No. _____

.

In the Supreme Court of the United States

SHEFFIELD KORTE JOINT VENTURE,
Petitioner,

v.

SECRETARY OF THE ARMY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Michael E. Wilson, Esq.
Counsel of Record
UB GREENSFELDER LLP
10 S Broadway Ste 2000
St. Louis, MO 63102
mwilson@ubglaw.com
(314) 516-2680

Counsel for Petitioner

Fifth day of November, MMXXV

United States Commercial Printing Company • www.uscpc.us • (202) 866-8558

QUESTIONS PRESENTED

In a landmark decision, this Court held in *United States* v. *Spearin,* 248 U.S. 132 (1918) (*Spearin*), that the federal government impliedly warrants to bidding contractors that a government-furnished design is free from defects.

The questions presented are:

1. Does the government impliedly warrant under *Spearin* that a government-furnished concept design for a design-build project is free from defects?

2. If the *Spearin* implied warranty applies, was it breached when a design feature in the government-furnished design that the government accepted and upon which the contractor relied during bidding turned out to be erroneous?

CORPORATE DISCLOSURE STATEMENT

The two members of Sheffield Korte Joint Venture are Korte Construction Company and Sheffield Construction LLC. Neither member has a parent corporation, nor publicly held.

RELATED PROCEEDINGS

Appeals Services Board of Contract Appeals:

Appeals of Sheffield Korte Joint Venture, Under Contract No. W912QR-15-C-0027, Nos. 62972, 62973 (opinion issued) (Aug. 11, 2023)

United States Court of Appeals (CAFC):

Sheffield Korte Joint Venture v. *Secretary of the Army*, No. 2024-1134 (ASBCA opinion affirmed) (May 22, 2025)

Sheffield Korte Joint Venture v. *Secretary of the Army*, No. 2024-1134 (rehearing denied) (Aug. 7, 2025)

TABLE OF CONTENTS

Appendix

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

OPINIONS BELOW

The Federal Circuit's decisions are unpublished and are reproduced in the Appendix at App.1-11. The Armed Services Board of Contract Appeals' (ASBCA) opinion is reported at 23-1 BCA ¶38417 and is reproduced in the Appendix at App.12-52.

JURISDICTION

The Federal Circuit issued its decision on May 22, 2025. The Federal Circuit denied rehearing en banc on August 7, 2025. This Court has jurisdiction under 28 U.S.C. §1254(1).

REGULATION INVOLVED

48 CFR §52.236-7 reads in part:

> **PERMITS AND RESPONSIBILITIES (NOV 1991)**
> The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work.

INTRODUCTION

The federal government should accept full responsibility for furnishing erroneous design information upon which a contractor reasonably relies that causes the contractor to suffer economic harm. In this case, Sheffield relied on the government-provided erroneous design information in preparing its bid for the project. As a result, Sheffield incurred greater performance costs, and yet the ASBCA and Federal Circuit both denied Sheffield relief.

The federal government historically employed the design-bid-build method to procure construction improvements. Under that method, the government solicitation documents issued to bidding contractors typically included "ready for construction" plans and specifications for the successful bidder to follow. From *United States* v. *Spearin,* 248 U.S. 132 (1918), a case involving that traditional procurement method, emanated the implied warranty in federal government construction contracts that the government-furnished design is free from defects.

The fundamental, yet compelling federal policy announced in *Spearin* is that the government warrants that government-provided design information will not be flawed, and thus, the successful bidding contractor that relies on such information during the bid [1] stage will be compensated should such information be erroneous and mislead the contractor to its economic detriment.

---

[1] We use "bid" and "proposal", and "bidder" and "proposer" synonymously.

Four years earlier, this Court similarly recognized the principle that government is liable when it misleads a contractor. In *Hollerbach* v. *United States,* 233 U.S. 165 (2014), the government issued specifications describing particular conditions to be found behind a dam in need of repair. The represented conditions consisted of stone, sawdust, and sediment. As it turned out, the actual conditions varied from those indicated in the specifications, causing the contractor to incur greater performance costs. This Court held the contractor was entitled to additional compensation. In so holding, this Court wrote:

> … [T]he specifications assured them [the contractor] of the character of the material,—a matter concerning which the government might be presumed to speak with knowledge and authority. We think this positive statement of the specifications must be taken as true and binding upon the government, and that upon it, rather than upon the claimants, must fall the loss resulting from such mistaken representations.

Id. at 172.

Hollerbach and *Spearin*, and other decisions of this Court discussed *infra,* simply uphold the risk allocation tenet that the government accepts responsibility when information it furnishes and upon which a contractor relies is erroneous and, as a result, misleads the contractor and causes it

economic harm. The risk in the government when it misleads.

Nowadays, the government's frequently adopted procurement method, if not the preferred one, is labeled design-build. While the government still furnishes key design parameters and requirements, the successful bidder provides the design services to complete the balance of the government-furnished design and then constructs the improvements per the completed design.

Due to the prevalence of the federal government employing the design-build procurement method to achieve building and other improvements, the need for reinforcing while clearly delineating the contours of the *Spearin* doctrine first prescribed by this Court in 1918 is long overdue.

"The *Spearin* Doctrine became one of the pillars of U.S. construction law." Buckner Hinkle, Robert MacPherson & James Nagle, *Still Spearin After All These Years*, 12 No. 1 American College of Construction Lawyers Journal 1 (January 2018). The 100-plus year-old doctrine is ingrained in the common law fabric of federal contract and procurement law.

In this case, the United States Army Corps of Engineers ("USACE") is the government agency that solicited design-build proposals. The USACE solicitation documents included a concept design, that the specifications affirmatively represented that USACE accepted. The design depicts a "stormwater management facility" in a manner that is consistent only with a centralized stormwater management approach. Sheffield relied on the design to bid on the basis of designing and constructing centralized

stormwater management system improvements. The government-furnished design proved to be defective when the government acquiesced in the State of Maryland demanding a decentralized stormwater system. Sheffield designed and built the more complex and expensive decentralized system for which it is claiming additional compensation of $1.8 million.

STATEMENT OF THE CASE

Sheffield submitted to USACE a certified claim for an equitable adjustment based on the change in design from a centralized stormwater management ("SWM") system to a decentralized one. (Appx3292-3359)

The USACE contracting officer's final decision dated April 21, 2021 denied that claim. In addition, that decision granted USACE recoupment of $418,406 paid by USACE to Sheffield. (Appx3393-3399; Appx3402; Appx3403-3439).

On July 6, 2021, Sheffield filed its notice of appeal to the ASBCA, as authorized by the Contract Disputes Act, 41 U.S.C. §§7101 *et seq*. (Appx027; Appx031; Appx032; Appx3403-39) The board exercised jurisdiction pursuant to 41 U.S.C. 7104(a). The ASBCA's opinion granted the government's motion for summary judgment and denied Sheffield motion for partial summary judgment. *Sheffield Korte Joint Venture*, ASBCA No. 62972, 23-1 BCA ¶38417 (2023).[2] In so deciding, the board rejected application of the *Spearin* warranty. The board

[2] "Appx[#]" refers to the Federal Circuit appendix.

similarly ruled in upholding the government's claim for recoupment.

Sheffield timely filed its Petition for Review. The Federal Circuit had jurisdiction under 41 U.S.C. 7107(a)(1)(A) and 28 U.S.C. 1295(a)(10). The Federal Circuit held that the *Spearin* implied warranty only extends to design specifications, i.e., specifications that explicitly state in detail what the contractor shall perform, and not to performance specifications that state the result to achieve. The appellate court further held that government-provided concept design documents on SWM requirements were performance specifications, thereby rejecting Sheffield's claim that the *Spearin* implied warranty was triggered. The Federal Circuit also upheld, without explanation, the board's decision granting the government recoupment. *Sheffield Korte Joint Venture* v. *Secretary of the Army*, 2025 WL 1466935 (CAFC 2025).

Background

The summary judgment record reflects the following uncontroverted material facts:

In 2009, the government published "The Army Reserve Design/Build RFP Instruction Manual" ("Design/Build Manual"). (Appx1168) Furnished to government-hired design professionals for use in preparing design documents for an army reserve design-build project, the Manual reads in part:

> It is intended that the conceptual design provides a workable site and building

> layout … which will be acceptable to the Users and RSC if the D/B Contractor's design team makes little effort to improve the RFP conceptual design.

Appx1179.

Furthermore, the Design/Build Manual instructs the government-hired "A/E" (i.e., architect or engineer) to make preliminary contacts with state and local officials to verify their requirements, and that the concept design shall consist of "all components to be included in the project design and construction." (Appx3300; Appx3357; Appx3359)

Beginning in 2014, USACE, via its request for proposals including amendments ("RFP"), solicited proposals[3] from contractors to complete the design for, and to construct, a new Army Reserve Center in Charles County, Maryland. The solicitation documents included conceptual drawings depicting, *inter alia,* major features as well as specifications expressing requirements for various project improvements. (Appx1241; Appx1243; Appx1258; Appx1275; Appx1278-80; Appx1439-62; Appx1511-15)

Michael Baker International, formally known as Michael Baker Jr. Inc. ("Baker"), prepared USACE's solicitation documents for the project. (Appx221) Baker is a "qualified and experienced engineering firm." (Appx3396)

[3] Both a technical proposal and a price proposal were required.

1. The Sheffield Claim

A major feature on the Baker-prepared site plan was labeled "stormwater management facility" (Appx1511; App., *infra*, __a) It was depicted toward the northwest part of the site distinct from other site features such as buildings and parking areas (*id.*) and "utilize[ed] a singular stormwater management area" (Appx2081; Appx3293; Appx3294; Appx3296). The specifications clarify that the Baker-prepared design depicts a SWM facility consisting of a retention pond to which stormwater should flow via swales. (App.60; App.61-62)

The Sheffield design team understood that a single retention pond was depicted for the stormwater management facility (Appx3279) to which stormwater would be directed for ultimate control and management. The government's counsel conceded below that a "centralized stormwater system" is depicted. (Doc. 46, p. 2) This is also known as a Chapter 3 system, the type of SWM system addressed in that particular chapter of the Maryland Department of Environment ("MDE") Stormwater Management Guidelines. Chapter 3 provides best management practices using "structural" devices, including stormwater ponds (Appx3294).

MDE's Guidelines also discuss a Chapter 5 design. "[A] Chapter 5 design emphasizes decentralized, small-scale stormwater management …" using non-structural SWM devices (Appx747; Appx760; Appx762; Appx3293)

According to USACE's project specifications:

> 1.2.4.1 The project conceptual design was developed by the Army Reserve, the Corps of Engineers, and an A/E design team; **this conceptual design is accepted by the Government.**
>
> 1.2.4.3 … The Contractor's designers shall develop and refine the conceptual site and building design in their completion of the design and construction documents. …
>
> 1.5 … The conceptual drawings are included as part of the RFP to provide information and criteria for the Contractor's completion of the design.

App.54-59.

The USACE specifications further indicate that the government or its design team participated in preliminary coordination efforts with MDE regarding the design for SWM. (Appx3413)

The USACE specifications also contain the Permits and Responsibilities clause quoted earlier. (Appx1692)

Sheffield's technical proposal and proposed price to USACE were based on incorporating centralized SWM system improvements, and Sheffield relied on the USACE-furnished conceptual design and specifications in proposing and pricing centralized SWM system improvements. (Appx745; Appx3278; Appx3293-94)

Sheffield was awarded the design-build contract. (Appx134) After contract award, Sheffield's

design team learned from MDE that a decentralized SWM design was necessary (Appx745; Appx3365). As a result, Sheffield abandoned the centralized SWM system design based on the USACE-accepted design and started anew; Sheffield's significantly different decentralized SWM design included 19 devices spread in various locations of the project site. (Appx3278; Appx3281; Appx3295; Appx3334)

The USACE Administrative Contracting Officer acknowledged in comparing the government-furnished SWM concept to the final SWM design that, "[t]he design differs from the RFP concept drawing significantly …." (Appx3284). This change in the SWM design increased Sheffield's design and construction costs, resulting in Sheffield's $1.8 million claim. (Appx745-46; Appx3281)

2. USACE's Claim

USACE claimed recoupment of the $418,406 paid to Sheffield pursuant to USACE's unilateral contract modifications that USACE later rescinded.

The material facts relating to the claim items totaling $418,406 are summarized hereinafter:

(1) A USACE-furnished site pavement plan specifically depicted a straight entry into the site from the north-south service road without a turnaround. However, USACE ordered installation of the turnaround (Appx135-136; Appx715; Appx1512; Appx3376).

(2) A USACE-furnished site pavement plan specifically depicted a certain size entrance radius to the north-south service road. However, USACE ordered a larger radius. (Appx135-136; Appx715; Appx1512; Appx3376).

(3) The USACE specifications call for fire hydrants every 400 feet on center. However, USACE ordered hydrant spacing of 300 feet. (Appx135-36; Appx715; Appx231; Appx725-726; Appx3376).

(4) The USACE specifications called for a precast concrete transition manhole. However, USACE directed the furnishing and installation of a polymer concrete transition manhole. (Appx135-136; Appx715; Appx1858; Appx3376).

(5) USACE-furnished drawings C-101 and C-102 depicts no stormwater inlets. However USACE ordered the furnishing and installation of stormwater inlets. (Appx135-136; Appx231; Appx715; Appx725-726; Appx1551).

(6) The specifications did not require the wash rack to be fully enclosed. However, USACE ordered full enclosure. (Appx135-136; Appx231; Appx715; Appx725-726; Appx1740).

(7) The USACE specifications only identify three specific County permits to acquire for the project. USACE acquiesced in the County's demand that Sheffield perform additional design services to obtain yet another permit—one not among the three identified permits. (Appx135-136; Appx148; Appx715; Appx1852; Appx2444).

The USACE contracting officer's final decision awarded USACE recoupment. (Appx3436-37)

REASONS FOR GRANTING THE PETITION

We realize that in most instances where certiorari is granted, a conflict exists among two or more courts on an important question of federal law. However, the Federal Circuit is the only appellate court with jurisdiction over an appeal from a case involving a Contract Disputes Act claim decided by either of the two available *fora*, namely the board of contract appeals or the federal claims court (41 U.S.C. 7107(a)(1); 28 U.S.C. 1295(a)(3) & (a)(10)).

Thus, the only conflict that can practically occur in such a case is one between the Federal Circuit and this Court, as in this case.

A. The Federal Circuit's Opinion Fails To Adhere To a Firmly Established Fundamental Principle Recognized in *Spearin*

The Federal Circuit's opinion is based on a test that fails to adhere to the full breadth of this

Court's *Spearin* doctrine. The government-furnished concept design information not only specified certain improvements but also depicted other types of improvements "accepted" by, and therefore acceptable to, the government. Sheffield relied on that design information in pricing the project work. When it was determined that the government's design information was flawed, Sheffield was compelled to incur additional costs to overcome the erroneous design information. The Federal Circuit rejected Sheffield's *Spearin*-based claim seeking additional compensation.

This case is of manifest importance and merits certiorari because the Federal Circuit's decision departs from the primary rule of law and rationale underpinning *Spearin*, among other decisions of this Court. This case also demonstrates the need for proper guidance regarding when the *Spearin* doctrine is triggered in the context of modern design-build procurements—one of today's most frequently employed federal government procurement methods for awarding building and other improvement projects.

It is well-known that "the federal government is the largest purchaser of construction services both domestically and internationally." Shiva Hamidinia, *The Misadventures of Shared Design Risk in the New Design-Build World: Strategies for Managing Design Risk and Responsibility on Federal Design-Build Projects,* 38 SPG Construction Lawyer 7 (Spring 2018). Furthermore, the federal government employs the design-build project delivery method with ever-increasing regularity. *Id.*

Therefore, the paramount economic importance bolstering the need for this Court to clarify the contours of the *Spearin* doctrine in the context of the prevalence of federal design-build solicitations nationwide cannot be overstated.

This Court has granted certiorari when faced with an important issue of federal law and the need to clarify the implications of a previous decision rendered by this Court. *See, e.g., Securities and Exchange Commission* v. *United States,* 387 U.S. 202, 207 (1967). The present case meets this two-part test.

1. *Spearin* and Other Precedents of this Court

In *Spearin,* the government furnished plans and specifications for the contractor to follow in constructing a dry dock. A sewer line intersected the site. The plans proved defective with respect to that pre-existing sewer to be diverted, specifically indicating it was unobstructed while omitting mention of a dam within the sewer. When excessive rain and a high tide combined, the internal pressure on the dam caused it to fail, resulting in a failure of the sewer line which, in turn, flooded the dry dock construction site. The government contended the contractor was responsible for the condition; the contractor pointed to what it considered were defective plans. Ultimately, the government terminated the contract.

Justice Brandeis, in writing for the Court in *Spearin*, and deciding the contract was wrongly terminated, recognized two similar fundamental federal government procurement principles: (1) "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" and (2) "the contractor should be relieved, if he was misled by erroneous statements in the specifications." 236 U.S. at 136.

Spearin is not the only decision where this Court addresses the government's liability when plans or specifications issued to the contractor are misleading.

The second principle cited above in *Spearin* was followed in *United States* v. *Atlantic Dredging Co.*, 253 U.S. 1 (1920). There, the government specified what it believed was the character of material to be dredged and included a map of the area to be dredged without publishing the actual results of the borings for that area. The dredging contractor awarded the contract used dredging equipment suitable for the government-specified conditions. The actual conditions encountered were consistent with the boring results; they made dredging both more difficult and costly. The Court pointed out the contractor's claim was not based in tort (instead, sounding *ex contractu*) by affirming the Court of Claims' opinion in which that court "regarded the representation of the character of the material as in the nature of a warranty …." *Id.* at 12.

In upholding the contractor's claim for damages, the *Atlantic Dredging* Court cited *Spearin* and three other decisions of this Court to preface the controlling principle that: "*It is held in those cases 'that the contractor ought to be relieved, if he was*

misled by erroneous statements in the specifications." Id. at 11 (emphasis added; quoting *Spearin*).

Another decision cited in *Atlantic Dredging* is *Hollerbach,* discussed *supra.* There, this Court similarly concluded that government is liable to the contractor when specifications for the dam repair work were inaccurate and caused the contractor which relied on the specifications to incur greater costs of performance.

Another of this Court's decisions cited in *Atlantic Dredging* is *Christie* v. *United States*, 237 U.S. 234 (1915). There, the government-provided plans that misrepresented the true character of the subsurface materials expected to be encountered. Because those plans misled the contractor, the Court upheld the contractor's right to additional compensation for the additional costs incurred to address the more difficult subsurface conditions.

Nearly 80 years after *Spearin*, *Hercules Inc.* v. *United States*, 516 U.S. 417, 424 (1996) was decided. The Court held that neither *Spearin* nor the implied warranty extended to a government contractor's costs to defend and settle third-party claims. In so ruling, the *Hercules* Court observed that *Spearin* upheld "a cause of action for breach of contractual warranty of specifications." The Court, while defining the contours of the *Spearin* doctrine, reiterated the import of its 1918 decision:

> 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. The specifications will not frustrate performance or make it impossible.

Id. at 425. The Court thereby acknowledged, albeit in *dicta*, that when the government specifies a design outcome that is impossible to achieve, the *Spearin* warranty is breached.

The overarching federal procurement principle spawned by *Spearin* is sensible in allocating risks. It can be summed up as: The government impliedly warrants that its design directions and information contained in the solicitation are free from error. Accordingly, if the design is defective and the contractor is thereby misled in pricing the work, the government has breached the implied warranty. It is liable to the contractor for the resulting damages.

2. The *Spearin* Progeny

The Federal Circuit and, its predecessor, United States Claims Court have expressed the *Spearin* principle in similar ways. Thus,

> Whenever the government uses specifications in a contract, there is an accompanying implied warranty that these specifications are free from errors. The test for recovery based on inaccurate specifications is whether the contractor was misled by these errors in the specifications.

Robins Maintenance, Inc. v. *United States*, 265 F.3d 1254, 1257 (CAFC 2001) (internal citation omitted.)

Likewise:

> Under the *Spearin* doctrine, when the government provides a contractor with defective specifications, the government is deemed to have breached the implied warranty that satisfactory contract performance will result from adherence to the specifications, and the contractor is entitled to recover costs proximately flowing from the breach.

Franklin Pavkov Const. Co. v. *Roche*, 279 F.3d 989, 994–95 (CAFC 2002)

See also Hahnenkamm, LLC v. *United States*, 104 F.4th 1333 (CAFC 2024) ("… the government has been held liable for damages incurred due to inaccurate statements in bid specifications on the theory that there is an implied warranty that these statements are accurate."); *La Crosse Garment Mfg. Co.* v. *United States,* 432 F.2d 1377, 1384 (Ct. Cl. 1970) (In authorizing an equitable adjustment, the court observed that "government contracts are held to contain a warranty that satisfactory performance is possible, if the specifications are followed, and the government is therefore liable for the increase in costs by reason of defects in the specifications.")

Notably, the court of claims concluded that *Spearin* governs when government-furnished plans and specifications only imply, albeit erroneously,

that a particular method will be successful. "Specifications so susceptible of a misleading reading (or implication) subject the [government] to answer to a contractor who has actually been misled to his injury." *Helene Curtis Industries, Inc.* v. *United States*, 312 F.2d 774, 778 (Ct. Cl. 1963), citing *Spearin* among other cases. There, the specifications were silent regarding whether grinding a particular chemical would be necessary to achieve the desired end result. However, because the specifications implied that proceeding *sans* grinding would be successful, a *Spearin* implied warranty claim was triggered when grinding was indeed necessary.

In yet another decision, the court of claims observed that: "It is now familiar law that a contractor is entitled to an equitable adjustment under the Changes Article for increased costs of performance due to defective specification." *L.W. Foster Sportwear Co.* v. *United States,* 186 Ct.Cl. 499, 507, 405 F.2d 1285 (1969). *Accord: Clearwater Constructors, Inc.* v. *United States,* 71 Fed.Cl. 25, 32 (2006).[4]

Significantly, even the board, in the context of cases involving government design-build solicitations,

---

[4] As briefed to the board, entitlement to compensation also rests under a constructive change order theory since the scope of the SWM work was reasonably understood to be based on incorporating a centralized SWM system, and the government, expressly or impliedly, ordered the change to a decentralized SWM system. *See Square One Armoring Services Co.* v. *United States,* 162 Fed. Cl. 429, 434 n.3 (Sept. 22, 2022), quoting *Bell/Heery* v. *United States*, 739 F.3d 1324, 1335 (CAFC 2014). *Accord: U.S. Aeroteam, Inc.* v. *United States,* 2022 WL 2431626, *2 (CAFC 2022); *BGT Holdings LLC* v. *United States,* 984 F.3d 1003, 1012 (CAFC 2020).

has ruled that the government-furnished concept design must be error-free, thereby applying (without citing) the *Spearin* doctrine.

In *M.A. Mortenson Co.*, 93-3 BCA ¶26,189 (1993), the USACE-hired design consultant prepared concept drawings for inclusion in the solicitation documents. The design-build contract required the contractor to complete the design and construct the improvements. The issue in *Mortenson* was whether the government warranted the adequacy of the concept drawings. This issue was crucial to the contractor's equitable adjustment request because the quantities of what the concept drawings called for were inadequate; as a result, the design-builder was required to provide larger quantities than what the concept drawings expressed. The board, consistent with the *Spearin* doctrine, concluded that the design-builder had the right to rely on the information in the concept drawings and accordingly granted the design-builder's claim for additional compensation.

Mortenson is noteworthy in how it relates to the case at bar. The contractor there was afforded two alternative concept designs from which to select, and the contractor chose the alternative that proved defective. Thus, the contractor was authorized, but not bound, to select that alternative. Similarly, the solicitation documents in the present case expressly stated the concept design depicting a single stormwater facility was accepted by the government and Baker, and therefore acceptable. That is enough to trigger the *Spearin* implied warranty.

In *CDM Constructors, Inc.*, ASBCA No. 60454, 18-1 BCA ¶37190 (2018), the Board summarized the

holding in *Mortenson, supra,* as "concept drawings create a warranty, even if the contract does not require a contractor to follow the drawings." USACE's Request for Proposal or RFP in *CDM* called for the successful design-builder to design and construct a water treatment plant as described in the RFP. CDM submitted a claim on the basis that after CDM furnished a standby generator per the concept drawings, USACE demanded a different, more expensive generator. In ruling in favor of the contractor, the board stated that "by providing the concept drawings, the Corps warranted that satisfactory performance would result from adherence to those drawings…." The board added that USACE breached the warranty when it rejected the standby generator design since it was consistent with the concept drawings. On reconsideration, the board wrote: "Legally, the government's issuance of a misleading solicitation itself is the basis for a price adjustment under a defective specification claim." *CDM Constructors, Inc.*, ASBCA No. 60454, 19-1 B.C.A. (CCH) ¶ 37332 (2019).[5]

---

[5] After distinguishing between design and performance specifications and following the citation to *Spearin,* the authors in an astutely drafted article point out that the *CDM* decision holds that "by providing the concept drawings, the agency warranted that satisfactory performance would result from adherence to those drawings." Schaengold, Prusock & Muenzfeld, 19-2 *Briefing Papers* 1 (Jan. 2019). Also, well-respected authors addressing government contract cases have concluded regarding *CDM* that "the Board held that concept drawings were detailed specifications because they were used by the bidders to compute their prices." Nash & Feldman, 1 *Government Contract Changes* §13:13 (June 2022 Update). This makes sense since the design team for the design-build

In *Parsons Evergreene, LLC*, ASBCA No. 58634, 18-1 BCA ¶37137 (2018), the Air Force-hired Michael Baker & Associates to prepare 35% complete concept drawings for inclusion in the design-build solicitation. The drawings included a double wall masonry design—block and brick. Ultimately, the government required Parsons to adopt a more expensive brick wall design to ensure against progressive collapse. In concluding that this required departure to a more robust wall design from that set forth in the concept drawings constitutes a compensable change to Parsons, the board reasoned that, like USACE in *Mortenson, supra,* the Air Force warranted the adequacy of the information in the concept drawings.[6]

3. The Court of Appeals' Test for Applying *Spearin* Is Too Narrow, Violating *Spearin*

A design-build project, also referred to as a design-build bridging project, creates a wrinkle *Spearin*-wise. Under the design-build procurement method, "the government provides a partial design with the expectation that the contractor will

---

contractor is not expected to undertake the full-fledged design development based on the concept design and to obtain federal, state or local review of the design details until *after* the contract is awarded; rather, the concept drawings and specifications afford critical information on which to price the work during the bid stage.

[6] On appeal, the court of appeals reversed as to damages, but did not overturn the determination of the government's breach of warranty. *Parsons Evergreene, LLC* v. *Secretary of Air Force*, 968 F.3d 1359 (CAFC 2020).

complete the design and build the project." *Balfour Beatty Const., LLC* v. *Administrator of General Services Administration,* 2025 WL 798865, *2 (CAFC March 13, 2025). However, the government does not issue "ready for construction" plans and specifications. Rather, a contractor under a design-build contract undertakes responsibility—post-contract award—to complete the design. For that portion of the design left open to the contractor's (or its design team's) ingenuity, the contractor clearly bears responsibility for the costs to create a proper design and construct it. The rationale for this risk allocation is clear: the contractor has the flexibility to select a suitable, yet adequate design to accomplish the expressed result the government seeks—*provided the result is achievable*.

The Federal Circuit has adopted a design specification versus performance specification test for determining when *Spearin* applies. Thus, *Spearin* governs only when the government furnishes a "design specification." *Stuyvesant Dredging Co.* v. *United States,* 834 F.2d 1576, 1582 (CAFC 1987) ("Detailed design specifications contain an implied warranty that if they are followed, an acceptable result will be produced."). *Stuyvesant* explains the demarcation between design and performance specifications:

> 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 how to achieve those results.

Id.

In *Balfour Beatty Const., LLC* v. *Administrator of General Services Administration, supra*, the Federal Circuit applied the *Spearin* doctrine to a contractor's claim arising from a design-build project. There, the court ruled that a government-furnished drawing instruction to match the thickness of a pre-existing slab was "sufficiently definite to constitute a design specification," and accordingly the design-build contractor was entitled to recover under *Spearin* when a thicker foundation became necessary. *Id.*

Of utmost importance, the Federal Circuit's design specification/performance specification test possesses a serious built-in flaw, allowing an outcome contrary to the rationale underlying *Spearin*. That major shortcoming manifested itself in the case at bar. The test is erroneously predicated on an "either/or" scenario, i.e., either a design specification subject to the implied warranty or a performance specification, which the Federal Circuit ruled is not subject to the implied warranty. Significantly, the test runs afoul of *Spearin* when the government's concept design, relied upon by the contractor—whether directed to be followed or declared as acceptable—cannot be achieved. Hence, in that instance, the government-provided design may theoretically allow the contractor discretion during design development in pursuit of the desired result—but in reality, the specified or expressly acceptable

result simply cannot be accomplished under the circumstances.

As such, the government must warrant the adequacy of that portion of the government-provided design for the design-build project, not only if it calls for a specific flawed or unachievable design but also if the design document seeks a desired or acceptable result that is unattainable. This breadth of the warranty stems from the longstanding principle espoused in *Spearin*, namely that when the government's solicitation furnishes design information that proves erroneous, and the contractor is misled by relying thereupon in developing its bid, the contractor should recover the resulting additional costs.

Unfortunately, when faced with this flaw, the Federal Circuit was unwilling to directly tackle and correct the test to conform to *Spearin*. Instead, the court incorrectly earmarked as a performance specification the depicted and specified centralized SWM system accepted by the government for incorporation in the project, even though that result could not be achieved under the circumstances. The Federal Circuit' opinion thereby wrongly departed from the law of the land established by *Spearin*.

4. Requiring the Invocation of the Full Parameters of the *Spearin* Doctrine Will Encourage More Competitive Bidding

The serious implication emanating from the Federal Circuit' watering down, and therefore deviating from, the *Spearin* doctrine is readily

apparent. When the contractor cannot rely on the soundness of the government-furnished design in the design-build process, the bidding contractor faced with such uncertainty is prone to add a contingency amount to its bid to address the risk of an unknown design deficiency. This practice drives up prices, generating expenditures taxpayers ultimately must unnecessarily bear.

On the other hand, ensuring the bidding contractor that it may place reliance on the design as being free from defects promotes—borrowing an archaic expression—a bidder to "sharpen its pencil" at bid time, thereby avoiding the urge to add protective contingency dollars to the bid. Indeed, the Federal Circuit acknowledges that fully recognizing the parameters of the implied warranty of adequacy in the government's design instrument "allows contractors to submit more accurate bids by eliminating the need for contractors to inflate their bids to account for contingencies that may not occur." *Cf. H.B. Mac, Inc.* v. *United States,* 153 F.3d 1338, 1343 (CAFC 1998)

To ensure a sound method for procuring design-build services in a manner that encourages best pricing practices, confidence should be instilled in design-build contractors that they can unhesitatingly rely during the bidding stage on the adequacy of government-furnished design information. Whether in the form of a concept drawing, a final drawing, or a specification, the norm should be an error-free design instrument upon which a contractor may base its bid.

So, when the government publishes its design that the contractor is either required to follow or that

the government has expressly endorsed or accepted (as in this case), the contractor should, unless there is evidence that the design error was patent, bid based on the reliability of that design without risk of assuming the costs to overcome an unknown error in the government-furnished design information.

Spearin instructs that the government warrants defect-free design information. When the contractor knows the government assumes full responsibility for its design, that enables the contractor to rely on the correctness thereof during the solicitation stage and to price accordingly. Correspondingly, an equitable price adjustment is warranted when the government-provided design proves defective after the contractor relied thereupon to its economic detriment. *E.L. Hamm & Associates* v. *England,* 379 F.3d 1334, 1338 (CAFC 2004).

5. Enforcing the Principle That the Government Bears Responsibility For Providing Erroneous Information Also Promotes Integrity In the Procurement Process

Furthermore, this case demonstrates the need to reinforce government integrity in the federal procurement process. Such a policy should be underscored, not discouraged. While "fundamental fairness" is an expression this Court may hear too frequently, it definitely fits here. It is a matter of fundamental fairness for the government to accept responsibility for the accuracy of a government-furnished work product. The government should not

be permitted, without consequence, to mislead contractors to their injury.

In *Heckler* v. *Community Health Services*, 467 U.S. 51, 61 n.13 (1984), Justice Stevens approvingly adopted apropos quotes from a Ninth Circuit and a Pennsylvania Supreme Court opinion. They are as follows: "To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government," and "Men naturally trust in their government, and ought to do so, and they ought not to suffer for it." Similarly, contractors bidding on the basis of design information published by the government should be able to treat that information as reliable.

6. The Government Acceptance of a Particular System As Stated In the Solicitation Documents & Authorizing the Completion of that Design Is Subject To the *Spearin* Warranty

The government-furnished concept drawings depict a "stormwater management facility" situated in one area of the Project site, distinct from other major features such as buildings and paved parking elsewhere on the site. (App.53.) As the summary judgment record indicates, without equivocation, that depiction reflects a centralized SWM system, also known as a Chapter 3 system. (*id.*; Appx2081; Appx3293-94; Appx3296; Doc. 46, p. 2) The specifications clarify that the predominant feature of that SWM system is a large retention pond, with swales elsewhere on the project site directing the stormwater to the pond. (App.61-62; Appx 3279)

That specification clarification confirms that a Chapter 3 SWM system was contemplated.

Notably, specification sections 1.2.4.1, 1.2.4.3 and 1.5 inform the bidders that the government and the government-hired design firm, i.e., Baker, have accepted the Baker-prepared concept design, and that the concept design shall be utilized to complete the project design. (App.54-59) The government-issued plans and specifications therefore call for a government-accepted centralized SWM system.[7]

The expectation that the Baker-authored concept design would be error-free is reinforced by the fact that Baker is known as a qualified and experienced engineering firm (Appx3396). Also fortifying the reasonableness of expecting an error-free concept design is the government's Design/Build Manual for Army Reserve projects. It instructs that major project features shall be included in the concept design in a manner that will not require significant design modification should the design-build contractor do little in revising the concept design. Since the Manual states that the conceptual design shall prove a "workable site" (Appx1168; Appx 1179), the reasonable expectation is that the government-advanced concept design is feasible and capable of being employed.

---

[7] The court of appeals' opinion erroneously states: "While the conceptual drawings depict a 'stormwater management facility' in the northern portion of the site, they do not specify the type of stormwater management system." (Doc. 48, p. 4) However, the drawing depiction of that facility as clarified by the specifications inform one that a Chapter 3 SWM system, with its predominant element being a retention pond, was not only contemplated but also accepted by USACE and its design firm.

In any event, a government-issued design document depicting as acceptable what amounts to a particular type of system, rather than one or more other possible systems, should be considered a design specification upon which the contractor has a right to bid. In establishing the contours of the *Spearin* doctrine, there is no sound reasoning for distinguishing a design calling for a particular, but unsuitable system from a design erroneously directing a defective design detail.

The summary judgment record reflects that Sheffield relied on the government-furnished design documents calling for, or at least conveying as acceptable, a centralized SMW system as opposed to a decentralized SWM system in developing its price proposal the government accepted. (Appx745; Appx3278; Appx3293-94) [8] In addition, the record establishes that Sheffield incurred additional costs in jettisoning the centralized SWM design approach reflected in the concept drawings and specifications, and to start from scratch in designing a decentralized system consisting of 19 SWM devices

[8] Such reliance during the bidding stage makes sense. At that point, neither Sheffield nor any other interested design-build contractor has been awarded the Project. With only a concept design, bidders lacked what state or local officials typically need to review in judging the adequacy and validity of a yet-to-be completed design. A state or local official cannot be expected to expend valuable time to conduct a design review session involving a concept design with a bidder not yet been awarded the contract. Besides, the specifications states that the government "preliminarily" coordinated with MDE's representative on SWM, thereby indicating certain factors must be satisfied. (Appx3413) Those factors are only consistent with a Chapter 3 centralized system. (Appx3279)

spread throughout. (Appx3278; Appx3281; Doc. 19, pp. 10-12; Appx3281)

Under the bedrock federal procurement policy advanced in *Spearin,* and applying that policy in the design-build context, "[a] public entity cannot absolve itself of responsibility for assuring that its preliminary design provided to design-build contractors is reasonably accurate." *See* Buckner Hinkle, Jr., Robert J. MacPherson, and James F. Nagle, "Still *Spearin* After All These Years?", Vol. 12, Issue 1 *Journal of the American College of Construction Lawyers* 1 (January 2018).

A well-known and well-respected treatise author on federal government contracting is Ralph C. Nash, Jr., Professor Emeritus of Law at the George Washington University School of Law.[9] He reviewed the Federal Circuit's decision and proffered the following critique:

> If, as the judges concluded, the concept drawings were of no consequence, what was their purpose? In this case, they induced the contractor to base its low bid on them, to the Government's benefit. That seems like a questionable practice.

39 Nash & Cibinic Report NL ¶42 (August 2025).

---

[9] Professor Nash co-authored several important federal government contracting legal works with John Cibinic, Jr. and others. For a listing, see: https://www.law.gwu.edu/ralph-clarke-nash-jr .

Exactly! Professor Nash's question can be expanded to: What is the purpose and effect of the government sanctioned concept drawing depicting a "stormwater management facility" consisting of a large retention pond in a limited area of the project site, especially when coupled with the specification terms stating the government and its design firm have accepted the concept design and that the design should be used to complete the project design and construct the project?

The law encourages a contract interpretation that avoids rendering terms meaningless. *See Wells Bros. Co. of New York* v. *United States,* 254 U.S. 83, 87 (1920) ("… language … cannot be treated as meaningless and futile and read out of the contract."); 11 Williston on Contracts §32:5 (4th edition) ("An interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable.").

Although Sheffield argued to the Federal Circuit that giving meaning to the government-accepted concept design and the earlier-quoted specification terms comports with this fundamental contract interpretation principle (Doc. 15, p. 58), the Federal Circuit's decision (Doc. 48) failed to give any effect to the above-quoted portions of the government contract.[10] The Federal Circuit's opinion in affirming the board's decision on Sheffield's $1.8 million claim is therefore clearly erroneous on this point as well.

As for the Federal Circuit's decision affirming that USACE should recoup the $418,406 paid for the

---

[10] The board's decisions and the court of appeals' opinion wholly ignore specification sections 1.2.4.1, 1.2.4.3 and 1.5.

seven claim items identified *supra*, that outcome is also clearly erroneous.

If this petition is granted, Sheffield will elaborate in its briefing on why the Federal Circuit erred in summarily upholding, without reasoning, the USACE claim, and thereby violated *Spearin*. Suffice it to say that, in each instance, the USACE-issued plans and specifications called for an element, a feature or something similar that turned out to be defective, deficient or inadequate. Sheffield, in each case, relied on the USACE design documents as to what the government-furnished plan information and specifications indicated to its economic detriment. And each claim item directly triggers the *Spearin* doctrine and involves a government breach of the implied warranty.

7. This Court Is the Appropriate Forum For Defining the Boundaries of the Over 100 Year-Old *Spearin* Doctrine

This Court has established and adhered to the principle that the federal government impliedly warrants that design information it furnishes will be free of fault. The *Spearin* doctrine has played a fundamental role in federal government procurement law for over a century. The principle is worthy of full enforcement to the fullest extent practicable, so as to encourage a fair procurement process that promotes competitive pricing favorable to the government for design-build services. To "guarantee the integrity of the federal contracting process" is of paramount importance. *Cf. United States* v. *Mississippi Valley Generating Co.,* 364 U.S. 520, 565 (1961). This Court

is therefore the appropriate forum, and this case is the appropriate vehicle, in which to definitively state, particularly, the parameters of how this Court's *Spearin* doctrine applies in the context of design-build procurement.

B. Other Points Raised By the Federal Circuit Should Not Discourage Certiorari

Other points advanced in the Federal Circuit's decision should not dissuade *certiorari.*

First, the Federal Circuit adopted the view that, regardless of the government-furnished concept design, the specifications required compliance with state and local requirements. Also, the court remarked that the 2010 MDE guidelines for federal projects contained terms to apply environmental site design, i.e., a Chapter 5 system, to the maximum extent possible.

However, the Federal Circuit' opinion ignores the following vital, yet undisputed, record evidence that defeats any suggestion that the solicitation documents required a Chapter 5 SWM system: Per section 2.2.6 of the Army Reserve Design/Build RFP Instruction Manual, the government-hired design firm is expected to contact local and state agencies to verify their respective requirements and to include them in the request for proposal documents if the requirements affect the project's scope, schedule or cost. (Appx3352; Appx 3357) A waiver of or variance from what otherwise may be required under MDE's 2010 SWM guidelines is permissible. (Appx757-59; Appx3280). Specification 3.7.5.2 reflects that based

on preliminary coordination with MDE, certain SWM factors must be met; those factors are consistent with a Chapter 3 centralized system while incongruent with a Chapter 5 decentralized system. (Appx3279) Other points noted by a member of Sheffield's civil engineering team (Appx3278) [11] support that engineering team's conclusion that the solicitation documents permit a Chapter 3 SWM system (Appx3279-80).

Second, the Federal Circuit's opinion places emphasis on the drawing note indicating that the contractor had the discretion to determine the "actual size and location" of the SWM facility. (App.6; App.53.)

But the drawing designation "stormwater management facility" is stated in the singular. In addition, the depiction of that single facility is one clearly drawn segment of the site only. Beyond that, the specifications clarify that the SWM facility was to consist of a stormwater pond, which is a Chapter 3 structural device. The foregoing cannot be reasonably construed to mean that what was intended was a Chapter 5 system of non-structural devices spread in various locations throughout the project site. Consistent with the foregoing, Sheffield's design team concluded that: "A reasonable interpretation of this would be that the Contractor's

---

[11] Sheffield-engaged the civil engineering firm of Mott MacDonald ("MM") (Appx3278). Gary Snyder, P.E., P.G., of MM wrote the September 20, 2016 letter report (Appx3278-81). Clifford Wilkinson, P.E., of MM wrote the January 3, 2020 letter report (Appx3394-99). USACE did submit contrary evidence from a professional engineer.

design will establish the size and location of the Chapter 3 device in order to provide Water Quality Volume, Recharge Volume, and Channel Protection Storage Volume." (Appx3280)

Third, the Federal Circuit's opinion seems to suggest that specification terms promoting "[l]ow impact development strategies" (i.e., LID strategies) to restore "natural hydrologic functions of a site" mandate employing a Chapter 5 system, thus countering the notion that a Chapter 3 SWM was acceptable.

However, a Sheffield civil engineering team member points out that LID strategies are not consistent with Chapter 5 Environmental Site Design, adding that the Chapter 3 system Sheffield proposed was indeed designed in a manner "to restore the predevelopment hydrology of the site," consistent with LID. (Appx3396; Appx3399)

Fourth, the Permits & Responsibilities Clause (48 C.F.R. 52.236-7) does not compel the outcome reached, contrary to what the Federal Circuit's opinion implies.

The first sentence of the Permits & Responsibilities clause reads: "The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work."

Sheffield's position is buttressed by *Hills Materials Co.* v. *Rice,* 982 F.2d 514 (CAFC 1992). There, the contractor's bid was based on OSHA

standards published in the specifications. Post award, the government enforced application of more stringent OSHA standards. The Federal Circuit held, however, that while the contractor must adhere to the new standards by virtue of the Permits & Responsibilities clause, the contractor was nevertheless entitled to additional compensation since its bid was predicated on the level of OSHA standard compliance the specific specification terms represented as acceptable.

The board has correctly acknowledged that the Permits & Responsibilities clause constitutes boilerplate, i.e., general standard terms. *J.E. McAmis, Inc.,* ASBCA No. 54455, 10-2 BCA ¶34607 (Nov. 18, 2010). So, too, did the former Corps of Engineers Board of Contract Appeals. *Odebrecht Contractors of California,* ENGBCA No. 6372, 2000 WL 975128 (July 6, 2000).

Thus, the particular features the government-furnished design specifies or expressly designates as acceptable are treated as specific, while the terms calling for compliance with state and local laws and codes at the contractor's costs are treated as general. The former controls. *City of Owensboro* v. *Owensboro Waterworks Co.,* 243 U.S. 166, 184 (1917) ("… specific should always control general provisions in a contract where they conflict ….”); *Hills Materials Co.* v. *Rice, supra* at 517 ("Where specific and general terms in a contract are in conflict, those which relate to a particular matter control over the more general language.").

Even *Spearin* adopts the principle that the implied warranty is not overcome by general disclaimer clauses. 248 U.S. at 137. The Federal

Circuit adheres to this tenet. *White* v. *Edsall Const. Co., Inc.,* 296 F.3d 1081, 1085 (CAFC 2002); *Al Johnson Constr. Co.* v. *United States*, 854 F.2d 467, 468 (CAFC 1988) ("The implied warranty is not overcome by the customary self-protective clauses the government inserts in its contracts ….").

A construction law treatise aptly points out when citing *Hollerbach* and *Spearin* in support that: "In a series of landmark cases decided between 1914 and 1920, the United States Supreme Court shredded the effect of such general disclaimers by holding that the contractor was entitled to rely upon specific positive statements in the specifications and upon other design details, without regard to general contract language requiring the contractor to make an independent investigation of conditions." 5 Bruner & O'Connor Construction Law § 14:54 (footnotes omitted).

The principle of construing conflicting specific and general terms in favor of the specific underscores why the Federal Circuit in *Hills Materials Co.* v. *Rice* correctly held that the Permits & Responsibilities clause did not control as to the question of entitlement to additional performance costs.

Besides, construing the Permits & Responsibilities clause to compel, at the contractor's cost, adoption of a design that meets state and local requirements, when it varies from a particular design directed or accepted by the federal government, effectively makes meaningless those terms calling for and declaring as acceptable that very design. Such an interpretation must be rejected as it violates a fundamental contract principle applied by this Court. *See Wells Bros. Co. of New*

York v. *United States, supra*. *See also* 11 Williston on Contracts §32:5.

CONCLUSION

This Court should grant certiorari.

Michael E. Wilson, Esq.
Counsel of Record
UB GREENSFELDER LLP
10 S Broadway Ste 2000
St. Louis, MO 63102
mwilson@ubglaw.com
(314) 516-2680

Dated: November 5, 2025 *Counsel for Petitioner*