No. 19-464

In the Supreme Court of the United States

VETERANS CONTRACTING GROUP, INC., PETITIONER

v.

UNITED STATES OF AMERICA

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

To bid on a contract that the Department of Veterans Affairs (VA) has reserved for competition among small businesses owned by service-disabled veterans, a potential contractor must be listed in a centralized database (VetBiz). After the VA removed petitioner from VetBiz, an agency contracting officer administering a federal solicitation rejected petitioner's bid. The Court of Federal Claims held that petitioner's removal from VetBiz was arbitrary and capricious, but that the contracting officer's separate decision to reject petitioner's bid was not. The court reinstated petitioner to VetBiz and awarded bid-preparation costs, but denied an injunction that would have retroactively rendered petitioner eligible for the solicitation. The Federal Circuit affirmed. The question presented is as follows:

Whether the courts below erred in finding that the contracting officer's decision to reject petitioner's bid was not arbitrary and capricious, and in declining to award an injunction that would have retroactively rendered petitioner eligible for the solicitation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 920 F.3d 801. The opinion and order of the Court of Federal Claims (Pet. App. 21a-44a) is reported at 135 Fed. Cl. 610.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2019. A petition for rehearing was denied on July 9, 2019 (Pet. App. 67a-68a). The petition for a writ of certiorari was filed on October 7, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Federal law requires the Department of Veterans Affairs (VA) to set aside certain contracts for small businesses owned by veterans with service-connected disabilities, known as SDVOSBs. See 38 U.S.C. 8127(a) and (e). In order to be eligible for an SDVOSB set-aside

contract, a firm must be listed in the Vendor Information Pages of a centralized database called VetBiz, which is administered by the VA's Center for Verification and Evaluation (CVE). 38 U.S.C. 8127(e) and (f) (2012 & Supp. V 2017); see also 48 C.F.R. 804.1102.

During the period relevant to this case, a potential contractor could be removed from VetBiz either as a result of the CVE's direct review of its eligibility, see 38 C.F.R. 74.15, 74.22 (2017), or as a result of an adverse decision in a protest before the Small Business Administration (SBA). With respect to the latter scenario, VA regulations provided that "[a]ny firm registered in the VetBiz * * * database that is found to be ineligible due to an SBA protest decision or other negative finding will be immediately removed from the VetBiz * * * database," and "will not be eligible" to participate in SDVOSB procurements until the CVE "receives official notification that the firm has proven that [the firm] has successfully overcome the grounds for the determination or that the SBA decision is overturned on appeal." 38 C.F.R. 74.2(e) (2017).

Petitioner is a veteran-owned small business that sought to participate in the SDVOSB set-aside program. In 2013, the CVE added petitioner to VetBiz after determining that it qualified as an SDVOSB under VA regulations. Pet. App. 4a. On July 18, 2017, however, an SBA area office determined that petitioner was not "unconditionally" owned by a service-disabled veteran, as required by SBA rules, and thus did not qualify as an SDVOSB. *Ibid.* Three days later, pursuant to 38 C.F.R. 74.2(e) (2017), the CVE removed petitioner from VetBiz. See Pet. App. 4a, 32a-33a.

Despite its removal, petitioner submitted a bid in response to a VA solicitation for a roof-replacement project that had been set aside for SDVOSBs with a bid deadline of July 28, 2017. Pet. App. 4a. The solicitation reaffirmed the general rule that "[a]ll prospective bidders must be . . . verified/visible/certified in VIP VetBiz . . . at the time of offer submission." *Id.* at 41a (citation omitted); C.A. App. 33; see also 48 C.F.R. 14.103-2(d), 14.301(a), 14.404-2 (contracting officer lacks discretion to deviate from terms of a solicitation). Because petitioner was not listed in VetBiz on the date of the bid deadline, the contracting officer treated petitioner's bid as nonresponsive. Pet. App. 5a, 34a.

After nonresponsive bids had been removed, the lowest remaining bid for the roof solicitation was 30% higher than the government's independent cost estimate. Pet. App. 5a. The contracting officer determined that none of the responsive bids was fair and reasonable, and he sought to cancel the solicitation. *Id.* at 5a, 34a; see 48 C.F.R. 14.404-1(c)(6) (permitting cancellation when all "otherwise acceptable bids received are at unreasonable prices"). On August 22, 2017, the cancellation was finalized and posted. Pet. App. 5a, 34a.

2. On July 28, 2017, the date of the bid deadline, petitioner filed a complaint with the Court of Federal Claims (CFC), challenging its removal from VetBiz and its resulting exclusion from the roofing solicitation. Pet. App. 5a; see also C.A. App. 89-90. On August 11, the government informed the CFC that it intended to cancel and resolicit the roofing contract. Pet. App. 5a. Petitioner did not amend its complaint to challenge the cancellation at that time. On August 22, hours after the agency had posted the cancellation, the CFC granted

petitioner's motion for a preliminary injunction directing the agency to restore petitioner to VetBiz. *Id.* at 66a; see also *id.* at 5a. The CFC declined to address the roof solicitation on the ground that petitioner's "claim with respect to that solicitation is moot" because the solicitation was "in the process of being cancelled and reissued." *Id.* at 66a n.11.

The CFC subsequently granted petitioner's motion to amend its complaint to challenge the cancellation itself. Pet. App. 23a, 35a. The parties then filed cross-motions for judgment on the administrative record. Petitioner sought to convert the preliminary injunction restoring it to VetBiz into a permanent injunction, and further sought an injunction retroactively barring cancellation of the roof solicitation and rendering petitioner eligible to compete for that contract. *Id.* at 35a, 41a.

On December 15, 2017, the CFC granted in part and denied in part each party's motion. Pet. App. 21a-44a. While acknowledging the requirement in 38 C.F.R. 74.2(e) (2017) that a firm "be immediately removed" from VetBiz upon an adverse SBA determination, the court pointed out that the SBA and VA used different definitions of "unconditional ownership." Pet. App. 26a-30a, 39a. The court concluded that, in light of this discrepancy, the agency's decision to "mechanistically" import the adverse SBA determination without first determining whether it was valid under VA regulations—and the agency's resulting removal of petitioner from VetBiz—were arbitrary and capricious. *Id.* at 39a-40a.[1]

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[1] In 2018, the pertinent regulations were amended to harmonize the two agencies' approaches to "unconditional ownership," and to grant the VA discretion over whether to give immediate effect to an adverse determination by the SBA. See *VA Veteran-Owned Small Business (VOSB) Verification Guidelines*, 83 Fed. Reg. 48,221

The court entered a permanent injunction restoring petitioner to VetBiz and requiring that petitioner's eligibility for VetBiz "be extended by 34 days to account for the period during which it was wrongfully excluded from competing for VA procurement set-asides." *Id.* at 43a-44a.

As to the roofing solicitation, the CFC rejected petitioner's claim that the contracting officer's decision to reject its bid and cancel the solicitation was arbitrary and capricious. Pet. App. 42a. The court explained that, on the date of the bid deadline, petitioner was not listed in VetBiz, as required by the solicitation. *Id.* at 41a. Because petitioner "did not meet the requirements of a solicitation, it was ineligible to compete for the contract," and the contracting officer simply "followed the normal procedures for handling the procurement" in rejecting petitioner's bid. *Id.* at 42a.

The CFC declined to issue an injunction that would set aside the cancellation and retroactively render petitioner eligible for the solicitation. Pet. App. 42a-43a. The court explained that "at no time between the deadline for bid submission and the cancellation of the roofing solicitation was [petitioner] eligible to compete for the roofing contract." *Id.* at 43a. The court acknowledged, however, that petitioner had been "prejudiced by the CVE's arbitrary application of VA's regulation as to the roofing solicitation." *Ibid.* Although the CFC did "not believe the retroactive injunctive relief sought by [petitioner] [was] proper," it "award[ed] [petitioner]

(Sept. 24, 2018); *Ownership and Control of Service-Disabled Veteran-Owned Small Business Concerns*, 83 Fed. Reg. 48,908 (Sept. 28, 2018).

its reasonable bid preparation and proposal costs for the roofing solicitation." *Id.* at 43a.[2]

3. Petitioner appealed, challenging the VA's cancellation of the roofing solicitation. The court of appeals affirmed. Pet. App. 1a-17a.

The court of appeals observed that, although the agency had acted improperly in removing petitioner from VetBiz, "[a] contracting officer must act in consideration of circumstances as they exist at the time of his decision." Pet. App. 9a-10a. The court explained that petitioner's "bid was not acceptable because [petitioner] was not listed in the VetBiz database when bidding closed," and "[a]t the time of his decision, the contracting officer was bound by the government's position on this issue and had to presume the [CVE] had acted lawfully." *Ibid.* The court also rejected petitioner's assertion that the contracting officer had acted pretextually and with an improper motive. *Id.* at 9a.

Petitioner argued that the contracting officer should not have opened the bids on the roofing contract while petitioner's challenge to its removal from VetBiz remained unresolved. Pet. App. 11a-12a. The court of appeals held that petitioner had waived that challenge by failing to raise it before the CFC. *Id.* at 12a. The court further held that the challenge lacked merit because petitioner "did not request injunctive relief until well after bids were opened," so that "the contracting officer had no notice of any reason to postpone opening bids." *Ibid.*

Judge Dyk dissented. Pet. App. 13a-17a. He stated that "[t]he VA would likely have awarded the contract to [petitioner] had it not erroneously removed [petitioner] from the [VetBiz] database," and he concluded

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[2] Petitioner later waived this award. D. Ct. Doc. 64 (Feb. 12, 2018).

that "[t]he appropriate remedy is to place [petitioner] in the situation it would have occupied had the VA not acted improperly." *Id.* at 17a. Judge Dyk described the majority's decision as holding that "an agency's decision based on an earlier, unlawful action is rational unless the agency official making the decision knew the earlier action was unlawful," thus "effectively limit[ing] [the court's] review to whether the contracting officer acted in bad faith." *Id.* at 15a. The majority disputed this characterization, stating that its decision "simply acknowledges that a contracting officer can only act within the scope of his authority and that, here, the contracting officer had no authority to consider [petitioner's] bid." *Id.* at 11a n.7.

The court of appeals denied rehearing en banc without recorded dissent. Pet. App. 67a-68a.

ARGUMENT

Petitioner contends that the court of appeals erred in resolving important questions of federal law, and that the court's decision created two circuit splits. Petitioner is mistaken. The Federal Circuit's decision is correct and does not conflict with any decision of this Court or another court of appeals. In addition, the availability of relief in this case is seriously complicated by the passage of time. Further review is not warranted.

1. The petition for a writ of certiorari and the dissent below suggest two analytically distinct theories on which the CFC might have issued an injunction setting aside the cancellation of the roofing solicitation. One theory is that the cancellation itself was unlawful because it would not have occurred but for petitioner's prior arbitrary removal from VetBiz, and therefore was tainted by that antecedent violation. The other is that,

even if the cancellation itself was lawful, the CFC was required to set it aside in order to provide complete relief for a different unlawful agency action, *i.e.*, the earlier VetBiz removal.

In the court of appeals, petitioner's principal argument was that the contracting officer should not have opened the bids on the roofing solicitation until the CFC had resolved petitioner's pending challenge to its removal from VetBiz. See, *e.g.*, Pet. C.A. Br. 15 (describing that argument as "the crux of this appeal"). The court of appeals held that this argument had been waived, and that it lacked merit in any event. Pet. App. 11a-12a. The court also held that, because petitioner was not listed on VetBiz at the time the contracting officer acted, "the contracting officer's decision to cancel the roof replacement solicitation was not arbitrary or capricious." *Id.* at 11a.

Petitioner's briefs before the panel did not assert the second of the two theories described above, *i.e.*, that vacatur of the cancellation was an essential element of relief for its earlier unlawful removal from VetBiz.[3] The panel majority likewise did not address that remedial issue. In any event, both of the theories described above lack merit.

a. The courts below correctly held that the VA's decision to cancel the roof solicitation was not arbitrary or capricious. Federal law prohibits a contracting officer from awarding an SDVOSB contract to a firm not listed on VetBiz, see 38 U.S.C. 8127(e); 48 C.F.R. 804.1102, or

[3] Even the petition for rehearing was vague on this point, asserting only that "the proper remedy for a flawed procurement process should be to return the contract award process to the status quo ante," without distinguishing between the two theories. Pet. for Reh'g 19 (brackets, citation, and internal quotation marks omitted).

from deviating from the express terms of a solicitation, see 48 C.F.R. 14.103-2(d), 14.301(a), 14.404-2. Contracting officers also lack the authority to consider whether a contractor was properly excluded from VetBiz. See 38 U.S.C. 8127(f) (2012 & Supp. V 2017); 38 C.F.R. 74.1 (2017).

Here, the contracting officer's determination represented a straightforward application of governing law to the facts of this case. The roofing project was an SDVOSB set-aside, and the invitation for bids expressly required that "[a]ll prospective bidders must be . . . verified/visible/certified in VIP VetBiz . . . at the time of offer submission." See Pet. App. 41a (citation omitted); C.A. App. 33. Thus, both the governing law and the invitation for bids required not only that each bidder satisfy the legal requirements for listing on VetBiz, but that it actually be so listed.

It is undisputed that petitioner was not listed on VetBiz at the time it submitted its bid. Because the contracting officer had no discretion to deviate from the listing requirement, he correctly rejected the bid. Nothing about that decision was arbitrary or capricious. And petitioner does not contend that the VA's subsequent decision to cancel the solicitation was unlawful, apart from the officer's initial rejection of petitioner's bid. See Pet. 6-7.[4]

b. Although the petition for a writ of certiorari does not clearly distinguish between the two theories described above, the petition can reasonably be read to argue that, even if the contracting officer's termination

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[4] Petitioner criticizes the Federal Circuit for mentioning the "subjective knowledge" of the contracting officer (Pet. 11), but petitioner itself *invited* a subjective inquiry by arguing that the contracting officer acted pretextually and with improper motives (Pet. App. 9a).

decision was not itself unlawful, the CFC should have vacated that decision in order to undo the practical consequences of petitioner's prior unlawful removal from VetBiz. The CFC held that this removal was arbitrary and capricious, and it granted injunctive relief restoring petitioner to VetBiz and extending its period of eligibility by the duration of the wrongful exclusion. See Pet. App. 6a. Petitioner suggests that these remedies were inadequate because its removal from VetBiz caused additional, downstream harm by precluding it from competing for the roofing solicitation. See Pet. 18-19.

The CFC, however, has already acknowledged and accounted for this argument. After (correctly) concluding that the contracting officer's decision to reject petitioner's bid was not *itself* arbitrary and capricious, the court observed that this "is hardly to say that [petitioner] was not prejudiced by the CVE's [earlier] arbitrary application of VA's regulation as to the roofing solicitation or that no remedy is available." Pet. App. 43a. While the court did "not believe that the retroactive injunctive relief sought by [petitioner] is proper," it awarded petitioner "its reasonable bid preparation and proposal costs for the roofing solicitation." *Ibid.*

Petitioner appears to endorse a categorical rule that a reviewing court *must* "set aside agency actions premised on or flowing from earlier unlawful actions." Pet. 13. But courts in bid-protest suits enjoy their traditional equitable discretion in determining whether to grant injunctive relief. *PGBA, LLC* v. *United States*, 389 F.3d 1219, 1225-1226 (Fed. Cir. 2004). The CFC exercised that discretion in selecting an appropriate remedy for the CVE's improper action in removing petitioner from VetBiz.

The CFC's determination that the removal was arbitrary and capricious did not require the court to set aside subsequent actions by the contracting officer (the rejection of petitioner's bid as nonresponsive and the later cancellation of the roofing solicitation) that were not themselves unlawful, simply because those actions were causally traceable to the CVE's earlier breach. Petitioner offers no basis for concluding that the CFC's rejection of its request for injunctive relief constituted an abuse of discretion. See, *e.g.*, *PGBA*, 389 F.3d at 1223-1224 (upholding award of bid-preparation and proposal costs and denial of injunctive relief under abuse-of-discretion standard). In any event, a case-specific dispute about the propriety of the specific remedy the CFC selected to redress the harm done by petitioner's removal from VetBiz would not warrant this Court's review.

2. Petitioner does not identify a circuit split concerning a precise legal question, such as the scope of a contracting officer's authority or a trial court's remedial discretion. Instead, petitioner contends that the court of appeals' holding is in general tension with the approach taken by other circuits in reviewing agency action. Petitioner focuses on two legal rulings that it attributes to the Federal Circuit and that it claims contribute to this tension: (i) arbitrary-and-capricious review focuses on the information available to the individual government actor, rather than on what is known to the agency as a whole; and (ii) an agency action cannot be set aside if it is required by an earlier, unlawful agency action. Pet. 10-13.

Petitioner's claim fails because the Federal Circuit expressly disclaimed both of these holdings. Much like petitioner, the dissent accused the majority of holding

that "an agency's decision based on an earlier, unlawful action is rational unless the agency official making the decision knew the earlier action was unlawful." Pet. App. 15a. Rather than defend this proposition, the majority explained that its decision did not depend on or endorse such a rule. The majority observed that its "decision simply acknowledges that a contracting officer can only act within the scope of his authority and that, here, the contracting officer had no authority to consider [petitioner's] bid" because, "at the time the contracting officer cancelled the solicitation, [petitioner] was not listed on VetBiz." *Id.* at 11a n.7. Petitioner does not dispute that, at the time he acted, the contracting officer was legally barred from accepting petitioner's bid.

The decisions that petitioner cites (Pet. 12-14) as evidence of a circuit split are not to the contrary. In *Dalton* v. *United States*, 816 F.2d 971 (4th Cir. 1987), the operators of a grocery store violated the conditions of the Federal Food Stamp Program. *Id.* at 972. Although the statute and regulations permitted the Secretary of Agriculture to impose a civil penalty rather than a disqualification for violations, a subordinate officer issued a memorandum purporting to strip the agency of that power. *Id.* at 974. Acting pursuant to this memorandum, the agency disqualified the operators of the store without considering imposition of a civil penalty as an alternative. *Ibid.* The court of appeals invalidated the memorandum as inconsistent with the statute and remanded for a determination whether a civil penalty should be imposed in lieu of disqualification. *Id.* at 975.

In *United States* v. *Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977), the district court enjoined the defendant from producing smoked whitefish

except in accordance with regulations promulgated under the Federal Food, Drug, and Cosmetic Act. *Id.* at 242-243. The court of appeals reversed, finding that the agency's process for adopting the regulations was defective, and that the regulations were accordingly invalid as applied to the defendant. *Id.* at 243, 253.

Both of these cases involved the direct application of an invalid agency rule of general applicability. In *Dalton*, the agency applied an invalid memorandum to deny relief, and in *Nova Scotia*, the agency sought an injunction based on an invalid regulation. That is not the situation here. In this case, petitioner challenged two separate agency actions: (1) the unreasonable application of 38 C.F.R. 74.2(e) (2017) to exclude petitioner from VetBiz; and (2) the agency's subsequent decisions to treat petitioner's bid as nonresponsive and to cancel the solicitation. Consistent with *Dalton* and *Nova Scotia*, the courts below deemed the first action arbitrary and capricious and sought to remedy its effects.

Even read in the light most favorable to petitioner, the decisions in *Dalton* and *Nova Scotia* at most held that remedies arguably analogous to the one petitioner seeks here were appropriate on the facts of those cases. Neither court suggested that agency action must *always* be set aside if it is causally traceable to prior unlawful agency conduct. As explained above, see p. 10, *supra*, the CFC did not ignore the fact that the contracting officer's treatment of petitioner's bid as nonresponsive, and the officer's consequent cancellation of the solicitation, were factually traceable to petitioner's prior unreasonable removal from VetBiz. Although the CFC declined to issue an injunction barring the VA from cancelling the solicitation and requiring it to treat petitioner as eligible for the contract, the court

"award[ed] [petitioner] its reasonable bid preparation and proposal costs for the roofing solicitation." Pet. App. 43a. Nothing in *Dalton* or *Nova Scotia* suggests that this was an impermissible remedial choice.

3. Finally, the record before this Court fails to account for changes in the status of the roof repair due to the passage of time. In the bid-protest context, changes in the relevant factual circumstances—such as performance under the contract, or termination of the procurement—may affect a bidder's entitlement to injunctive relief, even if it can show that the original solicitation was defective. See, *e.g.*, *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1975 (2016) (services under a challenged procurement had already been completed); *Veterans Contracting Grp., Inc.* v. *United States*, 743 Fed. Appx. 439, 440 (Fed. Cir. 2018) (at-issue contract had been terminated). Without a developed factual record on the status of the roofing contract, it would be impossible for a court to assess whether any injunctive relief here would be feasible as a practical matter. This complication represents an additional reason to deny the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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