No. 06-1156

In the Supreme Court of the United States

NIGHT VISION CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner's Small Business Innovation Research Phase I and Phase II contracts with the Department of the Air Force did not contain an implied term entitling petitioner to a Phase III contract if certain conditions were met.

2. Whether the court of appeals correctly held that an Air Force contracting officer lacked authority to form an oral or implied-in-fact contract obligating the United States to award petitioner a Phase III contract.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-13) is reported at 469 F.3d 1369. The opinion of the Court of Federal Claims (Pet. App. 14-78) is reported at 68 Fed. Cl. 368.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 2006. The petition for a writ of certiorari was filed on February 16, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1982, Congress provided for the creation of Small Business Innovation Research (SBIR) programs, see Small Business Innovation Development Act of 1982, Pub. L. No. 97-219, 96 Stat. 217 (15 U.S.C. 638), a means

by which federal agencies must spend a portion of their research and development budgets on contracts awarded to small businesses, see 15 U.S.C. 638(f). Procuring agencies may award SBIR contracts in three "phases." Phase I contracts fund the investigation of "the scientific and technical merit and feasibility of ideas that appear to have commercial potential." 15 U.S.C. 638(e)(4)(A). Phase II contracts "further develop proposals which meet particular program needs." 15 U.S.C. 638(e)(4)(B). "[W]here appropriate," an agency can award Phase III contracts, which direct private funding and public funding not earmarked for the SBIR program to small businesses so that they can further research their ideas or develop them for commercial or public applications. 15 U.S.C. 638(e)(4)(C).

Congress amended 15 U.S.C. 638 in 1992, see Small Business Innovation Research Program Authorization Act of 1992, Pub. L. No. 102-564, § 103(f), 106 Stat. 4249, adding 15 U.S.C. 638(j)(2), which provides that the Small Business Administration (SBA) "shall modify" its "policy directives" to provide for "procedures to ensure, to the extent practicable, that an agency which intends to pursue research, development, or production of a technology developed by a small business concern under a SBIR program enters into follow-on, non-SBIR funding agreements with the small business concern for such research, development, or production." 15 U.S.C. 638(j)(2)(C). The SBA Administrator satisfied Section 638(j)(2)(C) by publishing a modified SBIR policy directive. 58 Fed. Reg. 6144 (1993). In the modified policy directive, the Administrator provided that a small business proposing a new technology must perform at least two-thirds of the research and analytical effort in a Phase I contract and at least one-half in a Phase II

contract. *Id.* at 6148. With respect to Phase III contracts, the modified policy directive states that a "federal agency *may* enter into a third phase agreement with a small business concern for additional work to be performed during or after the second phase period," and provides that a Phase II contract "*may, at the discretion of the agency awarding the agreement*, set out the procedures applicable to third phase agreements." *Id.* at 6149 (emphases added). The modified policy directive nowhere guarantees a Phase III contract. Instead, it provides, like Section 638(e)(4)(C), that the agency can enter a Phase III contract "[w]here appropriate" and that "[a]gencies which intend to pursue research, research and development or production developed under the SBIR Program will give special acquisition preference including sole source awards to the SBIR company which developed the technology." *Ibid.*

2. Petitioner conducted research and development of night vision goggles for the Department of the Air Force from 1995 until 1999. Pet. App. 19, 27. The Air Force awarded petitioner a Phase I contract in May 1995 to develop a prototype of petitioner's Panoramic Night Vision Goggles (PNVGs). *Id.* at 16, 19. In July 1996, the Air Force awarded petitioner a Phase II contract to produce twelve more prototypes. *Ibid.*

Petitioner hired Insight Technologies Corp. (Insight) to be its principal subcontractor for Phase II. Pet. App. 21. Petitioner and Insight "maintained a tenuous relationship," *ibid.*, to the point of endangering the Phase II contract, *id.* at 22. The Air Force mediated the dispute while the Air Force and petitioner discussed the possibility of a Phase III contract. *Ibid.* In June 1999, the Air Force announced that, instead of awarding peti-

tioner a Phase III contract, it was considering seeking competitive procurement. *Id.* at 24.

In December 1999, an Air Force official adopted an acquisition strategy panel recommendation that the Air Force should procure Integrated Panoramic Night Vision Goggles (IPNVGs), a technology similar to petitioner's PNVGs, through competitive bidding according to the agency's Program Research and Development Announcement process. Pet. App. 31-32; cf. *AEC-ABLE Eng'g Co.*, [1994-1995] Gov't Cont. Rep. (CCH) ¶ 108,719 (Comp. Gen. Jan. 24, 1995) (discussing the process). The acquisition strategy panel's recommendation was based in part on petitioner's "difficulty in managing the Phase II contract which is less of a management challenge than a new Phase III contract would be." Pet. App. 31 (quoting the panel recommendation).

Three firms submitted bids: petitioner, Insight, and Litton Industries, Inc. Pet. App. 33. Government evaluators rated Insight's bid highest, and Insight was awarded the IPNVG contract. *Id.* at 33-34.

3. Petitioner filed a five-count complaint against the United States in the Court of Federal Claims (CFC) alleging, *inter alia*, that the Air Force had breached petitioner's Phase I and Phase II contracts by not awarding petitioner a Phase III contract (Count Two) and that the Air Force's failure to award petitioner a Phase III contract had breached an oral or implied-in-fact contract (Count Three). Pet. App. 17.

The CFC granted the government's motions for dismissal and summary judgment in full. Pet. App. 14-77. As relevant here, the court dismissed Count Two, rejecting petitioner's argument that Section 638(j)(2)(C) entitled petitioner to a Phase III contract and that such entitlement was incorporated into petitioner's Phase I and

Phase II contracts. *Id.* at 43-44. The court granted the government summary judgment on Count Three, holding that petitioner failed to establish that the alleged oral and implied-in-fact contracts guaranteeing petitioner a Phase III contract had been made by someone with authority to bind the government. *Id.* at 52. The CFC resolved the other counts of the complaint in the government's favor as well. *Id.* at 6, 77.

4. Petitioner appealed only as to Counts Two and Three, and the court of appeals affirmed. Pet. App. 2-13. With respect to Count Two, the court of appeals agreed with the CFC that Section 638(j) creates no obligations for an agency administering a SBIR program; rather, the court held, Section 638(j) merely required the SBA Administrator to modify SBA policy directives to ensure, "to the extent practicable," the statutory objective that small businesses be awarded Phase III contracts. *Id.* at 8-9. The court accordingly rejected petitioner's contention that Section 638(j) mandates particular action (*e.g.*, awarding Phase III contracts to small businesses that complete Phase I and Phase II contracts) to achieve that objective. *Id.* at 9-10.

With respect to Count Three, the court agreed with the CFC that petitioner had no evidence that a duly authorized government official had created the alleged oral and implied-in-fact contracts. Pet. App. 11-12. Assuming that the official who allegedly promised petitioner a Phase III contract was the Air Force contracting officer, the court held that she had no contract-making authority at the time of the alleged promises because the Air Force had not then determined whether to procure night vision goggles through a Phase III contract or through competitive procurement. *Ibid.* The contracting officer,

the court noted, did not have the authority to make that preliminary decision for the Air Force. *Ibid.*

ARGUMENT

The court of appeals' determination that the Air Force was not contractually bound to award a Phase III contract to petitioner is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 20-22) that a small business is entitled to a Phase III contract under Section 638(j)(2)(C) whenever "the Government intend[s] to pursue further research, development or production of the [small business's] technology" and "a Phase III award [is] 'practicable.'" Pet. 20. Petitioner misunderstands Section 638(j)(2)(C).

Section 638(j)(2) provides that

> the [SBA] Administrator shall modify the policy directives issued pursuant to this subsection to provide for * * * (C) procedures to ensure, to the extent practicable, that an agency which intends to pursue research, development, or production of a technology developed by a small business concern under an SBIR program enters into follow-on, non-SBIR funding agreements [*i.e.*, Phase III contracts] with the small business concern for such research, development, or production.

15 U.S.C. 638(j)(2). The court of appeals correctly held (Pet. App. 10) that Section 638(j)(2)(C) creates no entitlement. Rather, the statute requires only that the SBA (and not any other agency[1]) is to modify its policy direc-

[1] Other sections of Section 638 directly apply to other agencies, but they are not relevant here. See, *e.g.*, 15 U.S.C. 638(g) (providing that

tives. Petitioner argues (Pet. 16) that the court of appeals' reading of Section 638(j)(2)(C) gives "undue emphasis to the statute's prefatory language," and petitioner chastises (Pet. 17) the court for concluding that Section 638(j)(2)(C) "deals with 'procedures'" to accomplish the statutory objective and "*does not mandate particular action to achieve those results*." But the so-called "prefatory language" in Section 638(j)(2) identifies both the *subject* of the statutory requirement (the SBA Administrator) and the *scope* of that requirement ("modify the [SBA's] policy directives"), so the court of appeals quite correctly interpreted the statute in a manner that gives effect to those textual limitations. Petitioner's interpretation, by contrast, would effectively read those crucial provisions out of the statute, transforming it from a limited directive to the SBA into a substantive mandate imposed directly on all federal agencies with SBIR programs. There is no warrant for that revisionist result, and in any event the court of appeals' plain-language interpretation of the statute, which involves a "question of first impression" (Pet. 15), does not merit review.

Petitioner's breach of contract theory (Pet. 24) is that the so-called entitlement in Section 638(j)(2)(C) was incorporated into petitioner's Phase I and Phase II contracts. As discussed above, the major premise of that theory is invalid. Petitioner, moreover, has failed to demonstrate how Section 638(j)(2)(C) could be deemed incorporated into the contracts. Petitioner cites (Pet. 24) *Chris Berg, Inc.* v. *United States*, 426 F.2d 314 (Ct. Cl. 1970), as a case in which a regulation was read into

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each agency with a SBIR program "shall" "unilaterally" review proposals, "unilaterally" award SBIR contracts, and "administer its own SBIR funding agreements").

a contract to bind the government. The Court of Claims in *Chris Berg*, however, actually held that a private party was allowed to reform a contract that the government had made in violation of a regulation that prohibited the government from making such contracts. *Id.* at 317-318. *Chris Berg* is inapplicable here because the government did not violate Section 638(j) by entering into petitioner's Phase II contract. Nor did the Air Force violate the SBA's modified policy directive, which affords an agency discretion to enter into Phase III contracts. See 58 Fed. Reg. at 6149. And in any event, any alleged intra-circuit conflict between the decision below and *Chris Berg* would not merit this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

2. Petitioner argues (Pet. 18) that, in affirming the dismissal of its oral and implied-in-fact contract claim, the court of appeals articulated a "new sweeping rule concerning the authority of Contracting Officers * * * in derogation of express federal regulations and long-established common law." Petitioner's reading of the decision below is unfounded.

A party alleging a breach of an express or implied government contract must establish that the federal representative who allegedly made the contract possessed statutory contracting authority. See *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 383-384 (1947); see also *id.* at 384 ("[T]his is so even where * * * the agent himself may have been unaware of the limitations upon his authority."). Accord *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917). Petitioner alleges (Pet. 17) that the Air Force contracting officer promised petitioner a Phase III contract. The court of appeals held that the contracting officer had no such

contracting authority because she lacked authority to "determin[e] the type of procurement to be used for a particular transaction." Pet. App. 11; see *id.* at 59 (collecting authorities). Although petitioner notes (Pet. 28) that contracting officers have authority to enter into contracts in appropriate circumstances, that authority is ineffective until the officer's agency, pursuant to its governing procedures, has determined the type of procurement contract it needs. See *Harbert/Lummus Agrifuels Projects* v. *United States*, 142 F.3d 1429, 1433 (Fed. Cir. 1998) ("[A]gency procedures must be followed before a binding contract can be formed."), cert. denied, 525 U.S. 1177 (1999). As the statute defines a Phase III contract, there must be special funding for the contract, see 15 U.S.C. 638(e)(4)(C), and a contracting officer does not have authority to make that funding decision unilaterally.

Petitioner relies (Pet. 28) on Section 2.101 of the Federal Acquisition Regulations (FAR), 48 C.F.R. 2.101, which states that a contracting officer can "enter into, administer, and/or terminate contracts," and upon *LDG Timber Enterprises* v. *Glickman*, 114 F.3d 1140 (Fed. Cir.), cert. denied, 522 U.S. 916 (1997), which held that a contracting officer had authority to modify a contract when the officer was "administer[ing] a contract with which the officer is charged" and "the actions of the contracting officer are within the authority that pertains to the subject matter of the contract, and no statute or regulation limits that authority," *id.* at 1143. Neither FAR 2.101 nor *LDG Timber*, however, supports the proposition that a contracting officer can commit an agency to one method of procurement when the officer's agency

has not yet committed to a method.[2] Nor does either authority support the proposition that a contracting officer can enter into oral or implied-in-fact contracts to procure new technology. Indeed, as the trial court noted (Pet. App. 60), FAR 2.101 expressly requires that procurement contracts must be "in writing" "except as otherwise authorized," and there is no indication in the record that the contracting officer was "otherwise authorized" to make an oral contract. Accordingly, further review is not warranted.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2007

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[2] Both the statute (*e.g.*, 15 U.S.C. 638(e)(4)(C)(ii)) and Air Force regulations (see Pet. App. 31-32) provide procedures for selecting a method of procurement.

[3] Assuming, *arguendo*, that authority to form government contracts may arise by implication, rather than from an express legislative grant, compare *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 679 (1869) (stating "written law" is "the exclusive source" of authority to obligate government funds), with *H. Landau & Co.* v. *United States*, 886 F.2d 322, 324 (Fed. Cir. 1989) (discussing "implied actual authority"), petitioner still could not overcome the prohibition against oral contracts in FAR 2.101.