No. 98-1460

In the Supreme Court of the United States

ARBITER SYSTEMS, INC., PETITIONER

v.

RICHARD J. DANZIG, SECRETARY OF THE NAVY

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 correctly sustained the determination of the Armed Services Board of Contract Appeals that the Navy was not estopped from rejecting petitioner's claims for cost overruns on two Navy contracts.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is not yet reported. The opinion of the Armed Services Board of Contract Appeals (Pet. App. A3-A24) is reported at 97-2 B.C.A. (CCH) ¶ 29,183.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1998. The petition for a writ of certiorari was filed on March 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves two cost-plus-fixed-fee research and development contracts entered into between petitioner and the Department of the Navy: Contract

No. N00123-87-D-0126 (contract 0126) and Contract No. N00123-87-D-0279 (contract 0279). In 1986 and 1987, when the Navy solicited bids for those contracts, petitioner was already performing a similar, but smaller, contract for the Navy, Contract No. N00123-83-D-0081 (contract 0081). At that time, petitioner was a relatively small business, which employed eight to ten people and operated out of a small rented facility. Petitioner's owners recognized that, in order to be able to perform contracts 0126 and 0279, they would have to expand their operation. Accordingly, in the proposals that they submitted to the Navy with respect to the two contracts, they estimated petitioner's overhead cost rates based upon that anticipated expansion. Pet. App. A4, A6-A7.

The Navy initially rejected petitioner's proposals. The Navy noted that petitioner's projected overhead cost rates were higher than the pre-award audit rates established by the Defense Contract Audit Agency (DCAA), the agency responsible for assisting military contracting officers in auditing contractors. DCAA had based its pre-award audit rates on petitioner's performance of contract 0081 and on an analysis of projected labor costs. Pet. App. A7.

Two of petitioner's owners, Bruce Roeder and Michael Flatten, then met with the Navy contracting officer. They explained that, because of the intended expansion, petitioner would lose money if it billed at DCAA's rates. According to Roeder, the contracting officer replied that, because petitioner ultimately would be "reimbursed for all [of its] costs anyway," it did not matter whether the contract reflected DCAA's pre-award audit rates or petitioner's proposed increased rates. There was no discussion of whether petitioner

would be reimbursed in excess of the contract's estimated cost limitations. Pet. App. A7-A8.[1]

The Navy awarded petitioner contract 0126 on September 12, 1986, and contract 0279 on June 30, 1987. Each contract incorporated by reference the "Limitation of Cost" clause of the Federal Acquisition Regulations, 48 C.F.R. 52.232-20 (Pet. App. A33-A35). Pet. App. A4, A6.

The Limitation of Cost clause explicitly requires a contractor, if it seeks to recover costs in excess of the contract's estimated cost limitations, to "notify the Contracting Officer in writing whenever it has reason to believe" that its costs "will exceed 75 percent of the estimated cost specified in the Schedule." The clause further states that "[t]he Contractor is not obligated to continue performance under th[e] contract * * * or otherwise incur costs in excess of the estimated cost specified in the Schedule, until the Contracting Officer (i) notifies the Contractor in writing that the estimated cost has been increased and (ii) provides a revised estimated total cost of performing th[e] contract." The clause also provides that "[i]n the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the estimated cost." Pet. App. A33-A35.

The two contracts were implemented by a series of 21 delivery orders. Both contracts stated that "[e]ach delivery order shall be deemed to include therein the clause Limitation of Costs" described above. And each individual delivery order, like the contracts themselves, specified an estimated cost and provided that the gov-

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[1] The contracting officer could not recall at the time of the Board of Contract Appeals hearing whether she had, in fact, made the statements that Roeder attributed to her. Pet. App. A8.

ernment was not obligated to reimburse any amount expended by petitioner in excess of the estimated cost unless the amount was increased by formal modification. Pet. App. A5, A9.

The parties' course of performance indicates that petitioner understood the Limitation of Cost clause and its requirement of giving notice and receiving approval before exceeding cost limitations. On several occasions, petitioner requested additional funding as it approached the funding limit and stopped working until additional funds were provided. Moreover, in correspondence sent to petitioner during the performance of the contract, the Navy specifically reminded petitioner to provide notice if its actual overhead costs exceeded the funding limits. Pet. App. A11-A12.

As instructed by the Navy, petitioner billed at the provisional DCAA rate throughout the terms of the contracts. Pet. App. A10. Petitioner was aware, however, of its higher actual overhead costs. *Id.* at A19. Petitioner never gave notice to the Navy contracting officer of any actual overhead cost overruns during contract performance as required by the Limitation of Cost clauses of its contracts. *Id.* at A15.

At the conclusion of the contracts, petitioner's total overhead costs were calculated using an updated DCAA rate, which revealed that petitioner's costs well exceeded the contract's limits. Petitioner then invoiced the Navy for the entirety of its actual overhead costs, including its overruns. The Navy declined to fund the overruns because petitioner had failed to give notice as required by the contracts. Pet. App. A14-A15.

Petitioner then submitted claims to the Navy for $84,994.39 under contract 0126 and for $676,448.71 under contract 0279. The Navy contracting officer denied the claims. Pet. App. A16.

2. Petitioner appealed that decision to the Armed Services Board of Contract Appeals, contending, *inter alia*, that (1) petitioner was excused from the notice requirement of the Limitation of Cost clause because its cost overruns were unforeseeable, and (2) the government was estopped from asserting that notice requirement because the contracting officer had orally assured petitioner during contract negotiations that it would be paid its actual costs. The Board rejected both arguments. Pet. App. A17-A24.

First, the Board of Contract Appeals concluded that petitioner had not met its burden of proving that the cost overruns were not reasonably foreseeable. Pet. App. A17. The Board found "no indication that [petitioner] could not have determined its actual incurred costs during performance" of the contracts. *Id.* at A19. Indeed, said the Board, petitioner "appears to have been aware of its actual overhead and G&A expenses." *Ibid.*[2]

Second, the Board of Contract Appeals concluded that petitioner had likewise failed to meet its burden of proving that the government was estopped from invoking the Limitation of Cost clause to deny funding of the cost overruns. Pet. App. A21-A22. Applying the Federal Circuit's standard applicable to contractors' claims of estoppel against the government, the Board determined that petitioner had failed to establish two "essential elements" of that standard, *i.e.*, that the government was aware of the cost overruns and that the government engaged in conduct designed to induce the contractor's continued performance. *Ibid.* The Board found that "the Government had no idea of the

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[2] As a result of a typographical error, the word "its" appears in the Appendix to the Petition as "As."

amounts of any impending cost overruns on the various delivery orders because [petitioner] did not provide that information during contract performance." *Id.* at A22. The Board further found that "[t]he Government did not intend for [petitioner] to continue performance when the contract was in a cost overrun status and did nothing to encourage [petitioner] to do so." *Ibid.*

3. The Federal Circuit affirmed the Board of Contract Appeals' decision without opinion. Pet. App. A1-A2.

ARGUMENT

Petitioner challenges the Federal Circuit's unpublished order affirming the decision of the Armed Forces Board of Contract Appeals. That order is without precedential effect under the rules of the Federal Circuit (see Pet. App. A1). The underlying decision of the Board of Contract Appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and turns on the particular facts of this case. This Court's review is therefore not warranted.

1. Petitioner contends (Pet. 12-14) that the Board of Contract Appeals erred in adding a fifth element, foreseeability, to the four elements traditionally considered by the Federal Circuit to assess whether the government is estopped from invoking a contractual provision. See, *e.g.*, *Advanced Materials, Inc.* v. *Perry*, 108 F.3d 307, 311-312 (Fed. Cir. 1997) (enumerating four elements). Petitioner's argument rests on a misreading of the Board's decision. The Board recognized that petitioner could prevail if it established *either* (1) that compliance with the notice requirement of the Limitation of Cost clause was impossible because petitioner could not reasonably have foreseen its cost overruns, *or* (2) that the government was estopped from enforcing

the Limitation of Cost clause under the traditional four-element test. See Pet. App. A17, A21-A23. The Board found that petitioner had not satisfied either alternative inquiry. The Board did not, as petitioner contends, conflate the two inquiries.

Petitioner's assertion of a circuit conflict is predicated on the same misreading of the Board of Contract Appeals' decision. Petitioner claims (Pet. 19) that the Board's decision conflicts with the decisions of "other circuits"—although he cites only the Ninth Circuit's decision in *United States* v. *Georgia-Pacific Co.*, 421 F.2d 92 (1970)—on the sole ground that "other circuits simply do not allow 'foreseeability' to defeat estoppel." But neither did the Board in this case. No tension therefore exists between *Georgia-Pacific* and the decision here.

Petitioner also contends (Pet. 19) that the Board of Contract Appeals' decision conflicts with this Court's "requirements for the establishment of equitable estoppel against the government." But this Court has not yet even decided "whether an estoppel claim could ever succeed against the Government." *OPM* v. *Richmond*, 496 U.S. 414, 423 (1990); accord *Heckler* v. *Community Health Services*, 467 U.S. 51, 60 (1984). Much less has the Court articulated the particular "requirements" for the establishment of any such claim. In *Community Health Services*, the decision of this Court on which petitioner purports to rely, the Court merely suggested that a party seeking to establish estoppel against the government "surely cannot prevail without *at least* demonstrating that the traditional elements of an estoppel are present." 467 U.S. at 61 (emphasis added). The Court did not intimate that those would be the *only* elements that would have to be proved. Cf. *Richmond*, 496 U.S. at 424-434 (holding that estoppel

cannot apply to a claim for payment of money from the federal treasury).

2. The Board of Contract Appeals' conclusion that petitioner failed to satisfy the four traditional elements of estoppel is unexceptionable. In contending otherwise, petitioner relies (Pet. 15-17) solely on the Navy contracting officer's statement during the contract negotiations that petitioner's costs would be reimbursed. As the Board found (Pet. App. A22), however, petitioner's concerns expressed during the 1986 negotiations about anticipated increased overhead costs cannot be deemed to have given the government notice of actual cost overruns that did not occur until as late as 1990.

Nor could the contracting officer's statement reasonably have been construed as excusing petitioner's noncompliance with the Limitation of Cost clause and its notice requirement. As the Board found (Pet. App. A22), the contracting officer made that statement at a meeting that did not "concern actual costs in excess of funding the delivery orders." The contracting officer's statement merely indicated that petitioner could be reimbursed at its increased actual rates, not that petitioner would not have to comply with applicable contractual provisions in order to obtain such reimbursement. Indeed, the government explicitly advised petitioner during contract performance that it was required under the Limitation of Cost clause to provide notice of its actual overhead costs. *Id.* at A12. The government was not estopped, therefore, from asserting its rights under that clause.[3]

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[3] Petitioner also argues (Pet. 16-17) that the government is estopped from denying reimbursement of cost overruns on the two contracts at issue here, because the government allowed payment

In any event, the Board of Contract Appeals' decision, properly read, involves nothing more than the application of settled legal principles to the particular facts of this case. Such decisions do not ordinarily merit this Court's review. See Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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of all excess overhead costs under the earlier 0081 contract although petitioner gave no notice of its overhead cost overruns. As the Board of Contract Appeals explained (Pet. App. A20), however, "[p]rior retroactive funding of overruns on another contract does not bind the Government to fund future overruns on these contracts." See *Textron Defense Sys.*, 96-2 B.C.A. (CCH) ¶ 28,332, at 141,492 (1996), aff'd, 143 F.3d 1465 (Fed. Cir. 1998).