No. 15-1157

In the Supreme Court of the United States

DISTRIBUTED SOLUTIONS, INC., PETITIONER

v.

DEBORAH LEE JAMES, SECRETARY OF THE AIR FORCE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in summarily affirming a decision by the Armed Services Board of Contract Appeals holding that the government's contract with petitioner granted the government a perpetual right to use a software system that the government had paid petitioner and its predecessors in interest to develop.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-2) is not published in the *Federal Reporter* but is reprinted at 617 Fed. Appx. 996. The opinion of the Armed Services Board of Contract Appeals (Pet. App. 3-52) is reprinted at ASBCA No. 57266, 14-1 BCA ¶ 35,704, and is available at 2014 WL 4219560.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2015. A petition for rehearing was denied on December 11, 2015 (Pet. App. 53-54). The petition for a writ of certiorari was filed on March 10, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This is a contract dispute in which petitioner seeks money damages based on the government's con-

tinuing use of software that the government paid petitioner and its predecessors in interest to develop.

a. In 1999, the Air Force Non-Appropriated Fund Purchasing Office (AFNAFPO) awarded a contract for the development of a software system known as the Internet Based Purchasing System (IBPS), which AFNAFPO intended to use for its purchasing activities. Pet. App. 3-7. In 2000, the original contractor and AFNAFPO signed a novation transferring the contract to an entity that became known as Susquehanna Technologies, Inc. (SusQTech). *Id.* at 8.

The original contract did not specifically discuss the allocation of intellectual-property rights in the IBPS software. Pet. App. 8. In 2003—several years into the contract's term—SusQTech sent AFNAFPO proposed language addressing those issues. *Id.* at 8-9. SusQTech first suggested language that would have provided that SusQTech owned the software but that AFNAFPO had "a perpetual nonexclusive license to utilize the IBPS system." *Id.* at 9 (citation omitted). At AFNAFPO's request, SusQTech modified that language to recognize that AFNAFPO had "continuous and nonexclusive" rights to use the system. *Ibid.* (citation omitted). An AFNAFPO contracting specialist explained that AFNAFPO wanted to avoid the word "license" because AFNAFPO was "not paying licensing for IBPS." *Ibid.* (citation omitted). The specialist added that AFNAFPO had "paid to have the application developed," and that the "whole idea" of developing its own software system was "so that [AFNAFPO] would not have to pay costs to use the system." *Id.* at 10 (citation omitted).

In 2005, AFNAFPO and SusQTech adopted Modification 15, which incorporated an intellectual-property-

rights provision into the contract. Pet. App. 11. One part of Modification 15 incorporated AFNAFPO's preferred language recognizing its "continuous and nonexclusive" rights to use the IBPS software. *Ibid.* (citation omitted). Another provision required SusQTech to place in escrow "[a]ll source code used for the development and deployment of the IBPS system." *Ibid.* (citation omitted). Modification 15 then recognized AFNAFPO's rights to retrieve and use the escrowed source code:

> In the event [SusQTech] ceases operation, is acquired or merged, or should AFNAFPO choose to either support and build upon the IBPS system itself, or engage a third party to provide support and enhancements for AFNAFPO, AFNAFPO is granted authorization to retrieve all source code from the escrow system.

Ibid. (citation omitted). Finally, Modification 15 provided that, notwithstanding AFNAFPO's rights to use the IBPS software, that software and the other materials provided by SusQTech under the contract remained the intellectual property of SusQTech. *Id.* at 11-12.

b. In July 2005, petitioner paid $50,000 to purchase SusQTech's rights to the IBPS software. Pet. App. 14. Over the next several months, petitioner, SusQTech, and AFNAFPO negotiated the terms of a novation that would transfer the IBPS contract from SusQTech to petitioner. *Id.* at 14-23. Before the purchase, SusQTech had explained to petitioner that Modification 15 recognized AFNAFPO's "perpetual rights to use the [IBPS] application." *Id.* at 15 (citation omitted). Petitioner drafted language for the

novation that would have stated that Modification 15 was "complete and accepted by the Government." *Id.* at 18 (citation omitted). Petitioner's negotiator later testified that this language was intended "to 'kill' all of the rights, duties or obligations arising out of" Modification 15, including AFNAFPO's perpetual right to use the IBPS software. *Id.* at 19 (citation omitted).

Petitioner never communicated to AFNAFPO this intent to "kill" AFNAFPO's right to use the IBPS software. Pet. App. 19; see *id.* at 25-26. AFNAFPO nonetheless objected to petitioner's proposed language addressing Modification 15, explaining that Modification 15 was "not completed" because it imposed an ongoing duty on SusQTech (and thus on petitioner as SusQTech's successor) to update the escrowed version of the IBPS source code. *Id.* at 19-20 (citation omitted). Consistent with that understanding, AFNAFPO proposed revised language specifying that Modification 15 "is valid for the entire life of the contract and will not be considered complete until the contract is closed." *Id.* at 22 (citations omitted). Petitioner agreed to that language, and in October 2005 it was incorporated into the contract as part of Modification 22. *Id.* at 22-24.

c. The contract expired in September 2007. Pet. App. 29. Rather than extending its contract with petitioner, AFNAFPO chose to continue the development of IBPS with a different contractor. Gov't C.A. Br. 16. AFNAFPO also entered into a separate contract under which petitioner agreed to provide maintenance of the IBPS system for eight months. Pet. App. 30-31. The maintenance agreement stated that AFNAFPO had a nonexclusive right to use the IBPS software

"[d]uring the term of this Agreement." *Id.* at 32 (citation omitted).

2. In April 2009, petitioner notified AFNAFPO for the first time that it believed that AFNAFPO's right to use the IBPS system had expired upon the termination of the maintenance agreement in May 2008. Pet. App. 37. Petitioner asserted that AFNAFPO was obligated to pay a license fee for its continued use of the software, and it presented an invoice demanding $5.4 million for a two-year license. *Ibid.* AFNAFPO declined to pay, stating that it had "continuous and ongoing rights to use the IBPS software, as evidenced by the escrow provisions which authorized AFNAFPO to retrieve the software's source code for use." *Ibid.* (citation omitted).

In January 2010, petitioner submitted a certified claim to AFNAFPO seeking $8.1 million for a three-year license of the IBPS software. Pet. App. 37. A contracting officer dismissed the claim, again concluding that the contract gave AFNAFPO the right to continued use of the IBPS software without paying a license fee. *Id.* at 39.

3. The Armed Services Board of Contract Appeals (Board) denied petitioner's appeal. Pet. App. 3-52. The Board first held that, based on the language of the contract and the shared understanding of AFNAFPO and SusQTech, Modification 15 recognized that "AFNAFPO enjoyed a perpetual right to use its version of IBPS for free." *Id.* at 41. The Board then rejected petitioner's contention that Modification 22 had extinguished that right. *Id.* at 44. Petitioner relied on Modification 22's statement that Modification 15 "is valid for the entire life of the contract and will not be considered complete until the contract is

closed." *Ibid.* On petitioner's view, that language meant that AFNAFPO's right to use the IBPS system had ended upon the termination of the contract. But the Board was "dubious" that the language in Modification 22 "can reasonably be interpreted on its face to divest AFAFPO of its perpetual right to use IBPS, a right, according to [petitioner's] claim, worth tens of millions of dollars." *Id.* at 44-45. While acknowledging testimony by petitioner's executives that petitioner understood Modification 22 to have that effect, the Board noted that petitioner had never "disclos[ed] its intention and interpretation to AFNAFPO," and it emphasized that a party's "undisclosed" subjective understanding "is irrelevant in interpreting contract language." *Id.* at 45 (citing *Andersen Consulting* v. *United States*, 959 F.2d 929, 934 (Fed. Cir. 1992)). The Board also rejected petitioner's arguments based on its other agreements with AFNAFPO, including the eight-month maintenance agreement. *Id.* at 45-49.

4. The court of appeals affirmed the Board's decision in a judgment issued without an opinion pursuant to Federal Circuit Rule 36. Pet. App. 1-2.

ARGUMENT

Petitioner contends (Pet. 9-17) that AFNAFPO must pay millions of dollars in licensing fees to continue using the IBPS software that AFNAFPO paid petitioner and its predecessors to develop, even though petitioner itself acquired the rights to the software for just $50,000. The court of appeals correctly rejected that factbound argument, and its nonprecedential summary order does not warrant this Court's review. In addition, this case would not be an appropriate vehicle in which to consider the issues petitioner seeks to raise because it is unclear whether

the Federal Circuit had jurisdiction over petitioner's appeal. The petition for a writ of certiorari should be denied.

1. The Board correctly held that AFNAFPO has a perpetual right to use the IBPS software. AFNAFPO paid petitioner and its predecessors to develop the software for AFNAFPO's use, and petitioner no longer challenges the Board's finding that Modification 15 to the original contract recognized that "AFNAFPO enjoyed a perpetual right to use its version of IBPS for free." Pet. App. 41. Instead, petitioner maintains (Pet. 9-17) that Modification 22 terminated that right and substituted a right to use the IBPS software only during the limited term of the contract. Petitioner is mistaken.

The relevant language in Modification 22 specifies that Modification 15 "is valid for the entire life of the contract and will not be considered complete until the contract is closed." Pet. App. 24 (citation omitted). As the Board explained, that brief statement cannot "reasonably be interpreted on its face to divest AFNAFPO of its perpetual right to use IBPS, a right, according to [petitioner's] claim, worth tens of millions of dollars." *Id.* at 44-45. Petitioner's reading of Modification 22 is particularly implausible because AFNAFPO received nothing of comparable value in exchange for the purported relinquishment of its perpetual right. Petitioner's interpretation also cannot be reconciled with the contract's escrow provision, which required petitioner to place the IBPS source code in escrow and recognized AFNAFPO's right to "retrieve all source code from the escrow system" and to use that code to "support and build upon the IBPS system itself" or with a "third party." *Id.* at 11 (cita-

tion omitted); see *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (describing the "cardinal principle of contract construction" that a contract must "be read to give effect to all its provisions and to render them consistent with each other").

Rather than extinguishing AFNAFPO's perpetual right to use the IBPS software, the language on which petitioner relies simply established the duration of petitioner's obligation to update the escrowed source code. Modification 22 served "to incorporate the novation agreement recognizing [petitioner] as the new contractor," and to distinguish the work that had already been performed by petitioner's predecessors from the work that remained to be completed by petitioner. Pet. App. 23. Consistent with that purpose, Modification 22 "contained 12 paragraphs listing all prior modifications and indicating the present status of completion of each and [petitioner's] responsibility, if any, for each." *Ibid.* When read in that context, the statement that Modification 15 "is valid for the entire life of the contract and will not be considered complete until the contract is closed" clearly refers to petitioner's responsibility for the work identified in Modification 15—*i.e.*, the obligation to ensure that the escrowed source code was updated to reflect any changes to the IBPS software. See *id.* at 11-12. Modification 15 also recognized AFNAFPO's perpetual right to use the IBPS software, but that right was not an item of work to be completed by petitioner or its predecessors. Accordingly, that right was not affected by the specification that Modification 15 would be "considered complete" only after the contract was closed.

2. Petitioner contends (Pet. 11) that Modification 22 "unambiguous[ly]" extinguished AFNAFPO's per-

petual right to use the IBPS software, and that the Board nonetheless refused to enforce the contract's plain terms because petitioner had "never articulated [its] understanding of the legal effect of the language" during its negotiations with AFNAFPO. Based on those premises, petitioner asserts that the Board's decision departed from the rule that unambiguous contract language must be applied according to its terms (Pet. 10-14), and that the Board imposed an obligation on government contractors to inquire about the government's subjective understanding of a contract's plain language (Pet. 14-17).

Contrary to petitioner's contentions, the Board did not view Modification 22 as unambiguously supporting petitioner's reading, but instead was "dubious" that the language on which petitioner relies could "reasonably be interpreted on its face to divest AFNAFPO of its perpetual right to use IBPS." Pet. App. 44-45. Only *after* explaining that the contract's plain language did not support petitioner's reading—much less unambiguously compel it—did the Board discuss petitioner's failure to communicate its understanding of that language to AFNAFPO. *Id.* at 45. When it did so, the Board simply applied the well-established principle that one party's subjective, undisclosed understanding "is irrelevant in interpreting contract language." *Ibid.*; see, *e.g.*, *Andersen Consulting* v. *United States*, 959 F.2d 929, 934 (Fed. Cir. 1992) ("[T]he 'subjective unexpressed intent of one of the parties' to a contract is irrelevant.") (citation omitted).

The Board's decision is thus entirely consistent with the rule that an unambiguous contract must be enforced according to its terms. For the same reason, that decision imposes no new duty on contractors to

inform the government of their interpretation of unambiguous contract language or to inquire into the government's understanding. Petitioner's disagreement with the Board's decision rests not on any dispute about general interpretive principles or the law of government contracts; rather, petitioner simply disagrees with the Board's reading of the particular language at issue here. That factbound dispute over the interpretation of a single contract does not warrant this Court's review. See Sup. Ct. R. 10. Further review is particularly unwarranted where, as here, the court of appeals decided the case in a one-sentence summary order that establishes no binding precedent. Pet. App. 1-2; see Fed. Cir. R. 36.[1]

3. Even if the issues petitioner seeks to raise otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to consider them because it is unclear whether the court of appeals properly exercised jurisdiction over petitioner's challenge to the Board's decision. The Federal Circuit

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[1] Petitioner's challenge to the Board's decision also disregards the applicable standard of review. The Board exercised jurisdiction under the "Disputes clause" of the contract, see Pet. App. 39, which provides that the Board's resolution of factual questions "shall be final and conclusive." C.A. App. 585; see Gov't C.A. Br. 29-30, 42-43. Yet petitioner repeatedly relies on factual contentions that the Board specifically rejected. For example, petitioner states that its original proposed language for Modification 22 would have "eliminate[d] the Air Force's 'continuous' usage rights," and that AFNAFPO "understood" that the language would have had that effect. Pet. 4; see Pet. 11-12. But the Board disagreed, finding that "[i]t is clear from the record that AFNAFPO did not know what [petitioner] intended," Pet. App. 51 n.10, and that petitioner "never" disclosed its desire to extinguish AFNAFPO's perpetual rights, *id.* at 45; see *id.* at 22-23, 50 n.9.

has jurisdiction to hear "an appeal from a final decision of an agency board of contract appeals pursuant to [41 U.S.C. 7107(a)(1)]." 28 U.S.C. 1295(a)(10). Section 7107(a)(1) is the judicial-review provision of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 7101 *et seq.*, and the Federal Circuit has long held that Section 1295(a)(10) confers jurisdiction to hear an appeal only if the contract at issue was subject to the CDA. See, *e.g.*, *G.E. Boggs & Assocs.* v. *Roskens*, 969 F.2d 1023, 1026 (1992) ("If the [CDA] does not apply to the Boggs contracts * * * , this Court lacks jurisdiction.").

AFNAFPO is a nonappropriated fund instrumentality (NAFI), a type of federal entity "that does not receive funds by congressional appropriation." *Army & Air Force Exch. Serv.* v. *Sheehan*, 456 U.S. 728, 729-730 n.1 (1982). The CDA "applies to any express or implied contract (including those of the nonappropriated fund activities described in [S]ections 1346 and 1491 of [T]itle 28) made by an executive agency" for, *inter alia*, the procurement of property or services. 41 U.S.C. 7102(a). The five specific NAFIs to which Sections 1346 and 1491 of Title 28 refer are "the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, [and] Exchange Councils of the National Aeronautics and Space Administration." 28 U.S.C. 1346(a)(2), 1491(a)(1).

The Federal Circuit has held that "[c]ontracts with NAFIs outside these enumerated exchanges are not covered by the [CDA]." *Pacrim Pizza Co.* v. *Pirie*, 304 F.3d 1291, 1293 (2002). AFNAFPO is not one of the NAFIs specifically enumerated in Sections 1346 and 1491. Taken together, the Federal Circuit's prior

holdings in *Pacrim Pizza* and *G.E. Boggs & Associates* logically imply that petitioner's contract with AFNAFPO is not subject to the CDA and that the court of appeals did not have jurisdiction under 28 U.S.C. 1295(a)(10). Relying in part on those decisions, the government contended below that the court of appeals lacked jurisdiction. See Gov't C.A. Br. 25-29. Petitioner argued in response that *Pacrim Pizza* has been overruled by *Slattery* v. *United States*, 635 F.3d 1298 (Fed. Cir. 2011) (en banc). See Pet. C.A. Reply Br. 2-7. The court in *Slattery* held that jurisdiction under the Tucker Act, 28 U.S.C. 1491, and the Little Tucker Act, 28 U.S.C. 1346, extends to contract disputes involving NAFIs other than those that are specifically enumerated in those provisions. 635 F.3d at 1300-1301.

Although the CDA identifies the NAFIs that are within its scope by cross-referencing Sections 1346 and 1491, the CDA uses different language, and the court in *Slattery* did not address the CDA or decide the scope of its jurisdictional grant—as the Federal Circuit has since recognized. See *Minesen Co.* v. *McHugh*, 671 F.3d 1332, 1337 (Fed. Cir. 2012) (explaining that "*Slattery* did not directly reach the CDA," and reserving the question "whether claims against NAFIs can be made pursuant to the CDA"). It is therefore unclear whether petitioner's challenge to the Board's decision in this case fell within the court of appeals' jurisdiction. The fact that this Court would be obligated to resolve that jurisdictional question before reaching the issues petitioner seeks to raise, see *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93-102 (1998), provides an additional reason to deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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