No. 2012-1553

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

FLUOR INTERCONTINENTAL, INC.,

Plaintiff-Appellant,

v.

HILLARY RODHAM CLINTON, SECRETARY OF STATE,

Defendant-Appellee.

Appeal from the Civilian Board of Contract Appeals
In Case Nos. 490, 491, 492, 716, 1555, and 1763
Administrative Judge Jeri Kaylene Somers

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE SURETY & FIDELITY ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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December 21, 2012

Form 9

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Fluor Intercontinental, Inc. v. Clinton

No. 2012-1553

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) Chamber of Commerce, SFAA certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

The Chamber of Commerce of the United States of America
The Surety & Fidelity Association of America

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4. ☑ The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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12/21/12
Date

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Printed name of counsel

Please Note: All questions must be answered

cc: _____

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INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files amicus briefs in cases that raise issues of vital concern to the Nation's business community. Many of the Chamber's members enter into contracts with the Government.

The Surety & Fidelity Association of America ("SFAA") is a trade association of 459 member companies licensed to write fidelity or surety insurance in the United States. Collectively, these companies are sureties on the overwhelming majority of performance and payment bonds furnished to comply with the Miller Act, 40 U.S.C. §§ 3131, et seq., for public works projects of the United States.

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

This case presents an important legal issue: whether the Government, by inserting generic exculpatory language in its contracts, can absolve itself of responsibility for making misrepresentations to its contracting parties. *Amici* and their members have a strong interest in defending the traditional legal rule that such attempts to avoid liability cannot succeed.

SUMMARY OF ARGUMENT

Broad exculpatory provisions are disfavored in contract law. When such provisions violate public policy — for example, when they immunize a contracting party from liability for its misrepresentations — they may not be enforced at all. This rule is frequently applied in the construction context, where general disclaimers concerning the reliability of information are held not to preclude reliance on specific representations.

These black-letter contract law principles have long been recognized by the Supreme Court, this Court, and its predecessor in applying the federal law of government contracting. Confronted with the general disclaimers that are ubiquitous in federal contracts, the courts have refused to permit the Government to escape liability for misrepresenting material facts concerning the contract. Neither can the Government escape responsibility for the contract changes ordered by its agents by relying on general risk-shifting language in the contract.

This long-established rule is firmly rooted in sound policy and economic logic. Allowing the Government, through boilerplate language, to acquire the right to misstate facts would not just be unfair. It would also force each bidder to price into the contract the possibility that the Government is conveying false information, harming both contractors and the Government. This Court should not depart from an approach that is well grounded in precedent and policy, and should instead reaffirm the longstanding principle that general exculpatory provisions and disclaimers in a contract cannot excuse affirmative misrepresentations and similar wrongs.

ARGUMENT

Appellant Fluor Intercontinental, Inc. contends that it was disadvantaged in its contractual relationship with the State Department by misrepresentations, erroneous directives, and similar errors. In rejecting these claims, the Civilian Board of Contract Appeals ("Board") invoked general, boilerplate exculpatory language in the contract. To the extent the Board viewed these ubiquitous provisions as effectively authorizing the Government to make material misrepresentations or otherwise misdirect contractors without consequence, its decision marks a dangerous departure from longstanding principles of government contracting law. This Court should reaffirm that a general disclaimer does not

insulate the Government from liability for affirmative misrepresentations on which a contracting party reasonably relies.

I. Exculpatory Provisions In A Contract Are Disfavored And, When Contrary To Public Policy, Unenforceable.

"[B]road exculpatory clauses," which purport to insulate a contracting party from responsibility for misconduct, are "generally disfavored." *D.F.K. Enterprises, Inc. v. United States*, 45 Fed. Cl. 280, 289 (1999); *see also, e.g.*, 8 Richard A. Lord, Williston on Contracts § 19:21 (4th ed., West 2012) [hereinafter "Williston on Contracts"]; *Lago v. Krollage*, 575 N.E. 2d 107, 110 (N.Y. 1991); *Ralph Korte Constr. Co. v. Springfield Mechanical Co.*, 369 N.E. 2d 561, 562-63 (Ill. App. Ct. 1977); *Sproul v. Cuddy*, 280 P.2d 158, 164 (Cal. App. 2d Dist. 1955). At a minimum, such provisions are narrowly construed. *See, e.g.*, *Cadek v. Great Lakes Dragaway, Inc.*, 58 F.3d 1209, 1212 (7th Cir. 1995); *U.S. Industries, Inc. v. Blake Constr. Co.*, 671 F.2d 539, 544 (D.C. Cir. 1982); *Umpqua River Navigation Co. v. Crescent City Harbor Dist.*, 618 F.2d 588, 594 (9th Cir. 1980).

In certain circumstances, exculpatory provisions are not merely disfavored but are unenforceable on public policy grounds. *See* Restatement (Second) of Contracts § 195 (1981); 15 Joseph M. Perillo, Corbin on Contracts § 85.18 (Matthew Bender & Co. 2012); 8 Williston on Contracts § 19:24. One such circumstance arises when a party unreasonably attempts to "exempt[]" itself "from the legal consequences of a misrepresentation." Restatement (Second) of

Contracts § 196; *see also* 8 Williston on Contracts § 19:22 ("[W]hen it appears that one of the parties engaged in fraud or misrepresentation, the courts are likely to void the resulting exculpatory provision or release, at the urging of the other party, on public policy grounds or on other bases."). Indeed, courts have held that "[m]isrepresentations in the context of an exculpatory contract render it void even when the plaintiff is unable to prove all the elements of fraud." *Cadek,* 58 F.3d at 1212-13. This principle has particular importance in the construction context, where the "rule" is that "specific representations remain unaffected by general disclaimers." 4A Philip L. Bruner & Patrick J. O'Connor, Jr., Bruner & O'Connor on Construction Law § 14:35 (West 2012) [hereinafter "Bruner & O'Connor"].

In a leading decision, the California Supreme Court applied this rule to a construction contract requiring "independent investigation of facts" by the contractor, and disclaiming responsibility for the information provided. *E. H. Morrill Co. v. State,* 423 P.2d 551, 554-55 (Cal. 1967). The court held that this "general language" could not defeat a claim based on a "misrepresentation of conditions." *Id. Accord P.T. & L. Constr. Co. v. N.J. Dep't of Transp.,* 531 A.2d 1330, 1342 (N.J. 1987); *Jack B. Parson Constr. Co. v. State,* 725 P.2d 614, 617-18 (Utah 1986); *Hersey Gravel Co. v. State,* 9 N.W. 2d 567, 570 (Mich. 1943).

II. Under Longstanding Principles Of Government Contracting Law, General Disclaimers Do Not Immunize Government Misrepresentations.

"A Government contract should be interpreted as are contracts between individuals." *Hollerbach v. United States*, 233 U.S. 165, 171 (1914); *see also Krupp v. Fed. Hous. Admin.*, 285 F.2d 833, 836 (1st Cir. 1961) ("When the government goes into the market place it must go as everyone else."). It is therefore unsurprising that these black-letter contract law principles are reflected in the federal law of government contracting. "With respect to construction contracts, the rule is that a positive and specific statement by the government as to work conditions will override a general disclaimer of liability." 2 John Cosgrove McBride & Thomas J. Touhey, Government Contracts: Law, Admin., & Proc. § 13.100 (Walter Wilson ed., Matthew Bender & Co. 2012) [hereinafter "McBride & Touhey"].

Federal courts, including the U.S. Supreme Court, have confronted exculpatory provisions and disclaimers of the kind at issue in this case for at least a century. "Most government invitations for construction work contain a statement requesting prospective bidders to examine the site and to determine for themselves the conditions to be encountered[,] . . . coupled with a disclaimer of liability if conditions actually met during performance differ from those represented by the government." *Id.* § 13.60; *see also* Federal Acquisition Regulation ("FAR")

52.236-3, Site Investigation and Conditions Affecting the Work (Apr. 1984). In a seminal government contracts decision involving an early version of such a clause, the Supreme Court held that, this language notwithstanding, the Government "must [bear] the loss resulting from [its] mistaken representation." *Hollerbach*, 233 U.S. at 172. The contract in that case required the contractor to make its own inspection, and provided that "no claim shall be made against the United States" for its errors in estimating the work required under the contract. *Id.* at 167-68. But the Court ruled that "it would be going quite too far to interpret the general language" of these disclaimers as overcoming the Government's liability for its misrepresentations. *Id.* at 172; *see also United States v. Utah, Nevada, & California Stage Co.*, 199 U.S. 414, 424-25 (1905) (where advertisement "required the bidders to inform themselves as to the facts, and stated that additional compensation would not be allowed for [government] mistakes," the Court did "not think" this "general statement" would "require an independent investigation of a fact which the government had left in no doubt"); *Robert E. McKee, Inc. v. City of Atlanta*, 414 F. Supp. 957, 959 (N.D. Ga. 1976) ("The Supreme Court held long ago, in a series of cases relating to government contracts, that the government is liable to the contractor when it makes positive statements of material facts concerning the nature of work in question, when those facts are false. Moreover, general exculpatory clauses which disclaim any responsibility for the accuracy of

that data have been held to be of no effect when the positive specifications made by the government were obviously intended to be used by the bidding contractors in formulating their bids." (citations omitted)).

This principle is also the long-established law of this Circuit.[2] As this Court's predecessor succinctly put it, "a general disclaimer will not overcome a positive misrepresentation." *Security Nat'l Bank of Kansas City, Kansas v. United States*, 397 F.2d 984, 989 (Ct. Cl. 1968) (citing a previous edition of the McBride treatise); *see also J.A. Jones Constr. Co. v. United States*, 390 F.2d 886, 888 n.6 (Ct. Cl. 1968) (holding, in a case raising a "superior knowledge" claim, that a site inspection clause did not "preclude[] a claim for nondisclosure or misrepresentation"); *Dunbar & Sullivan Dredging Co. v. United States*, 65 Ct. Cl. 567, 568 (1928) (granting relief where the government misrepresented the type of material found at a dredging site, despite a warning that the government "does not guarantee the accuracy of its description"). More recently, this Court has held that "general disclaimers" do not excuse the Government from errors in design specifications it provides. *White v. Edsall Constr. Co.*, 296 F.3d 1081, 1085 (Fed. Cir. 2002); *see also Morrison-Knudsen Co. v. United States*, 397 F.2d 826, 841-42 (Ct. Cl. 1968) ("[T]his court has frequently held in comparable circumstances that

[2] Decisions of the United States Court of Claims announced before the close of business on September 30, 1982 are "binding as precedent" in this Court. *South Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (*en banc*).

broad provisions of this kind — stating that the government does not guarantee the statements of fact contained in the specifications or drawings or requiring the bidder to investigate the site and satisfy himself of conditions, etc. — cannot be given their full literal reach and do not relieve the government from liability. The short of the matter is that the information contained in the drawings constituted positive representations upon which plaintiff was justified in relying." (citations omitted)).

Other circuits follow the same rule. *See Umpqua River Navigation Co. v. Crescent City Harbor Dist.*, 618 F.2d 588, 594 (9th Cir. 1980) ("[G]overnment disclaimers of responsibility for contractual indications are disregarded."); *Michigan Wisconsin Pipeline Co. v. Williams-McWilliams Co.*, 551 F.2d 945, 953 (5th Cir. 1977) ("'Caveatory and exculpatory contractual provisions will not shift the liability flowing from an express or implied representation made by the Government and reasonably relied upon by the contractor.'" (quoting *Maurice Mandel, Inc. v. United States*, 424 F.2d 1252, 1255-56 (8th Cir. 1970))).

The Court of Federal Claims has also continued to apply the rule that "[t]he government . . . cannot rely on broadly worded exculpatory clauses to avoid liability for affirmative misrepresentations." *D.F.K. Enterprises, Inc. v. United States*, 45 Fed. Cl. 280, 289 (1999). Notably, it has pointed out that FAR 52.236-3 — a standard provision relied on by the Board in this case — "could, if broadly

construed, absolve the government from responsibility for *any* incorrectly-supplied information." *Travelers Cas. & Sur. Co. of Am. v. United States*, 75 Fed. Cl. 696, 714 (2007). Refusing to "place[] all risk" on "[t]he unfortunate contractor" that "rel[ies] on the government's information," the court cautioned that a contrary interpretation could "go a long way to rendering" many construction contracts with the Government "illusory." *Id.*

To be sure, in appropriate circumstances, the Government can make specific disclaimers that make it unreasonable for a contractor to allege that it relied on a particular representation. *See Rixon Electronics, Inc. v. United States*, 536 F.2d 1345, 1351 (Ct. Cl. 1976) ("You can engage a contractor to make snowmen in August, if you spell it out clearly, [that] you are not warranting there will be any subfreezing weather in that month."); *see also* Ralph C. Nash, Jr., *Exculpatory Clauses: Will They Protect the Government?*, 12 Nash & Cibinic Rep. ¶ 2 (Jan. 1998) ("[E]xculpatory clauses should be used to allocate specific, narrow risks but should not be used to throw broad, uncertain risks on a contractor.").

A court could also properly consider a disclaimer simply to confirm that no representation was made at all. *See Flippin Materials Co. v. United States*, 312 F.2d 408, 413 n.7 (Ct. Cl. 1963) ("general warnings . . . will not excuse an affirmative misrepresentation," but may be "taken into account in . . . deciding whether there was in fact a misrepresentation"). For example, in *Oman-Fischbach*

International (JV) v. Pirie, this Court relied in part on FAR 52.236-3 in finding that there had been no representation of a right of access through a Portuguese Armed Forces base in performance of a waste disposal contract. 276 F.3d 1380, 1384-85 (Fed. Cir. 2002). Also relevant in that case, however, were two critical facts: (1) the contract did "not identify a particular route to be used," and (2) the purported "representation" was simply the Government's use of a route through the base during the pre-bid site visit, along with an officer's "general comments about keeping roads clean and obeying traffic regulations." *Id.* Nothing in *Oman-Fischbach* stands for the broad proposition that a general disclaimer can negate an actual misrepresentation or compel the conclusion that no representation was made at all. To the contrary, any such rule would mark a departure from basic contracting principles that have long prevailed before the Supreme Court, this Court, and throughout the country.

The same fundamental limitations on exculpatory and disclaimer provisions apply when government agents obstruct the contractor's performance, issue new directives, or otherwise change the contract requirements in the course of performance. In general, contractors are entitled to compensation when a government contracting officer erroneously orders more costly work, including by misinterpreting the contract to require such work. *See* 1 Ralph C. Nash, Jr., & Steven W. Feldman, Government Contract Changes §11:1 (West 2012). In

applying this "constructive change" doctrine, courts have rejected the Government's efforts to escape liability through general provisions attempting to "cast the whole risk . . . on the contractor." *Morrison-Knudsen*, 397 F.2d at 829; *see also* 4 McBride & Touhey, § 28.30 ("The government frequently inserts in its contracts a general provision requiring the contractor to provide a complete and operable system. This provision, too, is ineffective to limit the changes clause, or to expand the scope of the work."); *cf.* 5 Bruner & O'Connor § 15:77 (discussing cases holding that exculpatory language could not be enforced in the face of "active interference" with performance of the contract). It would make little sense if the Government, simply by delegating to the contractor the responsibility for design and construction, could preemptively exculpate itself for the later-in-time directives (and misdirectives) of its own agents.

III. The Traditional Rule Is Supported By Sound Policy And Economics.

Precedent from the Supreme Court, this Court (and its predecessor), and other courts provides ample authority for the rule that the Government cannot secure the right to make misrepresentations through general exculpatory language. But in addition to its pedigree, this established principle is grounded in sound policy and economic logic.

Beyond being unfair, it would be economically inefficient to require "every bidder" to check the government's representations for possible falsity, "even

though the chance of receiving the bid was remote." *Robert E. McKee, Inc.*, 414 F. Supp. at 959. If this were the rule, "the number of bids would decrease and the dollar amount of the bids would increase," *id.* — a counterproductive outcome for both the contracting industry and the U.S. Treasury. *See Ozark Dam Constructors v. United States*, 127 F. Supp. 187, 190 (Ct. Cl. 1955) ("[It would be] a serious question of public policy" if the Government could secure immunity by "requiring bidders on a public contract to increase their bids to cover the contingency of damages caused to them by the negligence of the Government's agents. Why the Government would want to buy and pay for such an immunity is hard to imagine.").

One state supreme court, applying the same traditional approach to public contracts at the state level, explained that the rule has a "sound basis in policy" because it "place[s] responsibility for the accuracy of bidding information on the party best suited to determine whether [the government's statements are] misleading" — that is, the government. *Jack B. Parson Constr. Co. v. State*, 725 P.2d 614, 617 (Utah 1986). The danger of giving expansive effect to boilerplate exculpatory provisions is especially severe when "there is a vast disparity in bargaining power and economic resources between the parties, such as exists between the United States and particular government contractors." *Stevens Inst. of*

Tech. v. United States, 396 F. Supp. 986, 989 (S.D.N.Y. 1975) (internal quotation marks and citation omitted).

Just last Term, the Supreme Court reminded the Government of its "own long-run interest" in being "a reliable contracting partner." *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2190 (2012) (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 883 (1996) (plurality)). If the general disclaimers that are ubiquitous in government contracting are interpreted to immunize misrepresentations, "would-be contractors would bargain warily — if at all — and only at a premium large enough to account for the risk." *Id.* That is not, and should not be, the law.

CONCLUSION

For the foregoing reasons, this Court should clarify and reaffirm the longstanding principle that exculpatory provisions and general disclaimers in a contract cannot excuse affirmative misrepresentations and similar errors.

Respectfully submitted,

Dated: December 21, 2012

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d), because it contains 3,114 words.

2. This brief complies with the type-volume requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

December 21, 2012 /s/ Robert A. Long
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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2012, I caused the foregoing Brief for the Chamber of Commerce of the United States of America and the Surety & Fidelity Association of America as Amici Curiae in Support of Plaintiff-Appellant Fluor Intercontinental, Inc. to be served upon the following counsel, through the appellate CM/ECF system and by overnight mail:

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