No. 03-165

In the Supreme Court of the United States

GENERAL MOTORS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

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QUESTION PRESENTED

Whether Cost Accounting Standard 413, as it was in effect from 1978 until 1995, entitles petitioner to recover the portion of its pension deficit at the time of segment closing that is attributable to fixed-price contracts.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 316 F.3d 1366. The opinion of the Court of Federal Claims (Pet. App. 28a-108a) is reported at 50 Fed. Cl. 155.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2003. A petition for rehearing was denied on March 31, 2003 (Pet. App. 109a-110a). On June 19, 2003, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including July 29, 2003, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress in 1970 established the Cost Accounting Standards Board (CASB) to "promulgate cost-accounting standards designed to achieve uniformity and consistency in the cost-accounting principles followed by defense contractors and subcontractors under Federal contracts." 50 U.S.C. App. 2168(g) (1982) (repealed 1988); Act of Aug. 15, 1970, Pub. L. No. 91-379, § 103, 84 Stat. 797. "Although Congress gave the CASB wide authority in promulgating standards governing the measurement, assignment, and allocation of costs, Congress gave the CASB only very limited authority over cost '*allowability*' or other matters related to the *pricing* of contracts." Pet. App. 40a. "Thus, as a general rule, the original [CASB] regulate[d] the *allocation* of costs to cost objectives," while "allowability and pricing [were] generally left to the discretion of the procuring agency." *Ibid.*

The CASB issued two Cost Accounting Standards (CAS) governing accounting for pension costs: CAS 412, 4 C.F.R. Pt. 412 (1986) (originally promulgated in 1975 and effective in 1976), and CAS 413, 4 C.F.R. Pt. 413 (1986) (originally promulgated in 1977 and effective in 1978). Those two standards, which were substantially revised in 1995 (after the segment closing at issue here), 60 Fed. Reg. 16,540-16,557 (1995), prescribe the methods for measuring and adjusting pension costs as well as allocating those costs among various accounting periods, business segments, and specific contracts within each segment.

Under CAS 412, a contractor's pension cost for a particular accounting period is determined by the contrac-

tor's best actuarial estimate of the plan's anticipated earnings and benefit payments, taking into account the plan's past experience and reasonable expectations. 4 C.F.R. 412.40(b)(2) (1986). Thus, determining the amount of a contractor's pension cost for a year necessarily involves estimating future experience.

Pursuant to CAS 412, after a contractor determines its total pension costs, it allocates those costs among its various divisions (or "segments"), and then further allocates those costs among each segment's contracts. Pet. App. 4a. Those contracts might be with the government or private entities, and, regardless of the parties, may be flexibly-priced or fixed-price. Under an appropriate government flexibly-priced contract, the parties may agree that the government will reimburse the contractor for costs (including pension costs) subsequently allocated to the contract, if such reimbursement is allowed under the Federal Acquisition Regulation (FAR). *Ibid.* By contrast, a fixed-price contract "provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract." 48 C.F.R. 16.202-1. Accordingly, once the parties enter into a fixed-price contract, with the contract price then "fixed," the subsequent allocation of costs (including pension costs) to the contract has no effect on the contract price.

This case involves the accounting consequences to pension costs when a government contractor closes a segment (*e.g.*, by selling an operating division). The regulation that governed the accounting practices for

pension costs of closed segments, 1978 CAS 413.50(c)(12),[1] stated that:

> If a segment is closed, the contractor shall determine the difference between the actuarial liability for the segment and the market value of the assets allocated to the segment, irrespective of whether or not the pension plan is terminated. * * * The difference between the market value of the assets and the actuarial liability for the segment represents an adjustment of previously-determined pension costs.

4 C.F.R. 413.50(c)(12) (1986).

2. Petitioner General Motors Corporation sponsored defined benefit pension plans "in which the benefits to be paid or the basis for determining such benefits are established in advance and the contributions are intended to provide the stated benefits." 4 C.F.R. 412.30(a)(6) (1986). A government contractor sponsoring such a plan is generally required to deposit into the plan amounts sufficient to fund the specified benefits in the future. Those amounts depend on a number of estimates and projections, including the amount of income that plan assets will generate and plan beneficiaries' future salaries, retirement dates, and lifespans. Pet. App. 2a-3a. The government had a number of CAS-covered contracts with a division of petitioner that petitioner sold in 1993. At the time of the sale, which constituted a "segment closing," the pension plan for the division was underfunded. The parties dispute the amount of the government's alleged share of the

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[1] The regulation whose interpretation petitioner challenges here was in effect from 1978 to 1995 and will be referred to as "1978 CAS 413."

underfunding; petitioner alleges that it exceeded $300 million, but an audit conducted by the Defense Contract Audit Agency questioned over $293 million of the claimed amount. *Id.* at 6a-7a, 37a n.10.

Petitioner filed a claim, which was denied by the administrative contracting officer, for an adjustment to reflect the sold division's pension deficit. Petitioner then filed its complaint in this case in the United States Court of Federal Claims seeking payment for part of the deficit under 1978 CAS 413. Pet. App. 7a. Petitioner's case was heard at the same time as similar lawsuits by General Electric Company (GE) and Allegheny Teledyne Inc. and related entities (collectively, Teledyne) arising out of the sales of various government contractor segments having pension surpluses. These three lawsuits were not consolidated in the trial court. *Id.* at 36a-37a. On cross-motions for partial summary judgment, petitioner argued that 1978 CAS 413 required the government to "negotiate" with it regarding a resolution of its closed segment's pension deficit, including the portion of the deficit attributable to government fixed-price contracts. *Id.* at 66a. The government, as well as all of the contractors other than petitioner, however, agreed that 1978 CAS 413 did not mandate recovery of any pension surplus or deficit attributable to fixed-price contracts. *Id.* at 62a.

The trial court issued an interlocutory opinion ruling on the parties' cross-motions for partial summary judgment. Pet. App. 28a-108a. The trial court held, *inter alia*, that: (1) the sale of a segment to a third party constitutes a segment closing; (2) absent a specific contract provision to the contrary, the portion of the pension surplus or deficit attributable to government contributions under fixed-price contracts is not recoverable either under 1978 CAS 413 or as an equitable adjust-

ment; (3) the portion of the pension surplus or deficit attributable to government contributions under flexibly priced contracts where the government reimbursed actual pension costs is recoverable; (4) the amount of the segment closing adjustment that is recoverable by the government equals the proportion of the surplus that is attributable to government contributions under flexibly priced contracts entered after the effective date of 1978 CAS 413; and (5) the recoverable amount is recoverable as a current period adjustment at the time of segment closing. *Id.* at 106a-107a. The trial court *sua sponte* certified for interlocutory appeal the question of the proper interpretation of CAS 413, *id.* at 107a-108a, and the court of appeals granted the parties' petitions and cross-petitions for permission to appeal.

3. The court of appeals unanimously affirmed the trial court with respect to all issues raised upon appeal. Pet. App. 1a-27a. Specifically relevant to this petition, the court of appeals affirmed the trial court's determination that the portion of the segment-closing adjustment attributable to fixed-price contracts was not recoverable by the contractor or the government. *Id.* at 13a-14a.

ARGUMENT

Petitioner seeks review of the court of appeals' interlocutory ruling that an expired cost accounting standard, 1978 CAS 413, does not give petitioner a right to recover from the government the portion of its pension deficit that is attributable to fixed-price contracts in which the prices were fixed regardless of the contractor's costs. The court of appeals' ruling does not conflict with any decisions of this Court or of the courts of appeals, and involves a highly technical cost accounting

issue arising under a regulation that was superseded eight years ago. Further review is not warranted.

1. The courts below correctly held that 1978 CAS 413 does not provide a right to recover pension plan surpluses or deficits that are attributable to fixed-price contracts. As petitioner observes, the text of 1978 CAS 413 "does not differentiate between types of contracts." Pet. 24. The application of a cost *accounting* standard that governs the contractor's computation and allocation of costs to fixed-price contracts, however, says nothing about whether a contractor is entitled to *reimbursement* under a specific contract. Cost accounting standards generally "regulate the *allocation* of costs to cost objectives, but do not regulate issues of cost *allowability* or contract pricing." Pet. App. 4a (citing Act of Aug. 15, 1970, Pub. L. No. 91-379, § 103, 84 Stat. 796)) (emphasis added); accord 42 Fed. Reg. 25,751 (1977). "This is because allowability and pricing are generally left to the discretion of the procuring agency." Pet. App. 40a; accord 42 Fed. Reg. at 25,751 ("The CASB does not determine categories or individual items of cost that are allowable. Allowability is a procurement concept affecting contract price and in most cases is established in regulatory or contractual provisions.").

Because 1978 CAS 413 refers only to the adjustment of *costs* and is silent with respect to *allowability* of costs, the court of appeals correctly concluded that once costs are determined under 1978 CAS 413, price is determined according to the terms of each individual contract. By their nature, changes in contract costs do not affect the price of fixed-price contracts. Pet. App. 65a-66a. With respect to the fixed-price contracts at issue here, petitioner could "point to no * * * specific contract language granting a right to recover a pension

* * * deficit attributable to fixed-price contracts." *Id.* at 65a n.19. The court of appeals accordingly held that 1978 CAS 413 did not confer a right to government reimbursement of petitioner's pension plan deficit attributable to fixed-price contracts.[2]

Petitioner mistakenly relies (Pet. 25-27) upon the fact that the CAS 413 promulgated in 1995 provides that the government's share of a segment-closing pension cost adjustment is based in part upon pension costs that are attributable to fixed-price contracts, 48 C.F.R. 9904.413-50(c)(12)(vi); see 60 Fed. Reg 16,552 (1995), and that the 1995 standard "clarifies" 1978 CAS 413, 48 C.F.R. 9904.413-64(c). As the courts below explained, however, the 1995 regulation substantially modified the 1978 regulation in important respects. Thus, the 1995 rule "added a specific formula for allocating a pension surplus or deficit between the contractor and the government." Pet. App. 5a (citing 48 C.F.R. 9904.413-50(c)(12)). The 1995 rule also included provisions allowing for only prospective application of the rule and addressing the transition to the new rule, thereby evincing the Board's intent to enact a new substantive standard. *Id.* at 18a-20a, 73a-74a. Indeed, the 1995 revisions were so substantial that they created the need for conforming changes to the FAR. *Id.* at 18a-20a, 76a-78a. And when commenters objected to the fact that the new rule would, in effect, allow recovery of pension surpluses or deficits attributable to fixed-price con-

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[2] Petitioner argues that the CAS contemplates that the price of a fixed-price contract may be altered by an "equitable adjustment" under certain circumstances. Pet. 24-25. The court of appeals, however, affirmed the trial court's conclusion that petitioner was not entitled to an equitable adjustment in this case, Pet. App. 11a-12a, 68a-70a, and petitioner does not challenge that holding in this Court. Pet. 8 n.3.

tracts, the Board responded by defending the rationale for the change, rather than asserting that such recovery had been allowed under 1978 CAS 413. *Id.* at 18a, 74a-76a.

Petitioner also errs in asserting that the government is acting unfairly by attempting to change its position based upon whether a contractor has a segment closing surplus or deficit. Pet. 28. The three cases addressed together by the trial court below involve both *surpluses* and deficits. Thus, although the government estimates the surplus at issue with respect to Teledyne to be approximately $170 million, the government's position is that 1978 CAS 413 does not give the government a right to recover surplus amounts attributable to fixed-price contracts.

2. Petitioner argues (Pet. 12-23) that this Court's review is warranted because the court of appeals improperly declined to defer to the interpretation of 1978 CAS 413 by a CASB staff member and the Department of Defense (DoD). Petitioner's contentions lack merit.

a. Petitioner argues (Pet. 13-17) that the court of appeals should have deferred to three 1978 memoranda that are addressed to "Files" and that were authored by a single employee of the CASB, Bernard Sacks, who was an Associate Director of the CASB. See C.A. App. 681-688. The court of appeals properly declined to defer to those documents, however, because they were "vague." Pet. App. 15a. Indeed, there is no statement in any of Mr. Sacks's internal memoranda (and petitioner points to none) that explicitly states petitioner's view that 1978 CAS 413 confers a right to recover pension plan surpluses or deficits attributable to fixed-price contracts. Moreover, there was no evidence that Mr. Sacks's opinions reflected the Board's interpretation of 1978 CAS 413. As the trial court observed, the

memoranda "were prepared by one CASB staff person, and do not indicate that they were intended to reflect the intent of the entire [Board]," and petitioner "has not produced any evidence to show that the [Board] shared Mr. Sacks's view." *Id.* at 68a. In those circumstances, no deference was warranted. *E.g.*, *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 743 (1996) (opinion letter written by an agency's Deputy Chief Counsel did not "establish a binding agency policy" because "it only purported to represent the position of the Deputy Chief Counsel in response to an inquiry concerning particular banks").

Petitioner is therefore incorrect in arguing (Pet. 14-17) that the court of appeals' refusal to defer to Mr. Sacks's opinions conflicts with the decisions of other courts of appeals that have deferred to statements by agency officials who were authorized to make and did make a relevant interpretation on behalf of an agency. For instance, in *Elizabeth Blackwell Health Center for Women* v. *Knoll*, 61 F.3d 170, 174-175 (3d Cir. 1995), cert. denied, 516 U.S. 1093 (1996), deference was accorded to a letter of the Medicaid Director that represented the views of the Health Care Financing Administration. Similarly, in *Capistrano Unified School District* v. *Wartenberg*, 59 F.3d 884, 894 (9th Cir. 1995), the court deferred to a letter to all chief state school officers sent by the Assistant Secretary of Education, who is appointed by the President with the advice and consent of the Senate and, by statute, reports directly to the Secretary. 20 U.S.C. 3412(b)(2) and (g). By contrast, the *internal* documents relied upon by petitioner were prepared by an employee who did not purport to reflect his agency's views, much less reflect his agency's views on the precise interpretive question at issue.

b. Petitioner also asserts (Pet. 17-19) that this Court's review is warranted to determine whether the court of appeals was required to give some deference to the interpretation of 1978 CAS 413 by the DoD, which *implemented* but did not *promulgate* the rule. That contention lacks merit, because the petition is posited upon the false premise that it is the DoD's "long-standing view * * * that 1978 CAS 413 applies to fixed price contracts." Pet. 19. The current DoD view, to which any due deference would be directed, is that pre-1995 fixed-price contracts are *not* to be considered in determining the segment-closing pension surplus/deficit adjustment. Pet. App. 57a (citing Defense Contract Management Command Policy Change Notice No. 99-295 (Sept. 2, 1999)). Indeed, the final decision of the administrative contracting officer, the DoD official who denied petitioner's claims, was entirely consistent with the view that 1978 CAS 413 provided no basis for petitioner to seek reimbursement for the portion of its pension deficit that was attributable to fixed-price contracts. This case accordingly presents no occasion for the Court to determine whether deference is owed to the views of an agency responsible for implementing a regulation.[3]

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[3] In any event, petitioner is also wrong in asserting that the DoD's historical view was contrary to its current interpretation. The trial court's "review of the record reveal[ed] that federal defense agencies did not maintain a consistent interpretation and application of CAS 413.50(c)(12)." Pet. App. 71a. In particular, the historical position of the Defense Logistics Agency (DLA) was that 1978 CAS 413 resulted in cost recovery only with respect to flexibly priced contracts. Pet. App. 16a. Thus, prior to DoD's resolution of this issue in favor of the DLA's position, there was no consistent DoD position that could even arguably have been entitled to deference.

3. Other features of the court of appeals' decision render this case inappropriate for this Court's review. The court of appeals interpreted a cost accounting regulation that was superseded over eight years ago. 60 Fed. Reg. at 16,557 (48 C.F.R. 9904.413-63). The government is aware of only four other cases where the interpretation of 1978 CAS 413 is relevant. Two of those cases concern Teledyne and GE, both of which *agree* with the government that 1978 CAS 413 does not provide for recovery of pension plan surpluses or deficits attributable to fixed-price contracts. Pet. App. 62a.

The interlocutory posture of the case further counsels against this Court's review. The issue raised in the petition was decided by the Court of Federal Claims on cross-motions for partial summary judgment and by the court of appeals on interlocutory appeal under 28 U.S.C. 1292. In those circumstances, this Court's normal practice is to "await final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of certiorari). *E.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (denying certiorari because court of appeals had remanded the case and it was therefore "not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (interlocutory character of a case "of itself alone furnishe[s] sufficient ground for the denial" of review).

That conclusion is particularly warranted here because even the practical importance of the decision below is uncertain at this juncture in the litigation. For instance, petitioner asserts (Pet. 20) that "[t]his case involves a claim * * * involving more than

$300 million." The government, however, disputes $293,572,750 of petitioner's claimed deficit amount on numerous grounds, including that petitioner's claimed amount was based on artificially low interest rates and failed to consider employees who returned to work for petitioner, that petitioner sought non-compensable administrative expenses, and that petitioner improperly added 11% profit to its costs. No court has yet addressed the government's contentions. Pet. App. 37a n.10, 38a n.12 & 66a n.20. Accordingly, resolution of the government's contentions upon remand could drastically diminish the amount at issue in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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