No. 98-1230

In the Supreme Court of the United States

OCTOBER TERM, 1998

HARDWICK BROTHERS COMPANY II, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR 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

DAVID M. COHEN
JOHN C. HOYLE
BRIAN S. SMITH
Attorneys

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

QUESTIONS PRESENTED

1. Whether the courts below erred in rejecting petitioner's claim of breach of an implied warranty of the drawings and specifications on its construction contract.

2. Whether the court of appeals erred in not ruling in petitioner's favor on its claim of frustration and hindrance of performance of its construction contract.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1230

HARDWICK BROTHERS COMPANY II, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR 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. 1a-12a) is unreported. The opinion and order of the Court of Federal Claims (Pet. App. 13a-177a) is reported at 36 Fed. Cl. 347.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1998. A petition for rehearing was denied on November 2, 1998 (Pet. App. 178a-179a). The petition for a writ of certiorari was filed on February 1, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 27, 1977, the United States Army Corps of Engineers (Corps) awarded petitioner a fixed-price contract for the construction of a flood control levee project near the Missouri River. Pet. App. 3a. During contract performance, petitioner suffered a series of delays and inefficiencies that were generally attributable to wet soil conditions found at the job site. *Ibid.*[1] On November 12, 1980, the Corps accepted the contract work as substantially complete. *Ibid.*

2. In April 1986, petitioner submitted to the contracting officer certified claims under the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, seeking additional payments of $1.9 million, later amending the claims to request $3,736,096. Pet. App. 3a. Petitioner's claims alleged that it was entitled to additional payment on several bases, including purported differing site conditions, defective specifications, incorrect contract interpretations, and spoliation of evidence. After the contracting officer denied petitioner's claims, petitioner filed a complaint in the United States Claims Court (now the United States Court of Federal Claims) in December, 1988. *Ibid.* An eight-week trial took place in 1990. On July 31, 1996, after a period in which the case was dismissed for jurisdictional reasons and then reinstated after appeal, the trial court issued a 70 page opinion denying all but a small portion of petitioner's claims. *Id.* at 13a-177a; see also *id.* at 3a-4a. The trial court awarded petitioner damages in the amount of $28,145 on March 26, 1997. *Id.* at 5a.

---

[1] The chronology of events during performance is set forth in detail in the trial court's opinion. Pet. App. 13a-74a.

3. Petitioner appealed, alleging multiple errors in the trial court's decision. The court of appeals affirmed on August 24, 1998. Pet. App. 1a-12a. The court summarized the case as involving a "government contractor of proven reliability and competence [who] lost upward of $3 million on a $3 million contract to build a levee system," and concluded that "because the risk of extra costs from wet conditions at the construction site was allocated to the contractor by the contract itself, there is no basis at law to provide the relief the contractor seeks." *Id.* at 1a. The court also noted that "[i]t is well-settled law that a contractor who fails to perform an adequate site investigation bears the risk of any condition that it could have discovered if the investigation had been reasonable." *Id.* at 6a.

a. In holdings not challenged in this Court, the court of appeals rejected petitioner's contentions that the United States Court of Federal Claims had imposed additional burdens on contractors preparing to bid on a contract and misconstrued the "Damage to Work" clause in the contract. Pet. App. 7a-8a, 10a-11a.

b. The court of appeals also rejected petitioner's argument that "the Court of Federal Claims improperly failed to apply the doctrine of implied warranty in view of [petitioner's] compliance with the specifications provided by the Corps." Pet. App. 8a. The court acknowledged that under *United States* v. *Spearin*, 248 U.S. 132 (1918), "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." Pet. App. 8a-9a (quoting *Spearin*, 248

U.S. at 136). The court further explained, however, that the *Spearin* doctrine applies only to "design specifications," and not to "[p]erformance specifications." *Id.* at 9a (quoting *Stuyvesant Dredging Co.* v. *United States*, 834 F.2d 1576, 1582 (Fed. Cir. 1987)). In a line of post-*Spearin* cases, the court of appeals had honed the distinction between design and performance specifications, explaining that "[d]esign specifications explicitly state how the contract is to be performed and permit no deviations. Performance specifications, on the other hand, specify the results to be obtained, and leave it to the contractor to determine how to achieve those results." *Ibid.* (quoting *Stuyvesant Dredging Co.*, 834 F.2d at 1582). The court of appeals concluded here that "the Court of Federal Claims's categorization of the[] specifications [at issue] as performance specifications was [not] clearly erroneous, and therefore * * * the *Spearin* doctrine, as a matter of law, does not apply." *Id.* at 10a.

c. Finally, the court of appeals noted that "[t]he remainder of the issues raised by Hardwick on appeal are essentially challenges to the Court of Federal Claims's fact-findings," Pet. App. 11a, and concluded that those factual findings were not clearly erroneous. *Id.* at 11a-12a.[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.[3] Further review is not warranted.

---

[2] Petitioner does not contend in its petition that any of these factual findings were clearly erroneous.

[3] In its questions presented, petitioner claims that the court of appeals' decision is "contrary to [those of] seven other circuits"

1. Petitioner errs in arguing (Pet. 7-13) that the court of appeals failed properly to apply the doctrine regarding the warranty of government specifications first articulated in *United States* v. *Spearin*, 248 U.S. 132 (1918).

The warranty of government specifications, known as the "*Spearin* doctrine," provides that if the government furnishes specifications for the production or construction of an end product and proper application of those specifications does not result in a satisfactory end product, the contractor will be compensated for its efforts to produce the end product, notwithstanding the unsatisfactory results. Pet. App. 8a-9a; *United States* v. *Spearin*, *supra*; *Hercules, Inc.* v. *United States*, 516 U.S. 417 (1996). The *Spearin* doctrine has been discussed and clarified over the years, often with the words "design" and "performance" specifications used to differentiate between contracts to which the specifications warranty does and does not apply. *Stuyvesant Dredging Co.* v. *United States*, 834 F.2d 1576, 1582 (Fed. Cir. 1987); *J.D. Hedin Constr. Co.* v. *United States*, 347 F.2d 235, 241 (Cl. Ct. 1965); *Utility Contractors, Inc.* v. *United States*, 8 Cl. Ct 42, 50 (1985), aff'd, 790 F.2d 90 (Fed. Cir.), cert. denied, 479 U.S. 827 (1986); *J.L. Simmons Co.* v. *United States*, 188 Ct. Cl. 684 (1969); *Monitor Plastics Company*, ASBCA No. 14447, 72-2 B.C.A. ¶ 9626 (Aug. 3, 1972). "Design specifications explicitly state how the contract is to be performed and permit no deviations. Performance specifications, on the other hand, specify the results to be obtained, and leave it to the contractor to determine

---

(Pet. i), but it does not identify the purportedly conflicting cases or otherwise discuss any conflict with other circuits in the text of the petition.

how to achieve those results." *Stuyvesant Dredging Co.*, 834 F.2d at 1582. The warranty applies only to "design specifications" because only by utilizing specifications in that category does the government deny the contractor's discretion and require that work be done in a certain way. When the government imposes such a requirement and the contractor complies, the government is bound to accept what its requirements produce.

Petitioner criticizes the use of the labels "design" specification and "performance" specification, suggesting they create a false dichotomy which restricts the "ancient doctrine of *Spearin*." Pet. 7; see Pet. 7-9. This claim is without merit. As noted above, the courts have consistently interpreted *Spearin* as applying only to the class of cases in which the government has set forth exactly how the contract is to be performed. That some courts use the term "design" specification to describe that class of cases, while others do not, does not change the nature of the specifications to which the warranty applies. Indeed, the labels "design" and "performance" describe but do not drive the inquiry; the underlying question is one of discretion. Do the specifications describe in detail the materials to be used and/or the manner in which the work is to be employed, or do they allow discretion, for example, by setting forth a particular standard to be achieved but not requiring that certain materials or methods be used? Only if the specifications fall into the former category, regardless of the label used, will there be an implied warranty under *Spearin*.

Contrary to petitioner's assertions, distinguishing between these two categories of specifications does not create a false dichotomy (Pet. 7). Indeed, this Court recognized the class of specifications to which the

warranty applies in *Hercules, Inc.*, 516 U.S. at 425 (emphasis added):

> When the Government provides specifications *directing how a contract is to be performed*, the Government warrants that the contractor will be able to perform the contract satisfactorily if it follows the specifications.

Because the Court in *Hercules* did not use the terms "design" or "performance" specification, petitioner cites the decision in support of its position. But petitioner overlooks the fact that the *Hercules* decision is consistent with the established jurisprudence of the lower courts holding that the warranty applies only when the government "direct[s] how a contract is to be performed." *Ibid.*

The courts below properly declined to apply the *Spearin* warranty in this case. Because petitioner's contract did not direct petitioner how it was to build the flood control levee,[4] the court of appeals correctly recognized that petitioner's contract did not fall into the class of cases to which the warranty applies. Pet. App. 8a-10a.

Indeed, the essence of petitioner's claim has never been that the design of the flood control levee that petitioner built was defective—*i.e.*, that the plans for construction of the levee did not produce a functioning flood control levee. Pet. App. 151a-152a. Instead, petitioner's primary complaint is that the information depicted in the contract package relating to field elevations, soil conditions, and job site wetness was in-

---

[4] The trial court described in detail many aspects of the contract concerning which petitioner was given discretion over how to perform its work. Pet. App. 152a-157a.

accurate, that it relied upon the inaccurate information when formulating its bid, and that the inaccuracies caused it to incur increased costs during performance of the contract. *Ibid.* Petitioner's claim is really a differing site conditions claim, to which the *Spearin* doctrine has no applicability.

Petitioner, however, confuses the *Spearin* warranty with the government's responsibilities regarding differing site conditions on federal construction contracts. Petitioner contends that the court of appeals' rejection of its *Spearin* arguments is "especially insidious" (Pet. 10) because it eliminates the kind of "protect[ion]" (Pet. 12) provided to contractors by the differing site condition provisions in government construction contracts. Pet. 10-13. That allegation is without merit.

Under virtually every government construction contract, including petitioner's, the contractor is protected by a contract clause that provides that material differences between the subsurface physical features indicated in the contract documents and the features actually encountered by the contractor will be the basis for an equitable adjustment to the contract, to the extent that the differing site conditions cause increased costs to the contractor. Pet. App. 138a-149a; *P.J. Maffei Bldg. Wrecking Corp.* v. *United States*, 732 F.2d 913, 916 (Fed. Cir. 1984); *A.S. McGaughan Co.* v. *United States*, 24 Cl. Ct. 659, 664-665 (1991), aff'd, 980 F.2d 744 (Fed. Cir. 1992) (Table); *John Massman Contracting Co.* v. *United States*, 23 Cl. Ct. 24, 30-31 (1991); *Weeks Dredging & Contracting, Inc.* v. *United States*, 13 Cl. Ct 193, 218 (1987), aff'd, 861 F.2d 728 (Fed. Cir. 1988) (Table); *Pacific Alaska Contractors, Inc.* v. *United States*, 436 F.2d 461, 469 (Ct. Cl. 1971). This is the mechanism by which government construction contractors are protected in the event that information

concerning physical features of the site, which is relied upon by the contractor in bidding for the contract, proves to be materially inaccurate.

The court of appeals' rejection of petitioner's *Spearin* argument does not affect, in any way, the analysis of the government's responsibilities when site condition information is materially inaccurate. In this case, the trial court found that the site condition information provided to petitioner was not inaccurate because it "*gave sufficient notice to reasonably prudent bidders*" (Pet. App. 7a) of the conditions at the site. The court of appeals upheld that finding as not clearly erroneous. *Ibid.* Therefore the issue that remained before the court of appeals was simply whether the government's warranty of design specifications applied to petitioner's claims. As explained above, the court of appeals properly held that it did not.

Contrary to petitioner's contentions, the court of appeals' decision does not affect the viability and applicability of the design warranty. Contractors who expend futile efforts attempting to produce a product that will not work because of a defective design have always been and will continue to be compensated for their efforts. In contrast, contractors who construct "performance specification" contracts will not be guaranteed that their chosen methods of performance will be effective or produce a profit—but that has never been so, before or after *Spearin*. Finally, contractors, whether performing design or performance contracts, will still, as always, be compensated for legitimate differing site conditions. The decision of the court of appeals in this case is not contrary to precedent, prudence or "social policy."

2. Petitioner's argument (Pet. 14) that "the trial court erred in employing a 'bad faith' standard under

the theory of hindrance/frustration of performance" is without merit. Petitioner never advanced to the trial court a claim that the Corps frustrated the performance of its contract. In any event, the trial court rejected petitioner's claims without relying on petitioner's failure to establish bad faith.

The portion of the trial court's opinion set forth by petitioner as demonstrating the trial court's error (Pet. 4-5; Pet. App. 91a), relates to petitioner's claim of contour error. Although the trial court noted that there was no bad faith in the Corps' investigation of alleged contour errors during construction (*ibid.*), the trial court's rejection of petitioner's contour error claim rested on a factual finding, not petitioner's failure to show bad faith:

> The evidence is convincing that [petitioner]'s bid was not premised upon the contours on the Plans. Since [petitioner] did not rely upon the contours, any contours errors are immaterial. * * * The court also finds that [petitioner] suffered no harm as a result of any alleged contour errors and that [petitioner]'s related claims are all without merit under any theory of liability.

Pet. App. 91a-92a. Because the trial court did not rely on a bad faith analysis, any claim of error based on application of that standard is without merit.

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

DAVID M. COHEN
JOHN C. HOYLE
BRIAN S. SMITH
Attorneys

APRIL 1999