2022-1035

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LOCKHEED MARTIN AERONAUTICS COMPANY,

Appellant,

v.

SECRETARY OF THE AIR FORCE,

Appellee.

Appeal from the Armed Services Board of Contract Appeals
in Nos. 62505, 62506, Administrative Law Judges Prouty, Shackleford, Sweet, Smith, and Clarke

BRIEF OF THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

MILLER & CHEVALIER CHARTERED

Jason N. Workmaster
Principal Attorney
Alejandro L. Sarria
900 16th Street NW
Washington, DC 20006
Telephone: (202) 626-5893
Facsimile: (202) 626-5801
jworkmaster@milchev.com
asarria@milchev.com

Attorneys for National Defense Industrial Association

January 27, 2022

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 29 and 47.4, counsel for *amicus curiae* National Defense Industrial Association certifies the following:

1. The full name of the *amicus curiae* represented by me:

National Defense Industrial Association

2. The name of the real party in interest represented by me:

National Defense Industrial Association

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

None

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

Jason N. Workmaster and Alejandro L. Sarria of Miller & Chevalier Chartered

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

None

6. There is no information to report under Fed. R. App. P. 26.1(b) (Organizational Victims in Criminal Cases) or under Fed. R. App. P. 26.1(c) (Bankruptcy Cases).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF AMICUS CURIAE

The National Defense Industrial Association ("NDIA") drives strategic dialogue in national security by identifying key issues and leveraging the knowledge and experience of its military, government, industry, and academic members to address them. NDIA, comprised of its Affiliates, Chapters, Divisions, and 1,570 corporate and 63,000 individual members, is a non-partisan, non-profit, educational association that has been designated by the IRS as a 501(c)(3) nonprofit organization—not a lobbying firm—and was founded to educate its constituencies on all aspects of national security. NDIA formed from a merger between the American Defense Preparedness Association, previously known as the Army Ordnance Association, founded in 1919, and the National Security Industrial Association, founded in 1944. For more than 100 years, NDIA has provided a platform through which leaders in government, industry, and academia can collaborate and provide solutions to advance the national security and defense needs of the nation.

On behalf of our diverse membership and in support of our mission statement, NDIA respectfully submits this brief in support of the Appellant. As detailed herein, a ruling in favor of Lockheed Martin Aeronautics Company ("Lockheed Martin") will support timely and efficient resolution of future disputes involving the unilateral definitization of Undefinitized Contract Actions ("UCAs").

Such efficiency is in the interest of both the Government and the contracting community, particularly as UCAs (i.e., contract actions for which the contract terms, specifications, or price are not agreed upon prior to performance) can exist in myriad acquisitions, and those acquisitions can involve large and small businesses, high and low dollar figures, major and minor programs, acquisitions for goods and acquisitions of services, etc.

Pursuant to the Court's rules, NDIA notes: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

This appeal turns on one dispositive conclusion of law: a unilateral definitization modification meets the definition of an immediately appealable government "claim" under the Contract Disputes Act ("CDA"), the Federal Acquisition Regulation ("FAR"), and relevant caselaw. A CDA "claim" is a "written assertion by one of the contracting parties seeking, as a matter of right [among other things] …the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." FAR 2.101. Lockheed Martin demonstrates convincingly that a unilateral definitization falls within this

definition—either as a claim for "other relief" or for the "adjustment" of contract terms. This showing is determinative of the matter.

NDIA submits this brief to emphasize two points supporting the immediate appealability of definitization modifications: (1) the definitization clauses at issue here unambiguously provide that the contractor may immediately appeal a unilateral definitization modification (and finding otherwise would raise questions regarding longstanding, highly analogous precedent); and (2) confirming the immediate appealability of a unilateral definitization modification furthers the fundamental purpose of the CDA to provide an efficient mechanism for resolving disputes between the Government and its contractors.

I. THE DEFINITIZATION CLAUSES MAKE CLEAR THAT A UNILATERAL DEFINITIZATION MODIFICATION IS AN IMMEDIATELY APPEALABLE CLAIM, AND HOLDING OTHERWISE WOULD CREATE UNNECESSARY CONFUSION

It is axiomatic that, when assessing whether a given action constitutes an appealable claim under the CDA, the language of the contract at issue is of great—if not dispositive—significance. *See Garrett v. Gen. Elec. Co.*, 987 F.2d 747, 749 (Fed. Cir. 1993). Here, the definitization clauses in the contracts between Lockheed Martin and the Government, in relevant part, provide: "[T]he Contracting Officer may…determine a reasonable price or fee in accordance with subpart 15.4 and part 31 of the FAR, ***subject to Contractor appeal as provided in***

the Disputes clause." FAR 52.216-25(c); Defense Federal Acquisition Regulation Supplement ("DFARS") 252.217-7027(c) (emphasis added).

The language "subject to Contractor appeal as provided in the Disputes clause" does not give license to multiple interpretations. Rather, the only reasonable reading of this language is that it provides Lockheed Martin with the right to immediately appeal the unilateral definitization modifications. Holding otherwise would render this agreed-upon contract language superfluous and would leave the clause unenforced—contrary to fundamental principles of government contract interpretation. *See Westinghouse Hanford Co. v. United States*, 47 Fed. Cl. 665, 670 (2000) (quoting *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996)) (stating "the plain language of the contract, read as a whole, must be enforced, and that 'we must interpret the contract in a manner that gives meaning to all its provisions and makes sense'"). It also would eviscerate the clear intent of the parties. Indeed, the inclusion of this language makes clear the parties expressly stipulated that the unilateral definitization of a UCA would be immediately appealable under the CDA. A ruling confirming that intent would in no way prejudice the Government, particularly since it is the Government that drafted the definitization clauses and wrote the regulation requiring them to be included in the contract.

Finding that unilateral definitization modifications are immediately appealable also is consistent with the rule that other unilateral contract actions by the Government—namely, default terminations—are immediately appealable. *See generally Malone v. United States*, 849 F.2d 1441 (Fed. Cir. 1988); *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987); *Nuclear Research Corp. v. United States*, 814 F.2d 647 (Fed. Cir. 1987); *Z.A.N. Co. v. United States*, 6 Cl. Ct. 298 (1984); *James Reedom, d/b/a J & M Electronic*, ASBCA No. 30226, 85–1 BCA ¶ 17,879, at 89,566. In particular, as Lockheed Martin notes in its brief, the Default clause for fixed-price construction contracts contains language that is materially identical to the relevant language of the definitization clauses at issue in this litigation. *See* FAR 52.249-10(b)(2) (providing that the "findings of the Contracting Officer [are]…subject to appeal under the Disputes clause."). Given this similarity in language, it is clear that the same rule that applies to default-terminations (i.e., that they are immediately appealable) should apply also to unilateral definitization modifications. Additionally, a unilateral definitization modification is materially identical in effect to a default-termination in that it is an "assertion of the Government's right[s] . . . in accordance with [the given contract's] terms." *James Reedom, dba J*

& M Electronic, ASBCA No. 30226, 85–1 BCA ¶ 17,879.[1] For these reasons, holding that a unilateral definitization modification is not immediately appealable would only raise unnecessary questions regarding the rule for the immediate appealability of default terminations.[2]

II. CONFIRMING THE IMMEDIATE APPEALABILITY OF A UNILATERAL DEFINITZATION MODIFICATION IS CONSISTENT WITH THE FUNDAMENTAL PURPOSE OF THE CDA

As Lockheed Martin correctly argues, this Court and the boards of contract appeals have confirmed repeatedly that the term "claim" should be construed

---

[1] Because of the material similarity between unilateral definitization modifications and default-terminations, the Board's decision in *Bell Helicopter Textron*, ASBCA No. 35950, 88–2 BCA ¶ 20,656 was in error. In that decision, the Board summarily (and improperly) dismissed the appellant's reliance on *James Reedom* in a single sentence, concluding "That decision dealt with a default termination…and has no application here."

[2] A unilateral definitization modification is also materially the same as a unilateral determination of Final Indirect Cost Rates, and it is well-established that such determinations are also immediately appealable. *See Fiber Materials, Inc.,* ASBCA No. 53616, 07-1 BCA ¶ 33,563; *Brunswick Corp*., ASBCA No. 26691, 83-2 BCA ¶ 16,794; *General Dynamics Corp*., ASBCA No. 31359, 86-3 BCA ¶ 19,008; *Martin Marietta Corp*., ASBCA No. 25828, 84-1 BCA ¶ 17,119 at 85,257; *General Dynamics Corp. Electric Boat Division*, ASBCA No. 25919, 82-1 BCA ¶ 15,616 at 77,105-06. Like a UCA definitization, the establishment of Final Indirect Cost Rates determines the total price a Contractor is entitled to invoice the Government for each covered contract. Like the UCA definitization process, the Contractor provides supporting documentation to the Government, the Government reviews the documentation, the Government and the Contractor try to reach agreement, and—if agreement cannot be reached—the Government acts unilaterally to establish the rates (i.e., to set the prices of covered contracts).

broadly and that Congress intended CDA jurisdiction to be expansive. *See Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1268 (Fed. Cir. 1999); *Garrett v. General Elec. Co.*, 987 F.2d 747 (Fed. Cir. 1993); *Todd Constr., L.P. v. United States*, 656 F.3d 1306 (Fed. Cir. 2011); *General Elec. Co.*, ASBCA Nos. 36005 et al., 91-2 BCA ¶ 23,958. Finding a unilateral definitization modification to be an immediately appealable Government claim aligns with this broad statutory language, as well as with the over-arching public policy and purpose foundational to the CDA.

Moreover, and practically speaking, if a unilateral definitization does not constitute a claim, contractors may be put in untenable situations with no form of meaningful near-term relief. Indeed, without a clear ruling in Lockheed Martin's favor, contractors may wait until costs incurred exceed the definitized amount or until contract performance is complete before submitting a claim to the contracting officer for monetary relief. At the very least, contractors would be forced to endure additional, unnecessary administrative steps, such as resubmission (in the form of a certified claim) of the same information used to support the contractor's definitization position, or a request for the contracting officer to re-issue the same unilateral definitization modification in the form of a contracting officer's final decision. Elevating form over substance in this manner is antithetical to the established principle that the specific form of a claim does not determine whether it

is a valid, immediately appealable claim. *See BLR Grp. of Am., Inc. v. United States*, 84 Fed. Cl. 634, 639 (2008) (quoting *Contract Cleaning Maint., Inc. v. United States*, 811 F.2d 586, 592 (Fed.Cir.1987)) ("However, there is "no requirement in the [CDA] that a 'claim' must be submitted in any particular form or use any particular wording").

Additionally, such an approach could have severe implications for the financial health of contractors performing UCAs. This is because, in a UCA, the contractor proceeds to perform the contract at risk, based only on the assurance that the Government will later work with the contractor to establish a fair and reasonable price. *See* 48 C.F.R. § 252.217-7027(c). Until the Government and the contractor reach agreement on price, the contractor is only entitled to receive 50% of the estimated not-to-exceed contract value. *See* DFARS 217.7404-4(a). This is potentially true even if contract performance is complete and accepted. As reported anecdotally by NDIA's members, the Government often delays definitization by years, leaving the contractor to borrow funds to cover costs. For this reason, and because large contractors may have flexibility to absorb the financial loss, small businesses are often disproportionately impacted by UCA definitization negotiations. And, in such situations, contractors have no practical recourse: if the Government requests an extension, and the contractor does not

agree to the extension, the Government has authority to unilaterally definitize the contract, and establish a price without the contractor's consent.

It is in the interest of the Government to have a robust contracting community from which to acquire goods and services. Allowing contractors to immediately appeal unilateral definitizations ensures that contractors' rights are protected and that contractors receive relief in a timely manner such that they are not put in untenable financial positions that could hurt their ability to support the Government in the future.[3]

[3] NDIA also notes two issues not raised in this appeal, but of which the Court should be aware in framing its decision. First, there is no dispute regarding when Lockheed Martin received the definitization modifications in question. The Court, therefore, need not address that issue, as it could be misconstrued to erode contractors' right to actually receive appropriate notice—which can be a complex, fact-specific issue. Second, the issue of appropriate relief for failure to properly definitize Lockheed Martin's contracts is not before the Court. Given this, NDIA respectfully requests that the Court also avoid addressing that issue, as it could be misinterpreted to impose improper limits on potential relief in future cases.

CONCLUSION

By ruling for Lockheed Martin in this appeal, the Court will rightly decide and confirm:

- When the Government acts unilaterally to definitize a UCA, that constitutes a claim.
- When the Government asserts such a claim, a contractor has the right to take an immediate appeal so as to ensure its full and fair opportunity to be heard before a board of contract appeals or the U.S. Court of Federal Claims in an efficient and timely manner.

Respectfully Submitted,

MILLER & CHEVALIER CHARTERED

/s/ Jason N. Workmaster
Jason N. Workmaster
Principal Attorney
Alejandro L. Sarria
900 16th Street NW
Washington, DC 20006
Telephone: (202) 626-5893
Facsimile: (202) 626-5801
jworkmaster@milchev.com
asarria@milchev.com

Attorneys for National Defense Industrial Association

January 27, 2022