

No. \_\_\_\_\_

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IN THE SUPREME COURT OF THE  
UNITED STATES

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**HAMP'S CONSTRUCTION LLC,**  
Petitioner,  
v.

**SECRETARY OF THE ARMY,**  
Respondent.

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

**PETITION FOR A WRIT OF  
CERTIORARI**

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## I. QUESTIONS PRESENTED

1. Whether a Government construction contract containing the Differing Site Conditions clause, project-wide subsurface boring logs, drawings depicting construction traffic on the affected bank, and an amended solicitation authorizing barge-based work may be construed to make no representation whatsoever about the physical suitability of the affected bank for the construction operations the project required.
2. Whether the Federal Circuit may reject a Type I differing site condition claim as a matter of contract interpretation by treating the absence of a boring at the precise location of a latent failure as dispositive, notwithstanding evidence that the contract documents, read as a whole, indicated stable conditions suitable for top-of-bank construction operations.
3. Whether, in a Government-drafted construction contract containing ambiguous or incomplete site-condition information, the Government may avoid responsibility under the Differing Site Conditions clause by characterizing its own drawings, traffic designations, and available geotechnical information as nonrepresentative after performance reveals latent subsurface failures.

## II. PARTIES TO THE PROCEEDING

Petitioner Hamp's Construction LLC was the appellant in the United States Court of Appeals for the Federal Circuit and the appellant before the Armed Services Board of Contract Appeals.

Respondent Secretary of the Army was the appellee in the United States Court of Appeals for the Federal Circuit and the respondent before the Armed Services Board of Contract Appeals.

## III. RELATED PROCEEDINGS

United States Court of Appeals for the Federal Circuit:

*Hamp's Construction LLC v. Secretary of the Army*, No. 24-1528, judgment entered June 30, 2026.

Armed Services Board of Contract Appeals:

*Appeal of Hamp's Construction LLC*, ASBCA No. 62257, decision issued February 2, 2024.

Petitioner is unaware of any other proceeding in any court or agency directly related to this case.

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**Cases:**

*Hamp's Constr. LLC v. Sec'y of the Army*,  
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**Statutes:**

28 U.S.C. § 28 USCS § 1254..... 1

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**Regulations:**

48 CFR 52.236-2 (2026) ..... 5-6,9,13

48 CFR 36.502 (2026) ..... 5,10

## IV. OPINIONS BELOW

The opinion of the Federal Circuit is reported at 179 F.4th 1343 and is reproduced at App. A-4 to A-20. The Federal Circuit's judgment is reproduced at App. A-3. The decision of the Armed Services Board of Contract Appeals is reproduced at App. A-21 to A-75.

## V. JURISDICTION

The Federal Circuit entered judgment on June 30, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1), which authorizes review by writ of certiorari of cases in the courts of appeals upon a petition by a party. 28 USCS § 1254.

## VI. CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The following provisions are involved:

### 1. 28 U.S.C. § 1254(1):

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

### 2. 41 U.S.C. § 7107:

- (a) Review.

- (1) In general. The decision of an agency board is final, except that—(A) a contractor may appeal the decision to the United States Court of Appeals for the Federal Circuit within 120 days

from the date the contractor receives a copy of the decision; or (B) if an agency head determines that an appeal should be taken, the agency head, with the prior approval of the Attorney General, may transmit the decision to the United States Court of Appeals for the Federal Circuit for judicial review under section 1295 of title 28, within 120 days from the date the agency receives a copy of the decision.

(2) Tennessee Valley Authority. Notwithstanding paragraph (1), a decision of the board of contract appeals of the Tennessee Valley Authority is final, except that—(A) a contractor may appeal the decision to a United States district court pursuant to section 1337 of title 28, within 120 days from the date the contractor receives a copy of the decision; or (B) the Tennessee Valley Authority may appeal the decision to a United States district court pursuant to section 1337 of title 28, within 120 days from the date of the decision.

(3) Review of arbitration. An award by an arbitrator under this chapter [41 USCS §§ 7101 et seq.] shall be reviewed pursuant to sections 9 to 13 of title 9, except that the court may set aside or limit any award that is found to violate limitations imposed by Federal statute. (b) Finality of agency board decisions on questions of law and fact. Notwithstanding any

contract provision, regulation, or rule of law to the contrary, in an appeal by a contractor or the Federal Government from the decision of an agency board pursuant to subsection (a)—

- (1) the decision of the agency board on a question of law is not final or conclusive; but
- (2) the decision of the agency board on a question of fact is final and conclusive and may not be set aside unless the decision is—
  - (A) fraudulent, arbitrary, or capricious;
  - (B) so grossly erroneous as to necessarily imply bad faith; or
  - (C) not supported by substantial evidence.
- (c) Remand. In an appeal by a contractor or the Federal Government from the decision of an agency board pursuant to subsection (a), the court may render an opinion and judgment and remand the case for further action by the agency board or by the executive agency as appropriate, with direction the court considers just and proper.
- (d) Consolidation. If 2 or more actions arising from one contract are filed in the United States Court of Federal Claims and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the United States Court of

Federal Claims may order the consolidation of the actions in that court or transfer any actions to or among the agency boards involved.

- (e) Judgments as to fewer than all claims or parties. In an action filed pursuant to this chapter [41 USCS §§ 7101 et seq.] involving 2 or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one of the claims can be divided for purposes of decision or judgment, and in any action where multiple parties are involved, the court, whenever appropriate, may enter a judgment as to one or more but fewer than all of the claims or portions of claims or parties.
- (f) Advisory opinions.
  - (1) In general. Whenever an action involving an issue described in paragraph (2) is pending in a district court of the United States, the district court may request an agency board to provide the court with an advisory opinion on the matters of contract interpretation under consideration.
  - (2) Applicable issue. An issue referred to in paragraph (1) is any issue that could be the proper subject of a final decision of a contracting officer appealable under this chapter [41 USCS §§ 7101 et seq.].
  - (3) Referral to agency board with jurisdiction. A district court shall direct a request under paragraph (1) to

the agency board having jurisdiction under this chapter [41 USCS §§ 7101 et seq.] to adjudicate appeals of contract claims under the contract being interpreted by the court.

- (4) Timely response. After receiving a request for an advisory opinion under paragraph (1), an agency board shall provide the advisory opinion in a timely manner to the district court making the request.

- 3. FAR 52.236-2: As prescribed in 36.502, insert the following clause:

**DIFFERING SITE CONDITIONS (APR 1984)**

- (a)** The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.
- (b)** The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ

and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

**(c)** No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required; provided, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.

**(d)** No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.

(End of clause)

## **VII. STATEMENT OF THE CASE**

### **A. The Solicitation and Contract Documents.**

The Army Corps of Engineers solicited bids in July 2012 for flood-control improvements to Trapp Canal in Jefferson Parish, Louisiana. The solicitation incorporated FAR 52.236-2, the Differing Site

Conditions clause, and FAR 52.236-3, Site Investigation and Conditions Affecting the Work.

The solicitation included canal cross-sections and ten 2008 boring logs. Eight borings were taken on the east side of the canal, while two were taken on the west side near the canal's northern portion. The contract also included drawings that, according to Petitioner, depicted "Construction Traffic" on the top of the southwest bank.

The original solicitation prohibited barge use in the canal, but the Corps amended the solicitation before bid to remove that prohibition. The amendment advised that canal work "may have to be performed" from a floating platform, barge, or other specialized equipment. Petitioner submitted its bid after the amendment and received the contract in September 2012.

## **B. The Latent Failures on the Southwest Bank.**

The project site comprised northeast, northwest, southeast, and southwest quadrants divided by the canal and Harvey Boulevard. Petitioner completed work in the northern quadrants without major problems.

When Petitioner prepared to work in the southwest quadrant in May 2013, it found a collapsed bank and a depression approximately 100 to 200 feet long and 25 feet wide. Petitioner identified four additional failure areas and concluded that loaded construction trucks could not safely operate on the southwest bank. Petitioner therefore changed to a largely barge-based operation, resulting in double handling of materials and substantial delay.

Petitioner presented evidence that the southwest-bank failures were not visible during its two pre-bid inspections, that the Government's geotechnical expert agreed the supplied borings did not reveal the particular failures, and that the contract materials did not warn of the encountered instability. Petitioner also offered evidence that the project designer, Government personnel, and the Government's independent estimate anticipated top-of-bank operations by loaded trucks, excavators, and other equipment.

### C. The Administrative Claim and Federal Circuit Decision.

Petitioner submitted a request for equitable adjustment seeking \$3,948,833 and a 237-day extension based on differing site conditions and defective specifications on the southwest bank. After the contracting officer denied the request and then denied Petitioner's certified claim, Petitioner appealed to the Armed Services Board of Contract Appeals.

The Board found that Petitioner encountered real problems on the southwest bank and reasonably determined that heavy equipment could not safely operate there. The Board nevertheless denied relief because it concluded that the contract documents contained no representation of conditions at the precise location where the failures manifested.

The Federal Circuit affirmed. It held that the supplied boring logs did not provide a reasonable contractor with indications of subsurface conditions on the southwest bank and that Petitioner's

arguments regarding traffic-access drawings were forfeited. The court also concluded that the original barge prohibition could not support Petitioner's claim because it was removed before Petitioner bid.

## **VIII. REASONS FOR GRANTING THE PETITION**

### **A. The Decision Below Converts the Differing Site Conditions Clause into a Geographic-No-Representation Rule Inconsistent with the Clause's Allocation of Risk.**

FAR 52.236-2 provides relief where a contractor encounters subsurface or latent physical conditions that differ materially from conditions "indicated in this contract." 48 CFR 52.236-2 (2026). The clause requires the contracting officer to investigate the condition and provide an equitable adjustment when the qualifying condition changes performance cost or time. 48 CFR 52.236-2 (2026).

The Federal Circuit recognized that a Type I differing site condition does not require a contract indication that is explicit or site-specific in every detail. Instead, the contract documents must provide sufficient grounds for a bidder's expectation of materially different latent conditions. The court further acknowledged that whether a contract contains a sufficiently plain or positive indication presents a question of contract interpretation subject to de novo review.

Yet the decision below effectively makes the absence of a boring at the precise failure location dispositive. The court held that because the supplied logs were not located where the failures occurred, the

documents did not indicate conditions on the southwest bank. That approach gives controlling force to a single missing data point rather than construing the Government's drawings, boring logs, traffic designations, project design, and integrated specifications as a whole.

The question is exceptionally important in federal construction contracting. FAR 36.502 generally requires inclusion of the Differing Site Conditions clause in fixed-price construction contracts above the simplified acquisition threshold. 48 CFR 36.502 (2026). If an agency may include site information and construction-design features throughout a project but disclaim any representation wherever the agency did not place a specific boring, the clause no longer fulfills its risk-allocation function for latent conditions.

#### **B. The Decision Misapplies the Governing Type I Differing Site Condition Framework.**

The Federal Circuit's precedents recognize that a Type I differing site condition requires an identification in the contract of the conditions to be encountered, material variation from that indication, reasonable reliance, unforeseeability, and resulting damages. *Renda Marine, Inc. v. United States*, 509 F.3d 1372, 1376 (2007). The necessary indication need not be explicit or specific, but the documents must provide sufficient grounds for the bidder's expectation. *Hamp's Constr. LLC v. Sec'y of the Army*, 179 F.4th 1343, 1348 (2026).

Petitioner's theory was not that a single, distant boring guaranteed identical subsurface conditions throughout the project. Petitioner relied on the integrated contract materials: boring logs showing

stable conditions, drawings depicting construction traffic on the southwest bank, the project's operational design, and pre-bid inspections that disclosed no instability. The Board nevertheless treated Petitioner's own expert's observation that no boring was located at the failure area as effectively conclusive against Petitioner.

That reasoning improperly transforms a contractor's proof that the Government did not disclose a latent hazard into proof that the Government gave no contractual indication at all. It permits the Government to portray every incomplete dataset as a complete disclaimer, even when the contract itself describes how construction traffic will access and proceed through the site.

The Federal Circuit's own precedents require a reasonable-contractor assessment that accounts for the contract documents as a whole. In *Renda Marine*, the court explained that the inquiry includes whether the conditions were reasonably foreseeable in light of all information available at bidding and whether the contractor reasonably relied on its interpretation. *Renda Marine, Inc. v. United States*, 509 F.3d 1372, 1376 (2007). In *Randa/Madison*, the court held that a contractor had a duty to inspect specifically identified additional soil-test information made available by the contract. *Randa/Madison Joint Venture III v. Dahlberg*, 239 F.3d 1264, 1270 (2001). Here, in contrast, the Government did not specifically provide or identify borings for the critical southwest failure area, and Petitioner's evidence was that the available materials and inspections provided no warning of the latent collapses.

### C. The Decision Threatens Settled Principles of Government Contract Interpretation.

The court held that the question whether a contract includes a site-condition indication is a legal question reviewed de novo. But its analysis deferred in practical effect to the Board's characterization of the project's geography and evidence of pre-bid conditions, rather than independently construing the Government's integrated construction documents.

The Board and Federal Circuit accepted that Petitioner encountered actual, safety-significant problems that made loaded-truck operations unsafe and forced a change in construction means and methods. The Board further found that the change caused substantial adverse effects on Petitioner's construction plan. The decision nevertheless denies any remedy because the Government's incomplete subsurface information did not constitute an affirmative indication.

That result is incompatible with the established principle that an indication may be implicit when the contract documents provide a reasonable basis for the contractor's expectation. *Hamp's Constr. LLC v. Sec'y of the Army*, 179 F.4th 1343, 1348 (2026). It also undermines the settled rule that contract interpretation must place the court in the position of a reasonable and prudent contractor.

**D. This Case Presents an Important and Recurring Federal-Procurement Question Warranting Review Under Rule 10.**

This petition presents a recurring question concerning the scope of the Government's responsibility when it supplies partial subsurface information and construction documents that direct or depict the means of access and performance. The issue reaches far beyond Trapp Canal. Federal agencies routinely use fixed-price construction contracts containing FAR 52.236-2, and contractors must decide whether to bid based on Government-furnished boring logs, drawings, plans, and site information.

The decision below allows the Government to defeat a claim whenever it identifies a geographic distinction between a boring location and a failure location—even where the project documents collectively gave the contractor a reasonable basis to expect safe top-of-bank operations. That approach shifts the risk of undisclosed latent conditions to contractors despite the Differing Site Conditions clause's express provision for equitable adjustment when conditions materially differ from those indicated in the contract. 48 CFR 52.236-2 (2026).

This Court's review is necessary to clarify that the Type I inquiry remains one of integrated contract interpretation, not a categorical rule that a contractor must show a boring at the exact location of a latent failure before any contract indication can exist.

## IX. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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