No. 2022-1035

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

LOCKHEED MARTIN AERONAUTICS COMPANY,
Appellant,

v.

THE SECRETARY OF THE AIR FORCE,
Appellee.

Appeal from the Armed Services Board of Contract Appeals in Nos. 62505, 62506, Administrative Judge J. Reid Prouty, Administrative Judge Richard Shackleford, Administrative Judge James Sweet, Administrative Judge Brian S. Smith, and Administrative Judge Craig S. Clarke

CORRECTED BRIEF OF APPELLEE, THE SECRETARY OF THE AIR FORCE

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

PATRICIA M. MCCARTHY
Director

AMANDA L. TANTUM
Senior Trial Counsel
Commercial Litigation Branch
Department of Justice, Civil Division
P.O. Box 480, Ben Franklin Station
Washington, DC 20044
Telephone: (202) 616-8131
Amanda.Tantum@usdoj.gov

Attorneys for Appellee

OF COUNSEL:

Christopher J. Hilborn
Caryl A. Potter, III
Jeffrey P. Hildebrant
United States Air Force
Air Force Commercial Litigation
Field Support Center
1500 West Perimeter Road
Suite 4100
Joint Base Andrews, MD

May 5, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

ADMINISTRATIVE DECISIONS

STATUTES AND REGULATIONS

OTHER AUTHORITIES

STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, counsel for respondent-appellee states that Lockheed Martin Aeronautics Company's appeals, Nos. 63149 and 63150, pending before the Armed Services Board of Contract Appeals may directly be affected by this Court's decision in this appeal.

No. 2022-1035

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

LOCKHEED MARTIN AERONAUTICS COMPANY,
Appellant,

v.

THE SECRETARY OF THE AIR FORCE,
Appellee.

Appeal from the Armed Services Board of Contract Appeals in Nos. 62505, 62506, Administrative Judge J. Reid Prouty, Administrative Judge Richard Shackleford, Administrative Judge James Sweet, Administrative Judge Brian S. Smith, and Administrative Judge Craig S. Clarke

CORRECTED BRIEF OF APPELLEE, THE SECRETARY OF THE AIR FORCE

STATEMENT OF THE ISSUES

Whether the Armed Services Board of Contract Appeals (board) correctly determined that it lacked jurisdiction under 41 U.S.C. § 7104(a) to entertain Lockheed Martin Aeronautics Company's (Lockheed Martin) appeals because unilateral contract definitizations do not constitute Government claims and, therefore, may not be directly appealed to the board.

STATEMENT OF THE CASE

I. Nature Of The Case

Lockheed Martin appeals the board's June 24, 2021 decision dismissing its appeals before the board for lack of jurisdiction. Appx2; Appx12.

II. Statement Of Facts And Course Of Proceedings Below

A. The Undefinitized Contract Actions

Between 2015 and 2016, the United States Air Force entered into two undefinitized contract actions (UCAs) with Lockheed Martin to upgrade F-16 fighter aircraft on behalf of two different foreign governments pursuant to the Foreign Military Sales program. Appx2009 ¶ 1; Appx2013-2014 ¶¶ 16-19; Appx307 (§ 1.1.1); Appx1495 (§ 1.1.1). The UCA for the purpose of upgrading the avionics of F-16s owned by Singapore (Contract No. FA8615-16-C-6048) was entered into in December 2015. Appx2013 ¶¶ 16-17. The UCA for the purpose of upgrading the avionics of F-16s owned by Korea (Contract No. FA8615-17-C-6045) was entered into in November 2016. Appx2013-2014 ¶¶ 18-19.

Each contract was a UCA, or "letter contract," Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.216-25(c), meaning that the contract was awarded before the final price was set. Appx2009 ¶ 2. The relevant provision of each contract related to its undefinitized nature came from different sources, though they were identical in all material aspects. Appx2010 nn.1 & 2. The

relevant provision for the Singapore contract came from FAR 52.216-25, while the provision for the Korea contract came from the Department of Defense Supplement to the Federal Acquisition Regulation (DFARS) 252.217-7027. Appx2010 n.1; Appx101 (Singapore UCA); Appx1388-1389 (Korea UCA). These contract provisions both provide that a "definitive contract is contemplated." FAR 52.216-25(a); DFARS 252.217-7027(a). Moreover, in these provisions,

> [t]he Contractor agree[d] to begin promptly negotiating with the Contracting Officer [CO] the terms of a definitive contract that will include (1) all clauses required by the Federal Acquisition Regulation (FAR) on the date of execution of the letter contract, (2) all clauses required by law on the date of execution of the definitive contract, and (3) any other mutually agreeable clauses, terms, and conditions"

and to submit a proposal "including data other than certified cost or pricing data, and certified cost or pricing data, in accordance with FAR 15.408, Table 15-2, supporting its proposal." FAR 52.216-25(a); DFARS 252.217-7027(a). The contracts then supply a "schedule for definitizing this contract." FAR 52.216-25(b); DFARS 252.217-7027(b). The contracts provided that

> [i]f agreement on a definitive contract to supersede this letter contract is not reached by the target date in paragraph (b) above, or within any extension of it granted by the Contracting Officer, the Contracting Officer may, with the approval of the head of the contracting activity, 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. In any event, the Contractor shall proceed with completion

> of the contract, subject only to the Limitation of Government Liability clause.

FAR 52.216-25(c); DFARS 252.217-7027(c); Appx2010 n.1; Appx2012 ¶ 10. Each contract included the same Disputes clause, FAR 52.233-1, DISPUTES (MAY 2014) ALTERNATE I (DEC 1991)). Appx2012 ¶ 11; Appx102 (Singapore UCA); Appx1386 (Korea UCA).

After a period of several years, the parties were unable to agree on the contract prices for a definitive contract for either the Korea UCA or the Singapore UCA. Therefore, the contracting officers determined a reasonable price for each contract, as described in FAR 52.216-25(c) and DFARS 252.217-7027(c), and issued contract modifications to "unilaterally definitize[]" the UCAs. Appx639-640; Appx1673-1674.

Lockheed Martin did not file a claim with the contracting officers challenging these definitizations. Instead, on May 8, 2020, it filed notices purporting to appeal each definitization with the board, stating that it was appealing directly from the Government's two unilateral modifications. Appx2012 ¶ 12.

B. The Board's Decision

The board consolidated Lockheed Martin's two appeals. Appx3. The board concluded that it had already addressed the issue raised by Lockheed Martin in *Bell Helicopter Textron*, ASBCA No. 35950, 88-2 BCA ¶ 20,656 (Mar. 22, 1988), *aff'd*

on mot. for recon., 88-3 BCA ¶ 21,048 (July 22, 1988), and that that precedent was dispositive. Appx1; Appx3-4. The board stated that, "[i]n that case, we held that such a unilateral contract definitization is not a government claim and that, to obtain relief, the contractor must first file a claim with the [contracting officer] and then appeal to us if it is dissatisfied with the results." Appx1. The board rejected Lockheed Martin's arguments that *Bell* was no longer good law and that *Bell* had not addressed whether definitization constituted "other relief" under the FAR's definition of "claim" in FAR 2.101. Appx1; Appx 4 n.4.

SUMMARY OF ARGUMENT

Between 2015 and 2016, the Air Force and Lockheed Martin entered into two undefinitized contract actions, or UCAs, which provided that the terms of a definitive contract, including price, would be determined in the future. The FAR and DFARS provisions incorporated into the UCAs, FAR 52.216-25(c) and DFARS 252.217-7027(c), provided that, if the parties could not agree, through negotiations, on contract price terms, the contracting officer could "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." After the Air Force and Lockheed Martin did not reach agreement on contract price terms, the contracting officer issued unilateral modifications definitizing each contract's terms, including prices.

Lockheed Martin then appealed directly to the board from those unilateral modifications, requesting that the board declare that the prices established by the contracting officer were not "reasonable" and remand the matter to the agency with direction to provide Lockheed Martin a "reasonable" price. The Air Force explained, in a motion to dismiss, that the board lacked jurisdiction over these appeals because Lockheed Martin never submitted a written, certified claim to the contracting officer requesting a final decision in either of the appeals. Lockheed Martin disagreed, contending that the modifications are non-monetary Government claims, from which it could immediately appeal to the board.

The board correctly rejected this argument, applying its own precedent to conclude that the unilateral contract definitizations at issue are not Government claims. The definitizations at issue here do not constitute Government claims under the definition provided in the CDA, at 41 U.S.C. § 7103(a)(3), because they are not "against a contractor." Rather, the contracting officers simply performed their duties to definitize the contracts and establish prices. Because the definitizations are not Government claims under the CDA's definition, the definition of "claim" in the CDA's implementing regulations – the FAR and, specifically, FAR 2.101 – cannot independently make definitizations "Government claims," as Lockheed Martin asserts. Even assuming that FAR 2.101's definition were relevant, that provision could not be interpreted to encompass the

definitizations and convert them into Government claims – rather than agency actions that the contractor must challenge through a claim submitted to the contracting officer. That is, the definitizations are not a "written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." FAR 2.101. The definitizations, unlike Government claims, are not set forth in a contracting officer's final decision that could be appealed directly to the board. That other, materially different types of Government actions are considered to be Government claims has no bearing on the Court's interpretation of the plain language of 41 U.S.C. § 7103(a)(3) or FAR 2.101. Lockheed Martin's attempt to equate the definitizations with these dissimilar actions – such as default terminations that are set forth in contracting officer final decisions and are indisputably "against a contractor" – is unsuccessful.

Because the definitizations are not Government claims, the Court should, therefore, conclude that the board correctly determined that it lacked jurisdiction to entertain Lockheed Martin's appeals.

ARGUMENT

I. Standard Of Review

Pursuant to 41 U.S.C. § 7107(b)(1), the Court reviews the board's decisions on questions of law *de novo*. *Triple Canopy, Inc. v. Sec'y of Air Force*, 14 F.4th 1332, 1337-38 (Fed. Cir. 2021) (citing *Parsons Glob. Servs., Inc. v. McHugh*, 677 F.3d 1166, 1170 (Fed. Cir. 2012)); 41 U.S.C. § 7107(b)(1). "Interpretation of a government contract and interpretation of applicable procurement regulations are questions of law subject to *de novo* review." *Triple Canopy*, 14 F.4th at 1338 (citations omitted).

II. The Definitizations Are Not Government Claims

The board correctly held that the definitizations at issue here are not Government claims; instead, the CDA required Lockheed Martin to submit its complaints about the definitizations to the contracting officer in a written claim as required by the contracts' Disputes clause. Because Lockheed Martin did not do so, the board correctly concluded that it lacked jurisdiction to entertain Lockheed Martin's appeals of the definitizations.

A. Because A Government Claim Must Be "Against A Contractor" According To 41 U.S.C. § 7103(a)(3), The Definitizations Cannot Constitute Government Claims

The board correctly determined, applying *Bell*, that the definitization actions at issue here do not constitute Government claims and, therefore, cannot be directly appealed to the board. Appx2.

As the Court has explained, "[t]he CDA was enacted to 'provide[ ] a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving government contract claims' – that is, disputes arising between the Government and its contractors. *Winter v. FloorPro, Inc.*, 570 F.3d 1367, 1369 (Fed. Cir. 2009) (quoting Contract Disputes Act of 1978, S. Rep. No. 95-1118, at 1 (1978), as reprinted in 1978 U.S.C.C.A.N. 5235, 5235). The CDA requires that "[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision" and "shall be in writing." 41 U.S.C. § 7103(a)(1)-(2). The Court has explained that the contractor must supply "to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Contract Cleaning Maint., Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). The claim must also be certified if it exceeds $100,000, 41 U.S.C. § 7103(b)(1); Congress imposed this requirement to "deter[] contractors from filing inflated claims which cost the government substantial amounts to defeat,"

W.M. Schlosser Co. v. United States, 705 F.2d 1336, 1338 (Fed. Cir. 1983) (citation omitted), and "to encourage settlements." *Folk Constr. Co., Inc. v. United States*, 226 Ct. Cl. 602, 604 (1981) (citations omitted). Upon the issuance of a contracting officer's final decision on a claim, the contractor has the choice to appeal either to the appropriate board of contract appeals or to the Court of Federal Claims, and this Court may then entertain appeals from a final decision of either tribunal. 41 U.S.C. §§ 7104(a) & (b), 7107(a)(1)(A); 28 U.S.C. § 1295(a)(10). The Court has described "an appeal from a contracting officer's decision" as "the very 'linchpin' and necessary prerequisite for the board's jurisdiction." *McDonnell Douglas Corp. v. United States*, 754 F.2d 365, 370 (Fed. Cir. 1985) (quoting *Paragon Energy Corp. v. United States*, 227 Ct. Cl. 176, 645 F.2d 966 (1981)).

Certain Government decisions are considered to be "Government claims," which the contractor can directly appeal to the board without first submitting a claim to the contracting officer. *See Malone v. United States*, 849 F.2d 1441, 1443 (Fed. Cir.), *modified*, 857 F.2d 787 (Fed. Cir. 1988). The Court has explained the limited situations in which a contracting officer's decision can be considered a Government claim. For example, in *Placeway Construction Corp. v. United States*, 920 F.2d 903 (Fed. Cir. 1990), the Government did not pay remaining contract price balance to the contractor because it applied a set-off for damages due to contractor's failure to complete performance on the date set in the contract. *Id.*

at 905-06. The Court considered this set-off to be a Government claim "seeking incidental and consequential damages for [the contractor's] alleged breach of the contract" in not completing performance on time and found that the contracting officer had made a final decision on this claim. *Id.* at 906, 906 n.1; *see also M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1330 (Fed. Cir. 2010) (discussing *Placeway*). Another example of a Government claim is a final termination for default decision by a contracting officer, which hinges on the contracting officer's "determination that the contractor has failed to fulfill its contractual duties." *Malone*, 849 F.2d at 1443. This Court has explained that, when the Government makes a claim against the contractor, it has the burden of proof to justify its decision and any damages that it has assessed against the contractor. *See*, *e.g.*, *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764 (Fed. Cir. 1987) (addressing default terminations); *Malone*, 849 F.2d at 1443 (same). In contrast, the Court has determined that an appeal presents a "contractor claim, not a government claim," when, like Lockheed Martin, the contractor "is asserting a right to payment by the government and would have the burden of proof to establish the value of work it completed" – or, in this case, its own costs. *Westerhold v. United States*, 899 F.2d 1227 (Table), 1990 WL 28083 at *1 (Fed. Cir. 1990) (unpublished).

In *Malone*, this Court explained that "[t]he only guidance Congress provided concerning the *definition of a government claim* exists in the language of [41 U.S.C. §] 605(a), which states that '[a]ll claims by the government *against a contractor* relating to a contract shall be the subject of a decision by the contracting officer.'" 849 F.2d at 1443 (emphasis added). Amendments to the CDA since the *Malone* decision have not changed the substance of this language; it now states that "[e]ach claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer." 41 U.S.C. § 7103(a)(3). Notably, Lockheed Martin omits the words "against a contractor" when reciting the language of 41 U.S.C. § 7103(a)(3), perhaps recognizing that these words undermine its interpretation of that provision. App.Br. 19. The Court should reject Lockheed Martin's attempt to avoid the words "against a contractor." "A contract must also be construed as a whole and 'in a manner that gives meaning to all of its provisions'" – such as the words omitted by Lockheed Martin – "'and makes sense.'" *Bell/Heery v. United States*, 739 F.3d 1324, 1331 (Fed. Cir. 2014) (quoting *Hughes Commc'ns Galaxy, Inc. v. United States*, 998 F.2d 953, 958 (Fed. Cir. 1993)).

Further, the CDA "must be strictly construed" because it is "a statute waiving sovereign immunity." *Winter*, 570 F.3d at 1370. The provision, in 41 U.S.C. § 7104, of a "right of appeal" to an agency board "from [a] decision by

[the] contracting officer" is tied to "a contracting officer's decision under section 7103 of this title," 41 U.S.C. § 7104(a) – including the Government claims described in 41 U.S.C. § 7103(a)(3). Because this right of appeal is a waiver of the Federal Government's sovereign immunity, the "[l]imitations and conditions upon which the Government consents to be sued must be strictly observed[;] exceptions thereto are not to be implied[;]" *Lane v. Pena*, 518 U.S. 187, 192 (1996) (quoting *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981)), and ambiguities must be "construed . . . in favor of immunity." *Id.* (quoting *United States v. Williams*, 514 U.S. 527, 531 (1995)). "To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Id.* Thus, any right to appeal directly to the board "must be unequivocally expressed in statutory text . . . and will not be implied." *Id.* (citation omitted). The language "against a contractor" is a limitation on Government claims that must be strictly observed, and any ambiguity in it must be construed in favor of the Government not having waived immunity to a direct appeal to the board. *See id.*

In *Malone*, the Court explained that "[a] default termination falls precisely within the contours of th[e] language" in 41 U.S.C. § 7103(a)(3) because "[t]he government issues it by [contracting officer] decision, and it is both adverse to the contractor and relates to the contract because it involves a determination that the

contractor has failed to fulfill its contractual duties." 849 F.2d at 1443; *see also Lisbon Contractors*, 828 F.2d at 764 (concluding that a default termination was a Government claim because it is a "decision by the contracting officer on a government 'claim' against the contractor which[] [is] adverse" to the contractor). A contracting officer's definitization like those at issue here, to the contrary, cannot said to be "*against* a contractor," as the CDA requires, 41 U.S.C. § 7103(a)(3) (emphasis added) – or "adverse" to one, as the Court required in *Malone*, 849 F.2d at 1443 – because the contracting officer "d[oes] no more than establish the contract price in accordance with the terms of [the definitization clause in the UCA]." *Bell*, 88-2 B.C.A. (CCH) ¶ 20656. Further, in a definitization, "the Government has not and is not seeking any recourse or payment from [the contractor]" – unlike the set-off in *Placeway*. *Id.*

As in the board explained in persuasive reasoning in *Bell*, such UCA definitization determinations are simply contract administration actions. That is, they are no different in nature than contracting officer actions authorized by standard contract Changes Clauses, such as FAR 52.243-1 (1987), that give contractors the right to pursue equitable adjustments under the contract Disputes clause as contractor claims. The FAR defines "[c]ontract action" to "mean[] an action which *results* in a contract," and an "[u]ndefinitized contract action means any contract action for which the contract terms, specifications, or price are not

agreed upon before performance is begun under the action." FAR 217.7401 (emphasis added). The FAR defines definitization as "the agreement on, or determination of, contract terms, specifications, and price, which converts the undefinitized contract action to a definitive contract." *Id.* When the Government and a contractor enter into a UCA, the contractor agrees that it will negotiate the terms of the "contemplated" "definitive contract," including price, but understands that, "if agreement on a definitive contract to supersede this letter contract is not reached by the target date" or within an extension of it, the contracting officer may "determine a reasonable price." FAR 52.216-25(a), (c); DFARS 252.217-7027(a), (c). When definitizing contract terms, the contracting officer simply follows these agreed-upon procedures. As the board explained in *Bell*, "[t]he [CO] [i]s merely performing the duty prescribed by the contract when the parties failed to reach agreement on a price" and "initia[lly] establish[ing] [] the contract price pursuant to [the UCA clause in the contract]." 88-2 B.C.A. (CCH) ¶ 20656.

In essence, Lockheed Martin asserts that any action by the Government constitutes a Government claim when, and simply because, it has an allegedly deleterious effect on the contractor. The language of 41 U.S.C. § 7103(a)(3) does not support an intent by Congress to consider all such actions to be Government claims. *See Garcia v. United States*, 469 U.S. 70, 75 (1984) ("[O]nly the most extraordinary showing of contrary intentions from [the legislative history] would

justify a limitation on the 'plain meaning' of the statutory language."). Therefore, the Court should disregard the assertions of amicus curiae regarding "implications for the financial health of contractors performing UCAs" and such contractors' alleged lack of "meaningful near-term relief" since they must "wait until costs incurred exceed the definitized amount or until contract performance is complete" to submit a claim to the contracting officer. Amicus Br. 7-8.

Moreover, although 41 U.S.C. § 7103(a)(3) defines a Government claim as a "written decision," the Air Force's definitizations are not written decisions. They are not, by any stretch of the imagination, contracting officer final decisions, unlike actual Government claims, which are set forth in contracting officer final decisions. Lockheed Martin admitted below that "the [contracting officer's] unilateral definitization determination is not called a final decision" under the UCA Regulations. Appx2075. A termination for default decision, in contrast to a definitization, is considered an appealable "final decision" asserting a Government claim because FAR 49.402-3(g)(7) expressly provides that the notice of termination is such an appealable decision. *See* FAR 49.402-3(g)(7). There is no comparable FAR provision identifying unilateral definitization of UCAs as contracting officers' "final decisions."

Indeed, the UCA Regulations confirm the FAR drafters' intent that definitizations not be considered Government claims. The UCA Regulations

explain that, if an agreement on a definitive contract to supersede the UCA is not reached by the target date or extension of it granted by the contracting officer, "the Contracting Officer may, with the approval of the head of the contracting activity, 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*."[1] FAR 52.216-25(c) (emphasis added); DFARS 252.217-7027(c). The FAR's drafters, therefore, did not consider a definitization to be a Government claim – since the relevant Disputes clause, FAR 52.233-1, Appx102; Appx1386, requires a contractor to appeal by submitting a claim to the contracting officer. *See*, *e.g.*, FAR 52.233-1(b) & (d)(1). Although the amicus curiae contends that "the only reasonable reading of this language" in the Definitization clauses related to contractor appeal "is that it provides Lockheed Martin with the right to immediately appeal the unilateral definitization modifications," Amicus Br. 4, this interpretation is unsupported because it simply ignores the reference to the Disputes clause and its requirements, as described above. Such a reading would not give meaning to the words "as provided in the Disputes clause," instead

[1] The language in the UCA regulations incorporated into the Singapore and Korea contracts – "subject to Contractor appeal as provided in the Disputes clause" – is virtually the same as the language in the clause at issue in *Bell* ("subject to appeal by the Contractor as provided in the 'Disputes' clause of the contract"). *See Bell*, 88-2 B.C.A. (CCH) ¶ 20656.

omitting them to draw the assumption that "Contractor appeal" refers to an appeal to the board. *Bell/Heery v. United States*, 739 F.3d at 1331.

The Court should, thus, conclude that the definitizations at issue here are not Government claims as defined in 41 U.S.C. § 7103(a)(3).

B. Lockheed Martin's Interpretation Of FAR 2.101's Definition Of "Claim" In FAR 2.101 To Apply To The Definitizations Is Contrary To The Statutory Provision That This FAR Section Implements

Because the definitizations are not Government claims under the definition in the CDA, 41 U.S.C. § 7103(a)(3), the definition of "claim" in FAR 2.101 cannot expand the waiver of sovereign immunity and independently make definitizations "Government claims," as Lockheed Martin asserts. Lockheed Martin asserts that the contracting officer's definitization action constitutes a Government claim seeking "other relief" or an "adjustment," as described in FAR 2.101. The FAR provisions, including FAR 2.101, are the only CDA's implementing regulations and cannot expand the meaning of "Government claim" as Lockheed Martin contends they do, since this expanded meaning would be at odds with the statutory intent in the CDA.

The language of a regulation (FAR 2.101), generally defining "claim," *see* App.Br. 21-22, cannot override language of a statute (41 U.S.C. § 7103(c)) that explains what constitutes a *Government* claim. *Cf. B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1203 (2d Cir. 1992) (concluding that one statute's exemption of

materials from regulation "cannot take precedence over Congress' concerns spelled out in" another statute). As the Court explained in *Malone*, this is the only evidence of Congress' intent related to what constitutes a Government claim. 849 F.2d at 1443. The Court must reject administrative constructions of a statute, "whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1425 (Fed. Cir. 1988) (quoting *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981)).

Lockheed Martin contends that, in FAR 2.101, the words "relating to a contract" expand the term "claim" to cover virtually any Government action. App.Br. 21-22. However, had Congress intended to include, as Government claims in the CDA, a contracting officer's administrative actions simply applying contract terms, for example, to establish the contract price, Congress could have stated this explicitly in 41 U.S.C. § 7103(c). *Cf. B.F. Goodrich*, 958 F.2d at 1203. It would be inappropriate to blindly adhere to a *statutory* definition if such adherence would frustrate clearly expressed legislative intent, *Skelton v. Gen. Motors Corp.*, 660 F.2d 311, 317 (7th Cir. 1981); it would be even more inappropriate to adhere to a regulatory definition (in FAR 2.101) if it frustrates Congressional intent related to what constitutes a Government claim. As explained above, 41 U.S.C. § 7103(c) requires a Government claim to be "*against* a

contractor" and not merely seek an adjustment or "other relief," as Lockheed Martin interprets FAR 2.101. A definitization simply does not constitute an action "against a contractor" for the reasons described above.

More importantly, for the reasons described in Section II.A, above, the right to appeal directly to the board is a waiver of the Government's sovereign immunity. The right to appeal "must be unequivocally expressed in statutory text" of the CDA "and will not be implied." *Lane*, 518 U.S. at 192. Given this, no FAR section, including FAR 2.101, could be understood to expand the CDA's definition of "Government claim" and circumvent the statute's limitations on what can constitute a "Government claim" that can be directly appealed.

Finally, Lockheed Martin attempts to bolster its interpretation of FAR 2.101 by asserting, citing *Todd Construction, L.P. v. United States*, 656 F.3d 1306 (Fed. Cir. 2011), that this Court has an "'expansive' orientation toward CDA claims, generally, including nonmonetary claims." App.Br. 20 (citing *Todd*, 656 F.3d at 1311-12); App.Br. 21 (same); Amicus Br. 6-7. The language in *Todd* did not relate to any interpretation of the CDA provisions, such as 41 U.S.C. § 7103(a)(3), but instead to the interpretation of a different statute – 28 U.S.C. § 1491(a)(2). In *Todd*, the Court stated that "Congress has chosen expansive, not restrictive, language" in 28 U.S.C. § 1491(a)(2) "[i]n defining the jurisdiction of the [Claims Court] over CDA disputes." 656 F.3d at 1311. Plainly, 28 U.S.C. § 1491(a)(2),

related to the Court's jurisdiction over CDA disputes, does not reflect Congress's intent when drafting the separate provisions in the CDA and does not dictate the meaning of 41 U.S.C. § 7103(a)(3). It certainly does not indicate that 41 U.S.C. § 7103(a)(3) can be expanded to Government actions that are not "against the contractor." In fact, the Court explains in *Todd* that the CDA's definition of claim relates to "*disputes*." *Todd*, 656 F.3d at 1311 (emphasis added). The contracting officer's establishment of a contract price pursuant to the contracts' terms, as demonstrated above, is not a dispute.

The Court should, thus, conclude that Lockheed Martin's interpretation of FAR 2.101's definition of "claim" cannot supplant Congress's specific definition of a "Government claim" in 41 U.S.C. § 7103(a)(3).

C. Even If The Court Concludes That A Definitization Is "Against A Contractor," Lockheed Martin Cannot Demonstrate, Based On FAR 2.101's Language, That A Definitization Is A Government Claim

For the reasons described in Sections II.A and B, Lockheed Martin cannot demonstrate that the definitizations are Government claims under the CDA; therefore, the Court need not reach Lockheed Martin's arguments that the definitizations fall within FAR 2.101's definition of "claim." We nonetheless address below Lockheed Martin's arguments related to the words "adjustment" and "other relief" in FAR 2.101 and demonstrate that those words cannot convert a definitization into a Government claim.

1. Lockheed Martin Incorrectly Interprets FAR 2.101's Definition Of A Claim As A Demand, As A Matter Of Right, For "Other Relief" To Encompass Definitizations

First, Lockheed Martin fails to support its interpretation of the words "other relief" in FAR 2.101 to mean that definitizations are Government claims.

FAR 2.101 defines a claim as "a written *demand* or written *assertion* by one of the contracting parties *seeking*, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or *other relief* arising under or relating to the contract." FAR 2.101 (emphasis added). Although Lockheed Martin isolates the terms "adjustment" and "other relief," App.Br. 20, the Court should decline to read those terms separately from the requirement that there be a written "demand" or "assertion" "seeking" them "as a matter of right." FAR 2.101; *Bell/Heery*, 739 F.3d at 1330. The Court should reject Lockheed Martin's interpretation of these words and its request that the Court apply disparate and irrelevant FAR provisions and situations to derive the meaning of these words.

a. "Other Relief"

Relief is defined, in a legal sense, as "[t]he redress or benefit, esp[ecially] equitable in nature (such as an injunction or specific performance), that a party asks of a court."[2] Black's Law Dictionary (11th ed. 2019). "Relief" is obviously

[2] More generally, "relief" has been defined as "legal remedy or redress" or "removal or lightening of something oppressive, painful, or distressing." Merriam-Webster's New Collegiate Dictionary 985 (10th ed. 2001).

sought by a contractor in its request for redress from the entity that can decide a claim and, therefore, provide redress – the CO. A contractor has no such ability to provide redress and, instead, will simply respond, or not, to the contracting officer's direction to perform work or make a payment to the Government. Thus, the term "other relief" does not have an obvious connection to a Government claim. However, the Court has determined that a contracting officer can seek "other relief" from a contractor, making her demand a "Government claim." *Garrett v. Gen. Elec. Co.*, 987 F.2d 747, 749 (Fed. Cir. 1993). In *Garrett*, the Court considered a contracting officer's directive to a contractor to correct or replace defective jet engines to be a demand for "other relief." *Id.* A definitization is plainly distinct from such a directive and cannot be understood to seek "relief" for the same reasons described above – the Government is not "seek[ing]" recourse from the contractor, but instead is simply performing the duty required by the contract and establishing the contract price. *See* Section II.A, above. The contract price set by the contracting officer is not the equivalent of a written "demand" or "assertion" "seeking" "relief" – such as a demand that the contractor comply with the contract by performing work not otherwise required by the contract, as in *Garrett*, or make a payment to the Government to account for faulty work or late performance (through, for example, a set-off against monies otherwise owed the contractor, as in *Placeway*).

Moreover, the Court should read the term "other relief" along with "as a matter of right" as discussed below. In *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260 (Fed. Cir. 1999), the Court explained that "the phrase 'as a matter of right' in the regulatory definition of a 'claim' requires only that the contractor specifically assert entitlement to the relief sought. That is, the claim must be a demand for something due or believed to be due." *Id.* at 1265. "Other relief," therefore, must be something due or believed to be due – not simply prices established under agreed-upon contract procedures.

Finally, Lockheed Martin's curiously heavy reliance on the Court's *Todd* decision – which involved *contractor claim*, not a Government claim – to assert that definitizations are a form of "other relief" under FAR 2.101 is misplaced. App.Br. 43. The board, however, correctly explained below that *Todd* "did not hold that the challenged performance evaluations were, themselves, government claims; rather, it held that seeking relief from those evaluations was the proper subject of a claim. Appx6 (citing *Todd*, 656 F.3d. at 1313-14). As the board noted, this "is key: it is not that every written action in the course of a contract that a party considers to be adverse to it is a claim; instead, it is the seeking of relief from those actions that is the claim." Appx6-7. The board noted that this Court, in *Todd*, "never concluded that the performance evaluations were, *themselves*, government claims." Appx7 (emphasis added). Instead, "Todd sought review by

the contracting officer" by filing a claim, and subsequently, "the contracting officer issued a 'final decision regarding [Todd's] performance,' concluding that "the [u]nsatisfactory performance appraisal [was] justified and all required procedures were followed." *Todd*, 656 F.3d. at 1309.

b. "As A Matter Of Right"

The interpretation, by Lockheed Martin and amicus, of the words "as a matter of right" in FAR 2.101 is also unsupported.

A contracting officer's decision or action is not a Government claim simply because the contracting officer exercised a "contractually-granted right." App.Br. 20. Although a "contracting officer's decision purporting to terminate a contract for default is the assertion of the Government's *right* to stop the contractor's performance of the contract in accordance with its terms, *Reedom*, ASBCA No. 30226, 85-1 B.C.A. (CCH) ¶ 17879 (Jan. 22, 1985), this does not imply – as amicus contends – that *all* assertions of Government rights within a contract constitute Government claims. Amicus Br. 5-6. As noted above, a contracting officer obviously has a right under a Changes clause such as FAR 52.243-1 to make a change to a contract, but this does not create a Government claim. Instead, the contractor then is able to seek relief by submitting a request for equitable adjustment, and potentially a claim, as described in the Disputes clause. Further, this reading of FAR 2.101 is plainly at odds with the requirement in 41 U.S.C.

§ 7103(a)(3) that the Government have made a demand "against the contractor." Moreover, *Alliant*, on which Lockheed Martin relies, App.Br. 25, rejects Lockheed Martin's interpretation of "as a matter of right" within the context of FAR 2.101. In *Alliant*, the Court explained that

> the phrase 'as a matter of right' in the regulatory definition of a 'claim' requires only that the contractor specifically assert entitlement to the relief sought. That is, *the claim must be a demand for something due or believed to be due* rather than, for example, a cost proposal for work the government later decides it would like performed.

178 F.3d at 1265.

Lockheed Martin asserts that "the Air Force issued both modifications 'as a matter of right' by invoking the applicable Definitization clause – FAR 52.216-25 or DFARS 252.217-7027 – on Block 13(D) of the respective SF-30 modification form." App.Br. 25 (citing Appx639; Appx1673); *see also* Amicus Br. 5-6. Yet, it is plain that each of these pages within the definitizations is simply titled "modification of contract" and states – when asked to "[s]pecify type of modification and authority" – "FAR 52.216-25" or "DFARS 252.217-7027," respectively. Appx639; Appx1673. The mere fact that the contracting officer had a duty to establish a contract price under those clauses – and simply referred to them in a block on Standard Form 30 – does not demonstrate that the contracting officer was "*seeking*, as a matter of right," some form of "relief" from Lockheed

Martin, FAR 2.101 (emphasis added) – let alone "against" Lockheed Martin. 41 U.S.C. § 7103(a)(3). Rather than "demand[ing] . . . something due or believed to be due," *Alliant*, 178 F.3d at 1265, the contracting officer simply established prices following the agreed-upon procedure.

Finally, Lockheed Martin contends that the performance evaluations in *Todd* represented an exercise of the "discretionary right of the Government" to evaluate the contractor. App.Br. at 43. However, as explained above, this purported exercise of a right was wholly unrelated to the question here – whether there was a Government claim. *Todd* did not conclude that the challenged performance evaluations were, themselves, government claims; rather, it held that seeking *relief from those evaluations* was the proper subject of a claim by a contractor – not a Government claim. Appx6 (citing *Todd*, 656 F.3d. at 1313-14).

c. Lockheed Martin's Interpretation Of FAR 2.101 Based On The Language Of Other FAR Provisions And The Manner In Which Breach Of Contract Claims Are Raised

Lockheed Martin next presses an interpretation of FAR 2.101's language based, first, on the remedies, or lack thereof, provided by separate FAR sections related to changes, terminations for convenience, and default terminations and, second, on the way in which breach of contract claims are raised – through presentation to the contracting officer. App.Br. 39, 41. However, the meaning of "claim" in FAR 2.101 is grounded in its plain language, not in unrelated FAR

provisions or the unrelated situation of a breach of contract claim. *Bell/Heery*, 739 F.3d at 1330 (discussing contract interpretation). The Court should, therefore, disregard Lockheed Martin's interpretation based on these grounds.

In any event, Lockheed Martin's argument is not assisted by its assumption that contractors must only submit claims to the contracting officer only when contract provisions have provided them with remedies. App. Br. 39-40. This is because the UCA Regulations *do* provide a remedy – "Contractor appeal as provided in the Disputes clause." FAR 52.216-25(c); DFARS 252.217-7027(c). This remedy-providing language is no different than that in the termination for convenience clause cited by Lockheed Martin (FAR 52.249-2), which states that "[t]he Contractor shall have the right of appeal, under the Disputes clause, from any determination made by the Contracting Officer," with certain exceptions. FAR 52.249-2(j). Moreover, Lockheed Martin's reliance on claims that the Government breached a contract, App.Br. 39-40, is unavailing since such claims plainly are not made under remedy-granting contract clauses and are not resolved under contract clauses. *See J. Cooper & Assocs., Inc. v. United States*, 47 Fed. Cl. 280 (2000); *Mega Constr. Co. v. United States*, 29 Fed. Cl. 396, 415 n.11 (1993); John ~~Cibinic~~, Jr. & Ralph C. Nash, Jr., Admin. of Gov't Contracts 1239-46 (3d ed. 1995). Yet they must be raised through claims submitted to the contracting officer, not directly to the board or Court of Federal Claims.

Thus, contrary to Lockheed Martin's assertion, whether a contract provision provides a remedy to a contractor does not govern whether a Government action involving that provision is a Government claim. If it does, by Lockheed Martin's logic, definitizations are not Government claims because the UCA Regulations themselves provide contractors with a remedy – appeal pursuant to the Disputes clause.

Taking a different tack, Lockheed Martin also asserts that although definitizations are "subject to Contractor appeal as provided in the Disputes clause," according to the UCA Regulations, this language does not, in fact, anticipate the presentation of a claim to the contracting officer as explained in the Disputes clause, FAR 52.233-1. App.Br. 41. Lockheed Martin contends that this language cannot have its obvious meaning because the Default clause for fixed-price construction contracts contains the same language – the "findings of the Contracting Officer [are] . . . subject to appeal under the Disputes clause" – yet default terminations are considered Government claims.[3] App.Br. 41 (citing FAR 52.249-10(b)(2)); *see also* Amicus Br. 5. Again, as noted above, FAR 2.101's meaning is not properly interpreted by reference to separate FAR sections and

[3] Although FAR 54.249-10(b)(2) refers to an appeal of "findings of the Contracting Officer," FAR 52.249-10(b)(2), the CDA makes clear that "[s]pecific findings of fact are not required," and "[i]f made, specific findings of fact are not binding in any subsequent proceeding." 41 U.S.C. § 7103(e).

remedies provided, or not provided, within them. *Bell/Heery*, 739 F.3d at 1330. Further, Lockheed Martin does not demonstrate why language in the Default clause for fixed-price construction contracts has any bearing on the meaning of the UCA Regulations.

In any event, Lockheed Martin misreads the Default clause for fixed-price construction contracts, FAR 52.249-10(b)(2), when concluding that its reference to contractor appeal pursuant to the Disputes clause must refer to a Government claim. When FAR 52.249-10(b)(2) is read along with other provisions of FAR 52.249-10, it is plain that this specific sub-section does not relate to a default termination undertaken by the Government. Lockheed Martin appears to focus on FAR 52.249-10's title – "Default (Fixed Price Construction)" – and the fact that it provides, at sub-section (a), that

> [i]f the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed.

FAR 52.249-10(a). However, this provision allows a termination for default is followed by an exception: "[t]he Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause" if "[t]he delay in completing the work arises from unforeseeable causes beyond the control

and without the fault or negligence of the Contractor" and the contractor has timely notified the contracting officer of them. FAR 52.249-10(b), (b)(1), & (b)(2). FAR 52.249-10(b)(2) explains that the contractor can seek an extension of the time for completing the work shall be extended, but that if the contracting officer finds the delay is not excusable, these findings are "subject to appeal under the Disputes clause." FAR 52.249-10(b)(2). These findings related to the excusability of delay are plainly distinct from a contracting officer's final decision to terminate, based on default, the contractor's right to proceed with work. Thus, the fact that FAR 52.249-10(b)(2) refers to an appeal pursuant to the Disputes clause does not indicate, as Lockheed Martin claims, that appeals of default terminations are also made pursuant to the Disputes clause.

d. Definitizations Are Not Analogous To Contracting Officer Final Decisions Found To Constitute Government Claims, Like Terminations For Default And Offsets

Lockheed Martin and the amicus curiae attempt to analogize the definitizations to those types of contracting officer final decisions that this Court or the board have found to constitute Government claims. App.Br. 41; Amicus Br. 5. They fail to demonstrate that definitizations are in any way analogous.

(1) Default Terminations

Just because the Court has considered certain contracting officer final decisions, such as default terminations, to be Government claims that are

immediately appealable, this does not necessarily mean that unilateral definitization modifications must also be, without consideration of the statutory language (and the language of FAR 2.101, if necessary) and the circumstances surrounding a definitization. Amicus Br. 5. Although Lockheed Martin also attempts to equate the definitization – a unilateral modification – with a termination for default by describing such terminations as "unilateral modifications," App.Br. 41 (citing *Malone*, 849 F.2d at 1445), in a default termination, the Government does not *modify* a contract; rather, it *terminates* the contract. Certainly not all unilateral modifications can be understood to be Government claims, if they are not "against the contractor" and demands for something believed to be due, as required by 41 U.S.C. § 7103(a)(3) and FAR 2.101.

Further, Lockheed Martin relies on the fact that a contractor can challenge the *propriety* of an agency's termination for default, as in *Malone*. App.Br. 36; App.Br. 45. That a contractor can do so has no relevance to whether the Government has made a Government claim by seeking, as a matter of right, other relief – that is, in the Court's formulation, making "a demand for something due or believed to be due," *Malone*, 178 F.3d at 1265. Moreover, there is no support in the *Garrett* decision for Lockheed Martin's assertion that *Garrett's* decision with regard to "other relief" was linked to *Malone* court's consideration of the

"*propriety*" of the agency's termination for default. App.Br. 36 (emphasis added). Instead, the "propriety of the default termination by the government" is, specifically, "[a]n element of the contractor's claim" for conversion of the default termination to a termination for convenience and award of termination for convenience damages – not an element of any other challenge. *Lisbon Contractors*, 828 F.2d at 764; *see id.* at 761.

(2) Directives That Contractors Perform Work Outside The Contract Terms At No Cost

In addition, Lockheed Martin fails in its attempt to equate the definitizations with so-called "no-cost directions" – that is, contracting officer directions to a contractor to perform work that have been considered Government claims. App.Br. 38.

Lockheed Martin contends that the definitizations directed it to perform "no-cost" work by "requir[ing] Lockheed Martin to continue upgrading F-16 aircraft at no additional cost (above the [contracting officer's] unilaterally-imposed price caps)." App.Br. 38. Lockheed Martin contends that this purported requirement is equivalent to the directive to perform "no-cost" work in *Garrett* that the Court viewed as a Government claim. App.Br. 38.

As explained above, the situation in *Garrett*, however, was quite different from that presented here. In *Garrett*, the contractor had supplied the Navy with defective engines as part of its work under a contract. The Court concluded that,

"[u]nder the contract, the Navy had three options. It could have reduced the contract price or demanded repayment of an equitable portion of the contract price. Rather than seek these monetary remedies, the Navy chose" to "direct [the contractor] to correct or replace the defective engines." *Garrett*, 987 F.2d at 749. The Court concluded that this "alternative to a monetary remedy" "constitutes 'other relief' within the FAR's third category of 'claims,'" as described in FAR 2.101. *Id.* As the board noted, this Court, in *Garrett*, "recognized the problematic aspects of judicial intrusion into contract administration, but . . . found them to be inapplicable to the circumstances presented in that appeal, given, *inter alia*, that contract performance was already complete at the time the government revoked its acceptance of the jet engines and required the contractor to fix them." Appx6 (citing *Garrett*, 987 F.2d at 751-52). The "directive" in *Garrett* "to correct or replace defective engines" after contract performance was complete, App.Br. 35, is completely different from the contracting officer's simple establishment of a contract price in this case – along with the continuation of "completion of the contract" by Lockheed Martin as required by FAR 52.216-25(c) and DFARS 252.217-7027(c). Establishing contract prices does not directly impose a cost of performance and certainly is not the equivalent of "directing the contractor to incur *additional* costs of performance." Appx8 (emphasis added).

(3) Upgrades To Accounting Practices To Comply With The Cost Accounting Standards

Moreover, Lockheed Martin fails to support its claim that "the Air Force's unilateral definitization modification – requiring continued performance and invariably forcing cost overruns down the road – is jurisdictionally similar" to a requirement by the Government that a contractor bring its accounting practices into compliance with the FAR's Cost Accounting Standards (CAS), FAR Part 9904. App.Br. 47-49; App.Br. 38 (citing decisions related to CAS non-compliance, namely, *Newport News Shipbuilding & Dry Dock Co. v. United States*, 44 Fed. Cl. 613, 618 (1999), and *CACI Int'l, Inc.*, ASBCA No. 57559, 12-1 BCA ¶ 35,027 (Apr. 25, 2012); App.Br. 45-46 (same).

A CAS non-compliance determination "imposes the cost of a new accounting system on the contractor." Appx8. This certainly is not the effect of a simple establishment of prices, as occurred when the contracting officer definitized the contracts here.

Further, Lockheed Martin assumes that its costs will "invariably exceed down the road" "the contract price caps" set by the definitizations, which will result in "cost overruns." App.Br. 47-48. However, as the board explained, "[a]bsent a claim *by the contractor*, we have no way of knowing whether the particular price definitization imposed by the government will force later cost overruns in a particular case, much less whether any and all unilateral

definitizations would 'invariably' cause such overruns." Appx8 (emphasis in original). The board noted that Lockheed Martin "assert[ed] in its complaint that it is being wronged by tens of millions of dollars . . ., but it does not argue that such figures may be found in the [contracting officer's] definitization decision or that all unilateral priced definitizations will 'invariably' cause cost overruns." Appx8 n.9 (citing Appx2028-2029 ¶¶ 73, 80). This is certainly not a situation in which the burden should be placed on the Government – as it is when a "Government claim" is considered – because Lockheed Martin's own purported costs are involved, not damages assessed by the Government, and Lockheed Martin is seeking payment from the Government, not vice versa. *See* Section II.A, above (citing *Lisbon Contractors*, 828 F.2d at 764; *Malone*, 849 F.2d at 1443; *Westerhold*, 899 F.2d 1227 (Table), 1990 WL 28083 at *1).

(4) A Contracting Officer's Disallowance Of A Contractor's Indirect Costs

Finally, amicus curiae asserts an argument that Lockheed Martin raised before the board, but abandoned here – that a definitization is the equivalent of a "unilateral determination of Final Indirect Cost Rates," which the board has considered a Government claim and, thus, immediately appealable. Amicus Br. 6 n.2 (citing, among other decisions, *Fiber Materials, Inc.*, ASBCA No. 53616, 07-1 BCA ¶ 33,563 (Apr. 17, 2007)). This argument does not support a conclusion that the definitizations are Government claims.

First, unlike the definitizations here, which were issued on a simple form and not as a contracting officer's final decision, the contracting officer in *Fiber Materials* issued a "final decision." 07-1 BCA ¶ 33,563. This final decision was issued in 2001 (and later revised) to establish indirect cost rates for *past* years, "FYs [fiscal years] 1995 and 1996, based upon [the Defense Contract Audit Agency's (DCAA)] Form 1 findings" – that is, findings in DCAA's Form 1 "Notices of Contract Costs Suspended And/Or Disapproved" – and a meeting with, and subsequent submissions by, the contractor. *Id.* In this final decision, the contracting officer "demanded payment of [] $646,272, composed of $562,525 in unallowable costs and $83,747 in penalties . . . for allegedly expressly unallowable air transport, [a] cabin, and patent amortization costs." *Id.* That is, the contracting officer was setting indirect costs rates for *past* years – not for the ongoing performance of the contract, as in the present case. And the contracting officer was doing so in order to demand payment for amounts believed to be owed based on an audit showing the contractor's *past* charges were unallowable. This situation is quite different from that presented in the present case, in which the definitizations established future contract prices.

In any event, the Court is not bound by the reasoning of board decisions, such as *Fiber Materials*. *See Triple Canopy*, 14 F.4th at 1341. In *Fiber Materials*, the board did not cite the CDA's language defining claim, 41 U.S.C. § 7103(a)(3),

nor the FAR's definition of "claim," FAR 2.101, let alone engage in an interpretation of those provisions. Moreover, in its decision below, the board explained that the *Fiber Materials* decision was not persuasive. In that 2007 decision, the board, "in rather summary form," stated that "[t]he government's disallowance of appellant's indirect costs, as reflected in the ACO's [administrative contracting officer] unilateral rate determination, and her imposition of penalties, are government claims subject to appeal under the CDA." Appx10 (quoting *Fiber Materials*, 07-1 BCA ¶ 33,563). In reaching that determination, it cited three decisions that pre-date the *Bell* decision. *Id.* The board, therefore, took a different approach to definitizations, beginning with *Bell*, than it did to a disallowance of indirect costs and unilateral determinations of indirect cost rates.

The Court should, therefore, conclude that, contrary to Lockheed Martin's arguments, the definitizations are not demands, as a matter of right, for "other relief" arising from or related to the UCAs.

2. Lockheed Martin Does Not Demonstrate That The Definitizations Constitute Demands For Adjustments To The Contract, As Described In FAR 2.101

In addition, Lockheed Martin attempts to fit the definitizations within another type of "claim" described in FAR 2.101 and assert that they are, therefore, Government claims. Lockheed Martin asserts that "the Air Force's unilateral

modifications actually 'adjusted' the contract terms by establishing prices pursuant to the Definitization clauses" and therefore "could" be "classif[ied]" "as nonmonetary 'adjustment' claims under this Court's analogous precedent." App.Br. 49. This attempt to demonstrate a Government claim is unsupported.

First, Lockheed Martin misconstrues FAR 2.101 when it asserts that a Government claim can be based on the Air Force's purported price "adjustment" of contract terms through the establishment of contract prices. As we have previously noted, the board correctly concluded that "it is not that every written action in the course of a contract that a party considers to be adverse to it" – like the establishment of prices – "is a claim; instead, it is the *seeking* of relief *from* those actions that is the claim." Appx6-7 (emphasis added). Plainly, only Lockheed Martin's "seeking of relief from" the establishment of prices in the definitization would constitute a claim.

Second, the definitizations cannot represent an adjustment to the contract terms. It is plain from the terms of the Singapore and Korea UCAs that contract prices would be set in the future. The contracting officer's *establishment* of the contract terms related to price – when none previously existed – cannot constitute an "*adjustment*" to contract terms. Moreover, Lockheed Martin agreed to this procedure, in which the prices were not agreed-upon contract terms and would be

definitized in the future, by entering into UCAs that included the UCA Regulations.

Similarly, in *Bell*, the board concluded that the contracting officer's definitization action "was not premised on an issue of contract interpretation or adjustment." 88-2 BCA ¶ 20656. Instead, it "was the initial establishment of the contract price pursuant to [the definitization clause in the contract]" through the contracting officer's performance of "the duty prescribed by the contract when the parties failed to reach agreement on a price." *Id.* For this reason, Lockheed Martin's reliance on board decisions like *Boeing Co.*, ASBCA No. 37579, 89-3 B.C.A. (CCH) ¶ 21992 (Apr. 21, 1989), is misplaced. *Boeing* involved the contracting officer's unilateral modification to exercise an option, but the board concluded that it "assert[ed] the Government's right to adjust the contract terms to permit the late exercise of an option and perpetuate contractual ceiling prices" and therefore was "a contracting officer's decision asserting a Government claim from which Boeing could properly appeal." 89-3 B.C.A. (CCH) ¶ 21992. These contract terms existed and could be adjusted through the exercise of the option, unlike the price terms at issue here. In any event, the Court is not bound by decisions of the board, like *Boeing*. *See Triple Canopy*, 14 F.4th at 1341.

Third, the decisions involving claims based on "adjustments" relied on by Lockheed Martin, App.Br. 20-21, do not support its arguments. These decisions

relate to claims brought by *contractors*, not Government claims. *See Alliant*, 178 F.3d at 1265. Lockheed Martin relies on *Alliant*, in which the contracting officer issued a unilateral modification to exercise an option. 178 F.3d at 1264. The provision in the contract allowing the Government to exercise an option specified the time period during which the option could be exercised and the monthly rate at which the option quantity was to be delivered. *Id.* at 1263. The contractor sent the contracting officer a letter asserting that the contracting officer's "attempt to exercise the option was ineffective" because "(1) the attempted exercise of the option was untimely and (2) the contracting officer had specified a delivery rate that was not set forth in the option clause." *Id.* at 1264. The Government did not dispute that this letter was "seeking adjustment or interpretation of a contract term, *i.e.*, the evaluated option provision." *Id.* Indeed, although the Court, in *Alliant*, referred, generally, to the contractor's request was one for "adjustment or interpretation," *id.* at 1266-67, it concludes that Alliant, the contractor, made a "request for an *interpretation* of the contract" – that is, the option provision – *not* a request for adjustment. *Id.* at 1267 (emphasis added). Therefore, *Alliant* – in which a *contractor* made a demand seeking *interpretation* of a contract provision – has no relevance to the contracting officer's purported "adjustment" in this case. This wholly undermines Lockheed Martin's assertion that "[u]nilateral

definitization modifications are analogous to the unilateral option modifications in *Alliant*" and, thus, should be considered Government claims. App.Br. 54.

The Court should, therefore, conclude that the definitizations cannot constitute a demand, as a matter of right, for adjustment of contract terms and, thus, are not Government claims under FAR 2.101 on this ground. In sum, the Court should determine that the definitizations are not Government claims and, therefore, that the board correctly concluded that it lacked jurisdiction to entertain them when they were directly appealed by Lockheed Martin.

III. Contrary To Lockheed Martin's Assertion, Remand Is Not Warranted If the Court Agrees With The Board's Conclusion

Lockheed Martin contends that, instead of deciding whether the definitizations were Government claims, the Court could remand the matter to the board "because the board improperly relied upon" the purportedly "noncontrolling precedent" in *Bell* "as controlling." App.Br. 56 (capitalization omitted). Lockheed Martin contends that the Court could provide "instructions to properly analyze CDA claim jurisdiction without reliance" on *Bell*, which it describes as "inapposite case law." Such a remand would be futile because definitization actions are not Government claims as a matter of law, regardless of *Bell*.

Regardless of whether *Bell* was controlling and the board properly applied it or not, the Court will address the meaning of "claim" in the CDA and whether the definitizations are Government claims. The Court's review is independent of the

board's conclusions in *Bell*, which are not binding on the Court. *Triple Canopy*, 14 F.4th at 1341. A remand to the board to resolve this question is, therefore, unnecessary.

In any event, *Bell* is not "inapposite," as Lockheed Martin claims, because it directly, and correctly, evaluates whether a definitization, like that involved here, is a Government claim. App.Br. 56. That *Bell* "'did not explicitly cite' to 'other relief' claims in its decision," App.Br. 57 (quoting Appx4 n.3), is irrelevant for the reasons explained by the board. Appx4 n.3. While *Bell* did not explicitly discuss the words "other relief," this text was part of the FAR at the time. In an analogous situation, the Court concluded that "it is presumed that the Board has considered the entire record in reaching its decision unless specific evidence indicates otherwise." *McKenzie v. Peake*, 289 F. App'x 398, 401 (Fed. Cir. 2008) (unpublished) (addressing the Board of Veterans' Appeals) (citing *Gonzales v. West*, 218 F.3d 1378, 1381 (Fed. Cir. 2000); *see also Yeda Rsch. v. Mylan Pharms. Inc.*, 906 F.3d 1031, 1046 (Fed. Cir. 2018) (concluding that the Patent Trade and Appeal Board's "failure to explicitly discuss every fleeting reference or minor argument does not alone establish that the Board did not consider it"); *MySpace, Inc. v. GraphOn Corp.*, 672 F.3d 1250, 1263-64 (Fed. Cir. 2012) (finding no error in a district court's failing to explicitly mention secondary considerations "when

the record establishes that the evidence was properly before and considered by the court").

Further, as the board noted, *Bell* "addressed whether the government seeks other relief when it definitizes prices by *expressly* holding that the government did not seek any '*recourse*' when it definitized prices." Appx4 n.3 (quoting 88-2 BCA ¶ 20,656 at 104,392). Contrary to Lockheed Martin's contention, the board did not misconstrue *Bell's* use of the word "recourse," App.Br. 57; App.Br. 57-58 n.31. *Bell* noted that "the Government has not and is not seeking any recourse *or* payment from appellant," 88-2 BCA ¶ 20656 (emphasis added), and there is no basis in this text or the surrounding text for Lockheed Martin's assumption that *Bell* used "recourse" only "in the sense of monetary recourse other than transmission of payment, such as withholdings, price reductions, and deductive actions." App.Br. 57.

In any event, a remand to the board would not be warranted. The Court has previously rejected a request to remand an issue to the Merit Systems Protection Board (MSPB) for the MPSB to consider factors not explicitly discussed in its decision on appeal. *Auston v. Merit Sys. Prot. Bd.*, 371 F. App'x 96, 101-02 (Fed. Cir. 2010) (unpublished). The Court reached this conclusion because, despite the MPSB's failure to explicitly refer to certain factors, the MSPB had reached the correct conclusion. *Id.* The same reasoning applies here.

CONCLUSION

For these reasons, this Court should affirm the board's decision.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

/s/ Patricia M. McCarthy
PATRICIA M. MCCARTHY
Director

/s/ Amanda L. Tantum
AMANDA L. TANTUM
Senior Trial Counsel
Commercial Litigation Branch
Department of Justice, Civil Division
P.O. Box 480, Ben Franklin Station
Washington, DC 20044
Telephone: (202) 616-8131
Amanda.Tantum@usdoj.gov

Attorneys for Appellee

OF COUNSEL:

Christopher J. Hilborn
Caryl A. Potter, III
Jeffrey P. Hildebrant
United States Air Force
Air Force Commercial Litigation
Field Support Center
1500 West Perimeter Road
Suite 4100
Joint Base Andrews, MD

May 5, 2022

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I certify under penalty of perjury that on this 5th day of May, 2022, a copy of the foregoing "Corrected Brief of Appellee, the Secretary of the Air Force" was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Amanda L. Tantum
AMANDA L. TANTUM
Senior Trial Counsel
Commercial Litigation Branch
Department of Justice, Civil Division
P.O. Box 480
Washington, DC 20044
Telephone: (202) 616-8131
Amanda.Tantum@usdoj.gov

May 5, 2022

Attorney for Respondent-Appellee

FORM 19. Certificate of Compliance with Type-Volume Limitations **Form 19**
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 2022-1035

Short Case Caption: Lockheed Martin Aeronautics Company v. Secretary of the Air Force

Instructions: When computing a word, line, or page count, you may exclude any items listed as exempted under Fed. R. App. P. 5(c), Fed. R. App. P. 21(d), Fed. R. App. P. 27(d)(2), Fed. R. App. P. 32(f), or Fed. Cir. R. 32(b)(2).

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because it meets one of the following:

☑ the filing has been prepared using a proportionally-spaced typeface and includes 9,929 words.

☐ the filing has been prepared using a monospaced typeface and includes _____ lines of text.

☐ the filing contains _____ pages / _____ words / _____ lines of text, which does not exceed the maximum authorized by this court's order (ECF No. _____).

Date: 05/05/2022

Signature: /s/ Amanda L. Tantum

Name: Amanda L. Tantum

Save for Filing