003, a unilateral modification issued by the Navy, awarded petitioner $19,837 for overhead and field costs arising from petitioner's having performed work out of sequence and from the Navy's directive that petitioner stop work on the boat ramp until the Navy had reviewed its repair design. *Id.* at A7 n.1, A33. This amount included reimbursement to petitioner for its dredging and breakwater equipment for twelve days. *Ibid.* Work on the contract was completed by February 1996. *Id.* at A7.

2. Petitioner filed a complaint seeking additional compensation for its indirect costs for unabsorbed home-office overhead and for its direct costs for idled equipment and labor for the period November 16, 1994 through March 30, 1995, which it argued were caused by the government's Suspension of Work order. Pet. App. A30, A33. Following a trial, the Court of Federal Claims denied petitioner's claims and dismissed its complaint. *Id.* at A30-A49. The court first determined that under the Federal Circuit's established precedents, a contractor can recover unabsorbed home-office overhead only if it proves that the government required the contractor to "stand by" during a period of government-caused delay. *Id.* at A34-A35. The court then found that for the period November 16, 1994 through January 4, 1995, petitioner had been compensated for its overhead by Contract Modification P00003 for part of the period and was not on standby for the remainder of that period because it performed resequenced contract work for which a dredging permit

was not necessary. *Id.* at A37-A40. As for the period January 4, 1995 through February 2, 1995, the court found that petitioner was on standby but it was not entitled to damages because it bid for and obtained other work. *Id.* at A40-A42. The court then found that petitioner was not on standby from February 2, 1995 to March 30, 1995, because on February 2, 1995, the Navy postponed the dredging and breakwater work until the "date certain" of October 15, 1995, thereby removing any uncertainty surrounding petitioner's dredging and breakwater work. *Id.* at A42-A43. Finally, the trial court determined that petitioner was not entitled to recover additional direct costs for idled equipment and labor, beyond what it had received under Contract Modification P00003, because petitioner had not proved that the government had required petitioner to keep the equipment and labor idle. *Id.* at A43-A48.

3. On appeal by petitioner, the court of appeals affirmed-in-part, vacated-in-part, and remanded. Pet. App. A1-A29. The court reiterated the well-settled rule that in order to recover for standby damages, a contractor must show that the government required it to stand by during a government-caused delay of indefinite duration; and that while and because of standing by, the contractor was unable to take on other work. *Id.* at A9. After that showing, the government then bears the burden of showing either that it was not impractical for the contractor to obtain replacement work during the delay or that the contractor's inability to obtain such work, or to perform it, was not caused by the government's suspension. *Ibid.*

The court of appeals affirmed the trial court's findings that petitioner did not prove it was on standby from November 16, 1994 to January 4, 1995, or from February 2, 1995 to March 30, 1995. Pet. App. A9-A10.

As to the first period, the court of appeals held that the trial court "did not clearly err in finding that [petitioner] was not on standby when it was working on the contract and the government had not suspended all contract work." *Id.* at A10-A11. As to the second period, the court of appeals held that "'standby' requires an *uncertain* delay period where the government can require the contractor to resume full-scale work at any time," and here petitioner knew "with certainty that it could not be called on to perform the [dredging] work before October 15." *Id.* at A12-A13.

The court also affirmed the denial of petitioner's claims for idle equipment and labor. Pet. App. A7 n.2. The court, however, remanded petitioner's claim for unabsorbed home-office overhead from January 4, 1995 to February 2, 1995, a period for which the government conceded that petitioner was on standby, holding that the trial court had applied an incorrect legal standard to determine whether the government met its burden. *Id.* at A13-A19.

ARGUMENT

The court of appeals correctly applied the established legal standard governing recovery of standby costs to the facts of this case. Its decision does not conflict with the decisions of this Court or any other court of appeals. Further review is not warranted.

1. The Federal Circuit, the appellate court that Congress has entrusted to review government contract disputes, see 28 U.S.C. 1295(a)(3) and (10); 41 U.S.C. 609, has long held that a contractor can recover for unabsorbed overhead costs of the type petitioner seeks here only if it proves, among other things, that the government required the contractor to "stand by" during a government-caused delay of indefinite dura-

tion. See, *e.g.*, *Altmayer* v. *Johnson*, 79 F.3d 1129, 1133 (Fed. Cir. 1996); *Interstate General Gov't Contractors, Inc.* v. *West*, 12 F.3d 1053, 1056 (Fed. Cir. 1993); see also *Eichleay Corp.*, 60-2 B.C.A. (CCH) ¶ 2688, aff'd on reconsideration, 61-1 B.C.A. (CCH) ¶ 2894 (ASBCA 1960). Both the Court of Federal Claims and the Federal Circuit concluded that petitioner was not on standby from November 16, 1994 to January 3, 1995, and from February 3, 1995 to March 30, 1995, because during these periods petitioner was "not on indefinite duration standby." Pet. App. A10. Specifically, from November 16, 1994 to January 4, 1995, petitioner was not on standby because it performed significant and uninterrupted repair work required by the contract, albeit in a different sequence than was originally planned. *Id.* at A10-A12, A37-A40. And, from February 2, 1995 to March 30, 1995, petitioner could not have been on standby because it knew with certainty that it would not be called on to perform the work related to the permit until October 15, 1995. *Id.* at A12-A13, A42-A43. The courts' findings and conclusions of law are correct and comport with Federal Circuit case law.

2. As to the first period, November 16, 1994 through January 4, 1995, petitioner relies principally on *Altmayer* v. *Johnson*, 79 F.3d 1129 (Fed. Cir. 1996) (Pet. 24-27). Reliance on *Altmayer* provides no basis for review. First, any inconsistency with a Federal Circuit decision would demonstrate at most an intra-circuit conflict, which is not a basis for review by this Court. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Furthermore, *Altmayer* is distinguishable. *Altmayer* involved a government-caused delay which effectively disrupted performance of an entire

construction project through a "critical path" delay of uncertain duration. See 79 F.3d at 1131 (defining "critical path" as "all of the critical tasks to be performed on the contract in a logical sequence that would ultimately lead to timely completion of the contract."). In that case, the Federal Circuit concluded that the finding that the contractor performed additional work was simply not supported by the evidence; it also found it insignificant that the contractor had completed some minor items during the period of government imposed delay. See *id.* at 1134.

In this case, by contrast, the Federal Circuit concluded that the evidence demonstrated that from November 16, 1994 to January 4, 1995, petitioner performed significant repair work that was entirely independent of the dredging and breakwater work called for by the contract. Thus, petitioner was not on standby when it performed uninterrupted work on these contract items, for which it was fully compensated.

Petitioner also errs in relying (Pet. 28) on *Williams Enterprises* v. *Sherman R. Smoot Co.*, 938 F.2d 230 (D.C. Cir. 1991). In that case the District of Columbia Circuit held that in order to recover damages for home-office overhead costs arising from an extension (rather than a suspension) of a non-government contract, the contractor "must be able to show that it was unable to avoid the additional home office overhead costs." *Id.* at 235. That holding is entirely consistent with the holding below. In *Williams* there had been a sudden and unpredictable collapse of the building under construction; therefore the contractor clearly had no opportunity to mitigate its loss. *Ibid.* No similar circumstances prevented petitioner from mitigating its loss in this case.

3. The Federal Circuit also correctly determined that petitioner was not on standby from February 2, 1995 to March 30, 1995. Pet. App. A12-A13. The Court of Federal Claims found that on February 2, 1995, petitioner had been informed by the Navy that the dredging and breakwater portions of the contract would be postponed until October 15, 1995. *Id.* at A42-A43. Under the Federal Circuit's established precedents, once the government fixes a future date for the resumption of work, standby cannot be shown because standby requires an uncertain delay period during which the government can require the contractor to resume full-scale work at any time. See, *e.g.*, *West* v. *All State Boiler, Inc.*, 146 F.3d 1368, 1380 (Fed. Cir. 1998).

4. Finally, the Federal Circuit properly affirmed the Court of Federal Claims' determination that petitioner was not entitled to additional compensation for direct costs related to idled equipment and labor. The Court of Federal Claims correctly found that, apart from days for which equipment costs were paid through Contract Modification P00003, Pet. App. A45, petitioner simply provided no evidence that its dredging and breakwater equipment was ever made idle as a result of the delay relating to the dredging permit, *id.* at A45-A46. Rather, the trial court found that petitioner moved its equipment from the Navy's contract site to other project sites and used the equipment on those jobs. *Id.* at A45. Because petitioner's equipment was never "necessarily set aside and awaiting use in performing the [Navy] contract," the government was not liable for idled equipment costs. See, *e.g.*, *J.D. Shotwell Company*, 65-2 B.C.A. (CCH) ¶ 5243, at 24,687 (ASBCA 1965).

Similarly, the Court of Federal Claims correctly found that petitioner did not establish government responsibility for idled labor. First, the trial court found that during November and December 1994, petitioner's employees were performing the resequenced repair work required by the contract. Pet. App. A47-A48. Second, the trial court found that "[w]hen [petitioner's] employees were not working on the contract in January [1995], they were performing other construction projects." *Id.* at A48. Petitioner's claim for idled labor for the period after February 2, 1995—the date when the Navy postponed the remainder of the contract until October 1995—is inconsistent with its "duty to mitigate [its] damages by transferring labor and equipment affected by the stoppage to other uses pending the time that work can recommence." *Signal Contracting, Inc.*, 93-2 B.C.A. (CCH) ¶ 25,877, at 128,736 (ASBCA 1993). The trial court found that "[n]o evidence presented at trial showed that all idle labor claimed was necessary. [Petitioner] could have layed off employees pending recommencement of the Navy project." Pet. App. A48. Finally, the trial court found that petitioner benefitted from the "shop work" that its employees performed during this period. *Ibid.*

The Court of Federal Claims' findings were not clearly erroneous. Following settled principles of law the Federal Circuit correctly affirmed.*

---

* Moreover, we note that the decision below is interlocutory in that one of petitioner's claims remains open on remand. Petitioner's complete recovery will not finally be determined until the completion of that part of the case. Cf. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (denying petition for writ of certiorari where the court of appeals remanded the case).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
FRANKLIN E. WHITE, JR.
Attorneys

MARCH 2000