No. 19-154

In the Supreme Court of the United States

ZAFER CONSTRUCTION COMPANY, PETITIONER

v.

ARMY CORPS OF ENGINEERS

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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QUESTIONS PRESENTED

1. Whether petitioner was entitled to reformation of its contract with the government under principles of unilateral mistake, when petitioner failed to establish (1) that it had made any mistake in formulating its proposal; (2) that any mistake it may have made was not the result of business judgment; or (3) the amount of the bid that petitioner would have submitted in the absence of any mistake.

2. Whether petitioner was entitled to reformation of its contract on the theory that the government had violated bid-verification requirements contained in 48 C.F.R. 14.407-3.

ADDITIONAL RELATED PROCEEDINGS

Armed Services Board of Contract Appeals:

Zafer Constr. Co., No. 56769 (June 2, 2017)

United States Court of Appeals (Fed. Cir.):

Zafer Constr. Co., aka Zafer Taahhut Insaat ve Ticaret A.S. v. *United States Army Corps of Eng'rs*, No. 17-2430 (Feb. 12, 2019)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not reported in the Federal Reporter but is available at 753 Fed. Appx. 909. The decision of the Armed Services Board of Contract Appeals (Board) (Pet. App. 3a-93a) is reported at ASBCA No. 56769, 17-1 BCA ¶ 36,776.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 2019. A petition for rehearing was denied on April 30, 2019 (Pet. App. 94a-95a). The petition for a writ of certiorari was filed on July 29, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a contract to perform work on the Afghanistan National Military Hospital campus in Kabul, Afghanistan. The campus consists of multiple buildings designed and constructed by the Soviet Union

in the 1970s. It includes a 400-bed patient-care facility, operations and administration buildings, a rehabilitation building, an isolation ward, a polytechnic clinic, a morgue, a kitchen/dining facility, a laundry facility, a water supply facility, a sewage plant, a central heating plant, and quarters for the surgeon general. Pet. App. 5a.

In 2004, respondent Army Corps of Engineers (Corps) issued a solicitation for design, renovation, replacement, and repair work on the hospital campus. Pet. App. 16a. The Corps elected to conduct a competitive, negotiated procurement under Part 15 of the Federal Acquisition Regulation (FAR), see 48 C.F.R. Part 15, for a firm-fixed-price contract. Pet. App. 16a.

Procurement contracts are subject to the requirements of federal procurement law, including the FAR, a "Government-wide procurement regulation," 41 U.S.C. 1303(a)(1), which procuring agencies "shall" follow. 41 U.S.C. 1121(c)(1). FAR Part 15, titled "Contracting By Negotiation," governs competitive, negotiated procurements. The Part 15 provisions are "intended to minimize the complexity of the solicitation, the evaluation, and the source selection decision, while maintaining a process designed to foster an impartial and comprehensive evaluation of offerors' proposals, leading to selection of the proposal representing the best value to the Government." 48 C.F.R. 15.002(b). A "firm-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; see *Allegheny Teledyne Inc.* v. *United States*, 316 F.3d 1366, 1376 n.7 (Fed. Cir.), cert. denied, 540 U.S. 1068 (2003); *Dalton* v. *Cessna Aircraft Co.*, 98 F.3d 1298, 1305 (Fed. Cir. 1996).

In accordance with the procedural requirements in FAR Part 15, the Corps issued a solicitation that required each offeror to submit an overarching bid schedule containing contract line-item numbers and price amounts for each of the included buildings, as well as separate technical and price proposals. Pet. App. 17a. The solicitation contained numerous references to the layouts of the buildings, including descriptions of the absence or presence of basements in particular buildings, but it did not give detailed information about the number of floors in the various buildings. *Id.* at 22a-34a. It specified that the contractor would be required to "design and build renovations to obtain original performance criteria," such that "products and craftsmanship" would be similar to "the existing building components and systems." *Id.* at 33a-34a (emphasis omitted).

To this end, the solicitation stated that hospital engineering personnel would grant access to the original, Soviet as-built drawings for the hospital campus, known as the "Russian drawings." Pet. App. 42a. Those drawings were made available in the facility's engineering offices before offers were due. See *id.* at 41a-42a, 46a. A potential offeror "possessing the Russian drawings could discern enough information to gain a reasonably accurate understanding of the structural features of the pertinent buildings," including "whether a particular building has multiple floors." *Id* at 44a. In addition, "a potential offeror in possession of the Russian drawings would have had notice that several of the * * * hospital campus buildings had sub-grade floors or basements." *Id.* at 46a. Petitioner did not attempt to obtain the Russian drawings before submitting its proposal. *Id.* at 42a.

The Corps also transmitted to petitioner and other potential offerors the "Baker sketches": "eight sketches

of the ANA hospital campus, consisting of a mix of utility site plans and partial floor plans for some of the buildings on the ANA hospital campus." Pet. App. 9a. Some of the floor-plan sketches for individual buildings contained "closely-formed and repeated straight lines" that are "a technical symbol that is commonly used to denote stairwells." *Id.* at 13a. Floor-plan sketches were not provided for other buildings on the hospital campus, although those additional buildings appear in the site-plan sketches. *Ibid.*

Both the solicitation and the ultimate contract at issue in this case incorporated the FAR clause set forth at 48 C.F.R. 52.236-3, "Site Investigation and Conditions Affecting the Work." See C.A. App. 331; Pet. App. 18a. That provision requires the contractor to "acknowledge[] that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost." Pet. App. 21a (emphasis omitted). The clause also requires the contractor to "acknowledge[] that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site . . . as well as from the drawings and specifications made a part of this contract." *Id.* at 22a (emphasis omitted).

The Corps sponsored at least one site visit to the hospital campus. Pet. App. 36a. During a site visit, each "participant would have had occasion to visually assess most of the accessible * * * hospital campus grounds * * * including the project buildings." *Id.* at 38a. Petitioner did not request or attend a site visit. *Id.* at 40a-41a.

Petitioner submitted a proposal to complete the Afghanistan National Military Hospital project for $16,950,202. Pet. App. 53a. The Corps' pre-award internal estimated price was $29,949,420, and petitioner's chief competitor for the project, Kolin Construction Company (KCC), submitted a bid of $23,700,000. *Ibid.* Petitioner's proposal thus was 43 percent below the government's internal estimate, and about 28 percent less than KCC's bid. *Id.* at 53a-54a. The contracting officer "believed the difference in price between the KCC proposal and [petitioner's] proposal was the result of the difference in overhead" that resulted "from KCC's choice to subcontract the design work to a firm based in the United States." *Id.* at 56a.

The contracting officer asked petitioner to confirm its pricing, stating in an e-mail that the Corps was "in the process of reviewing [petitioner's] bid proposal," and "would ask at this time you review what you submitted as your proposal and verify your proposal prices as the total price of $16,950,202.00." Pet. App. 55a (citation omitted). Petitioner confirmed that figure by e-mail. *Ibid.* The Corps subsequently awarded petitioner a firm-fixed-price contract for $16,508,725. *Id.* at 56a.

After receiving notice to proceed with contract performance, petitioner conducted a site visit. Pet. App. 58a. Afterward, petitioner submitted a letter to a representative of the Corps, stating that it had misunderstood the work area involved in the project because it had calculated the estimated work area using only the Baker sketches. *Id.* at 59a. The representative responded that the solicitation had referred to basements, and that the dimensions and number of stories of buildings were visible from a site inspection. *Id.* at 59a-60a.

Petitioner performed under the contract but, pursuant to the Contract Disputes Act, 41 U.S.C. 7101 *et seq.*,

submitted a certified claim of $4,104,891. See 41 U.S.C. 7103. Petitioner alleged that it had miscalculated the work area for the project because it had prepared its proposal based on the Baker sketches. Pet. App. 70a. It asserted that the solicitation for the project had not informed petitioner of the full scope of the work to be completed. *Id.* at 64a, 70a. Petitioner claimed that "[i]n particular a number of the buildings had additional stor[ies]" not reflected in the solicitation documents. C.A. App. 843. Petitioner also asserted that the Corps should have realized that petitioner's proposal reflected a "mistake in bid" because of the disparity between petitioner's proposal and the government's own estimate. Pet. App. 71a. The Corps denied petitioner's certified claim, C.A. App. 844-850, and petitioner appealed, Pet. App. 71a.

2. The Board held a five-day hearing on petitioner's appeal. At the hearing, petitioner did not "provide the testimony of anyone who either prepared [its] proposal or had contemporaneous knowledge of the proposal preparation team's underlying assumptions or the information it used to calculate the square footage of buildings on the ANA hospital campus." Pet. App. 49a.

The Board denied petitioner's appeal. Pet. App. 3a-93a. In findings of fact, the Board found that neither of petitioner's witnesses—its government projects coordinator and its CEO—had provided credible testimony regarding the basis for petitioner's "square meters calculations or any other assumptions relied upon by [petitioner] in formulating its price proposal." *Id.* at 50a; see *id.* at 52a. It determined that "[t]he record does not support any findings respecting the underlying assumptions of [petitioner's] proposal preparation team" regarding the campus project "or the information it used

to calculate square meters." *Id.* at 52a. It also found that petitioner had "failed to show that it raised any inquiry to the government regarding the project site or the scope of work prior to submitting its proposal." *Id.* at 53a.

The Board also found "no evidence" that the government's contracting officer "had knowledge of the mistake [petitioner] alleges occurred in its proposal preparation that resulted in [petitioner's] underestimation of the work required." Pet. App. 56a. The Board found that the officer had "believed the difference in price" between petitioner's proposal and the next lowest proposal from KCC "was the result of the difference in overhead" that the two companies would have, "which in turn resulted from KCC's choice to subcontract the design work to a firm based in the United States." *Ibid.*

The Board rejected petitioner's argument that it was entitled to relief under the doctrine of unilateral mistake. See Pet. App. 73a-83a. The Board explained that, to obtain reformation of its contract based on unilateral mistake, petitioner had the burden of showing by clear and convincing evidence that

> (1) [a] mistake in fact occurred prior to contract award;
>
> (2) the mistake was a clear-cut, clerical or mathematical error or a misreading of the specifications and not a judgmental error;
>
> (3) prior to award, the Government knew, or should have known, that a mistake had been made and, therefore, should have requested bid verification;
>
> (4) the Government did not request bid verification or its request for bid verification was inadequate; and

(5) proof of the intended bid is established.

Id. at 74a (quoting *McClure Elec. Constructors, Inc.* v. *Dalton*, 132 F.3d 709, 711 (Fed. Cir. 1997) (*McClure*)).

The Board stated that it would "[a]ssum[e] solely for the purposes of argument (and we do not so find) that the government knew or should have known that a mistake had been made and that its request for proposal verification was inadequate"—the third and fourth requirements in *McClure*. Pet. App. 75a. The Board concluded, however, that petitioner had not satisfied the other three requirements. *Ibid.*

With respect to the first *McClure* requirement, the Board explained that petitioner had not proved by clear and convincing evidence that its proposal was based on or embodied a mistake. Pet. App. 76a. The Board "found a lack of credibility" in the witnesses on whom petitioner had relied to establish that a mistake had occurred. *Ibid.* The Board also stated that petitioner had failed to show "any credible evidence of the constitution of its price proposal other than a listing of the lump-sum prices proposed for each building," and that petitioner had "pointed * * * to nothing that would demonstrate that the assumptions and calculations underlying its proposal were, in fact, mistaken." *Id.* at 76a-77a.

Regarding the second *McClure* requirement, the Board concluded that petitioner had not demonstrated that any mistake that might have occurred was a "clear-cut, clerical, or mathematical error or a misreading of the specifications and not a judgmental error." Pet. App. 77a (emphasis omitted). It observed that petitioner had argued that its error was a result of a misreading of specifications (and not a mathematical or clerical mistake), but that petitioner had not "specif[ied] which (if any) of the specifications it allegedly misread." *Id.* at

78a; see *id.* at 81a ("[Petitioner] has failed to show by clear and convincing [evidence] that it actually misread any of the specifications."). The Board further stated that, insofar as there were gaps in the specifications and petitioner had "made assumptions without any attempt of verification with the government," petitioner's asserted mistake was "one of business judgment, not a misreading of the specifications." *Id.* at 80a. The Board likewise concluded that petitioner's decisions not to seek or participate in a site visit, not to obtain the Russian drawings, and not to make inquiries of the government were "business judgments," not a "demonstrated misreading of the specifications." *Id.* at 81a.

The Board further found that petitioner had not satisfied the fifth *McClure* requirement. Pet. App. 82a. The Board explained that, "by failing to provide either documentary evidence of the composition of its proposal or testimony by someone involved in preparing the proposal," petitioner had "failed to prove by clear and convincing evidence what its proposal price would have been but for the alleged mistake." *Ibid.*

The Board rejected petitioner's argument that the Corps had unconscionably overreached by accepting petitioner's proposal. Pet. App. 83a-86a. The Board observed that petitioner's argument for overreaching "appears to be based upon the disparity between [petitioner's] proposal and both the next-lowest submission" and the internal government estimate. *Id.* at 84a. The Board explained that this price disparity alone did not establish unconscionability. *Ibid.* It observed that "the government did request that [petitioner] confirm its proposal price," and that the contracting officer had given "a credible explanation for her belief that the price disparity was accounted for by the next lowest offeror's

higher overhead." *Id.* at 84a-85a. The Board further determined that petitioner could not establish unconscionability when it had not shown that the proposal embodied or was based on "a mistake that occurred prior to contract award" and that "was a clear-cut clerical or mathematical error or a misreading of the specifications, and not an error in business judgment." *Id.* at 85a-86a.

The Board stated that it had "considered the other arguments advanced by [petitioner] and f[ound] them to be without merit." Pet. App. 91a. The Board found it "unnecessary" to detail its "rejection of" those additional arguments because petitioner had "fail[ed] to argue its alternative theories in its post-hearing briefs," a failure that governing precedent "equated to abandonment" of the arguments. *Id.* at 91a-92a.

3. The court of appeals affirmed the Board's decision in an unpublished per curiam order. Pet. App. 1a-2a.

ARGUMENT

Petitioner contends that it is entitled to reformation of its contract because it submitted a "mistaken bid * * * caused by incorrect drawings provided by the Government" (Pet. i), and because the government violated bid-verification requirements contained in federal regulations (Pet. ii). Petitioner's claims lack merit and do not implicate any conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. a. The FAR allows contracting authorities to reform a contract based on a unilateral mistake in a bid only if there is "clear and convincing evidence that a mistake in bid was made," and only if the mistake was "so apparent as to have charged the contracting officer with notice of the probability of the mistake." 48 C.F.R. 14.407-4(c); see 48 C.F.R. 14.407-4(b); see also 48 C.F.R.

15.508 (making the above requirements applicable to negotiated procurements under FAR Part 15). A contractor seeking reformation on that basis also must "support the alleged mistake" through evidence that establishes "the bid actually intended." 48 C.F.R. 14.407-4(e)(1); see 48 C.F.R. 15.508. A court will order reformation based on unilateral mistake in a bid only if the contractor establishes by clear and convincing evidence, among other facts: that the contractor actually made a mistake of fact; that the mistake was a clear-cut clerical or mathematical error or a misreading of the specifications and not a judgment error;[1] and the amount of the contractor's intended bid. *McClure Elec. Constructors, Inc.* v. *Dalton*, 132 F.3d 709, 711 (Fed. Cir. 1997); see, *e.g.*, *United States* v. *Hamilton Enters., Inc.*, 711 F.2d 1038, 1046 (Fed. Cir. 1983); *Ruggiero* v. *United States*, 420 F.2d 709, 713-714 (Ct. Cl. 1970); see also *Liebherr Crane Corp.* v. *United States*, 810 F.2d 1153, 1157-1158 (Fed. Cir. 1987).

The Board correctly determined that petitioner was not entitled to reformation of its contract under these principles. The Board found that petitioner had not made at least three factual showings necessary for reformation based on unilateral mistake: a mistake in its proposal, that any mistake resulted from a clear-cut clerical or mathematical error or a misreading of specifications, and its intended price. Pet. App. 75a-82a.

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[1] The rule that contract reformation based on unilateral mistake requires a clear-cut clerical or mathematical error or a misreading of specifications, rather than an error of judgment, reflects traditional limitations on equitable reformation authority. See *Will H. Hall & Son, Inc.* v. *United States*, 54 Fed. Cl. 436, 440-441 (2002) (citing authorities).

b. Petitioner contends (Pet. 8-9) that the court of appeals' unpublished summary affirmance of the Board's decision was incorrect, and warrants this Court's review, because the Board's decision conflicts with *Hollerbach* v. *United States*, 233 U.S. 165 (1914). *Hollerbach* is inapposite. In *Hollerbach*, the government had *misrepresented* in its bid specifications the scope of the work to be performed on a dam. *Id.* at 168. The Court of Claims held that the contractor could not recover for its additional work, despite the government's misrepresentation, because the contract had imposed on the contractor an affirmative duty to inspect the site and ascertain the nature of the work. *Id.* at 169. This Court disagreed, holding that the contractor's duties did not negate the government's "positive statement of the specifications," and that the contract did not require "independent investigation of facts which the specifications furnished by the Government as a basis of the contract left in no doubt." *Id.* at 172.

Hollerbach does not suggest that a court can order a contract reformed where, as here, the contractor has neither demonstrated that its initial proposal was based on any sort of mistake nor showed what its proposed price would have been if no mistake had occurred. The Court in *Hollerbach*, moreover, addressed a mistaken bid that had been based on a "positive statement" from the government that constituted "mistaken representations" of the work specifications. *Hollerbach*, 233 U.S. at 172. Although petitioner now suggests (Pet. i, 9) that the present case also involves government misrepresentations, petitioner sought reformation below on the ground that it had made a unilateral mistake in interpreting the government's solicitation documents. See

Pet. App. 73a n.17 & 74a. The Board accordingly adjudicated the case under the rubric of unilateral mistake, and it did not find that the government had made misrepresentations.

c. Petitioner alternatively suggests (Pet. 10-11) that the court of appeals' unpublished summary affirmance conflicts with the intermediate state-court decision in *Balaban-Gordon Co.* v. *Brighton Sewer Dist. No. 2*, 342 N.Y.S.2d 435 (N.Y. App. Div. 1973). In *Balaban-Gordon*, a bidder on a municipal government contract discovered—before the government had made its contract award—that the bidder had made a mistake in reading the specifications. *Id.* at 437-438. It then asked to withdraw its bid. The municipal government refused, relying on New York law. *Id.* at 438. The court held that the contractor should be allowed to withdraw its bid because the contractor's error in reading the specifications was "the type of a mistake which justifies relief by rescission." *Id.* at 439.

The court in *Balaban-Gordon* applied New York law pertaining to government contracts, not federal law. It allowed the bidder to withdraw before the contract was awarded (let alone performed) and did not address reformation of a completed contract.[2] In any event, a conflict between an intermediate state court's decision and a ruling of a federal court of appeals would not warrant this Court's review.

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[2] An offeror in a FAR Part 15 negotiated procurement would be able to withdraw its offer before award, as the contractor in *Balaban-Gordon* sought to do, without demonstrating any error at all. See 48 C.F.R. 15.208(e) ("Proposals may be withdrawn by written notice at any time before award.").

2. Petitioner contends (Pet. i-ii, 12-16) that this Court should grant certiorari to decide whether a contractor is entitled to reformation of a contract if "the Government does not comply with [48] C.F.R. 14.407-3 requiring verification of the bid by the Government." Pet. ii. That issue does not warrant this Court's review.

Petitioner does not appear to have raised any claim based on Section 14.407-3 before either the Board or the Federal Circuit. And the Board's decision made clear that it understood any claims other than unilateral mistake and unconscionability to have been abandoned. Pet. App. 91a-92a. This Court does not ordinarily review questions that were neither pressed nor passed upon below. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

In any event, petitioner's reliance on Section 14.407-3 is misplaced. That provision applies to procurements that involve sealed bidding. See 48 C.F.R. 14.000. But this case involves a FAR Part 15 negotiated procurement, Pet. App. 16a—"[a] contract awarded using *other than* sealed bidding procedures," 48 C.F.R. 15.000 (emphasis added). Part 15 negotiated procurements are not governed by the sealed-bidding rules in Part 14. See, *e.g.*, *C.W. Over & Sons, Inc.* v. *United States*, 54 Fed. Cl. 514, 521 (2002) (noting that "[P]art 14 of the FAR * * * is directed only to sealed bidding," while "Part 15 of the FAR applies to negotiated procurements").

Contrary to petitioner's contention (Pet. 12-16), the summary affirmance below does not conflict with the Ninth Circuit decision in *Sulzer Bingham Pumps, Inc.* v. *Lockheed Missiles & Space Co.*, 947 F.2d 1362 (1991). The court in that case held that reformation of a contract was appropriate when a government contractor, bound

by a prior version of 48 C.F.R. 14.407-3 in issuing a subcontract, had failed to comply with its bid-verification requirements. 947 F.2d at 1365-1366. But Section 14.407-3 does not apply to the negotiated procurement here, and petitioner did not invoke that regulation before either the Board or the court of appeals.

Petitioner's reliance (Pet. 13-14) on the Board's 1984 decision in *Sealtite Corporation*, ASBCA No. 25805, 84-1 BCA ¶ 17,144, is likewise misplaced. In awarding summary judgment to a contractor, the Board in *Sealtite* found that the contractor had made a mistake in reading the government's specifications, and that the government had failed to comply with bid-verification regulations. In suggesting that the contractor might be entitled to relief even if its misreading reflected an error of judgment, the Board emphasized that its decision concerned contract rescission, not reformation, and suggested that the limitations governing reformation do not uniformly apply in rescission cases. The Board's decision regarding rescission on distinct facts does not conflict with the decision regarding reformation below. In any event, a conflict between Board decisions (or between a Board decision and a decision of the Federal Circuit) would not warrant this Court's review. [3]

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[3] Petitioner asserts that "*Sealtite* was affirmed per curiam by the Court of Appeals for the Federal Circuit." Pet. 14 (emphasis omitted). That is incorrect. The Federal Circuit decision that petitioner cites involved the same contractor, but a different contract and different legal issues. *Sealtite Corp.* v. *United States*, 739 F.2d 630 (Fed. Cir. 1984) (per curiam) (affirming *Sealtite Corp.*, ASBCA No. 26209, 83-2 BCA ¶ 16,792).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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