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

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PRINCIPAL BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2022-1035

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

Filing Party/Entity Lockheed Martin Aeronautics Company

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Name: Stephen J. McBrady

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☐ None/Not Applicable
Lockheed Martin Aeronautics Company		State Street Corporation and State Street Bank and Trust Company

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Michelle Coleman		
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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, appellant's counsel states that he is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. Appellant's counsel is unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

INTRODUCTION

This is an appeal from a decision of the Armed Services Board of Contract Appeals (the "ASBCA" or "Board") dismissing Lockheed Martin's appeals for lack of jurisdiction. At issue are two Air Force Contracting Officer ("CO") determinations, implemented by unilateral modifications, that unilaterally established—"definitized"—the total contract prices to be paid by the Government to Lockheed Martin under two separate F-16 upgrade contracts valued at approximately $1 billion each. In government contracting, a unilateral decision regarding how much to pay the contractor (for the entire contract) is an extraordinary action of last resort.

This is a case of first impression at the Federal Circuit, but the plain language of the Contract Disputes Act of 1978 ("CDA") (41 U.S.C. §§ 7101 *et seq.*), the implementing Federal Acquisition Regulation ("FAR") (48 C.F.R. §§ 1 *et seq.*), Defense FAR Supplement ("DFARS") (48 C.F.R. §§ 201 *et seq.*), the two Definitization clauses in the contracts, and the Court's own precedents, require that the Board's decision be reversed. The unilateral decision of a CO setting a total contract price under a Definitization clause is a Government "claim" under the CDA, properly subject to appeal by the contractor to the Board.

Here, the Government definitized the contracts pursuant to the regulations (contract clauses), which grant the Government, after first requiring the parties to

negotiate over cost data to try to reach bilateral agreement, the drastic, one-time right to curtail negotiations and unilaterally determine the final contract price/fee, as follows:

> [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); DFARS 252.217-7027(c) (collectively, "Definitization clauses").[1]

Unlike remedy-granting clauses such as the changes or convenience terminations clauses, the plain language of the Definitization clauses do not entitle the contractor to an equitable adjustment for costs incurred, or monetary relief, or to any particular amount. *See id*. Rather, the contractor is entitled to a "reasonable" Government price determination. *Id*. The plain language defines "reasonable" as "in accordance with" the objective cost and pricing rules of FAR 15.4 and 31, *id.*, which contain their own requirements for how the Government must determine the

[1] In addition to the definitization modifications satisfying the CDA plain language test to be Government "claims," the Air Force's extraordinary, one-time action to end negotiations and unilaterally pick the price to pay Lockheed Martin for the entire contract is undoubtedly a "non-routine" action, similar to a termination, notwithstanding the Government's contractual right to take such actions. *See, e.g*., *James M. Ellett Const. Co. v. United States*, 93 F.3d 1537, 1542 (Fed. Cir. 1996) ("[I]t is difficult to conceive of a less routine demand for payment than one which is submitted when the government terminates a contract for its convenience. Such a demand, which occurs only in a fraction of government contracts is certainly less routine than a request for an equitable adjustment, several of which a contractor might submit on any one contract.")

"reasonable" costs and prices. *E.g.*, FAR 15.404-1(a)(3) ("Cost analysis shall be used to evaluate the *reasonableness* of individual cost elements when certified cost or pricing data are required. Price analysis should be used to verify that the overall price offered is fair and *reasonable*.") (emphasis added); FAR 31.201-3 (Determining reasonableness).

Under the plain language of the CDA, the regulations, and this Court's precedent, the Air Force's unilateral price definitizations—issued by written modifications—are Government CDA *claims* that the contractor may "appeal" to the Board for adjudication of the "reasonable[ness]" of the definitized price. FAR 52.216-25(c); DFARS 252.217-7027(c). The CDA only requires a Government "claim" be "written." 41 U.S.C. § 7103(a)(3). This Court looks to the FAR's definition of "claim," which the FAR defines as a "written assertion" made by either party "seeking, as a matter of right" one of three things: (1) the "payment of money in a sum certain," (2) nonmonetary contract "adjustment" or "interpretation," or (3) nonmonetary "other relief arising under or relating to the contract." FAR 2.101. Here, the two definitization modifications satisfy all jurisdictional aspects to qualify as CDA "claims." The Government's "matter of right" for definitizing final prices is found on block 13(d) of each modification, where the Government cited the applicable Definitization clause as its authority for the modification. And each modification seeks relief: Lockheed Martin believes that the definitization

constitutes nonmonetary "other relief" under this Court's precedent, but, alternatively, could be construed as contract "adjustment" relief, as discussed below in Sections II.B and II.C, respectively.[2] *Id*.

In addition, the plain language of the Definitization clauses recognizes the Government's non-routine definitization to be a *claim* because the clauses expressly authorize the contractor to directly "appeal" the Government's determination. FAR 52.216-25(c); DFARS 252.217-7027(c). This court has long held the prerequisite to every CDA appeal is an underlying CDA "claim," which—here—is the Government's unilateral determination. *Garrett v. Gen. Elec. Co.*, 987 F.2d 747, 749 (Fed. Cir. 1993) (holding a Government directive met the jurisdictional requirement for a claim); *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1541 (Fed. Cir. 1996) ("for the court to have jurisdiction under the CDA, there must be [ ] a valid claim"). That these definitization modifications are "claims" is reinforced by the plain language and precedent concerning terminations for default under FAR 52.249-10(b)(2). The termination clause contains materially indistinguishable language about Government unilateral decisions and the contractor's right to "appeal," and this Court has held that Government default

[2] While Lockheed Martin has not argued that the unilateral definitization modifications are Government *monetary* claims, if this Court hold that they are, Lockheed Martin would likewise be able to directly appeal the Government claim to the ASBCA. *See* 41 U.S.C. §§ 7104(a), 7103(a)(3).

termination modifications are Government nonmonetary CDA "claims." *Malone v. United States*, 849 F.2d 1441, 1443 (Fed. Cir. 1988).

For decades this Court has consistently interpreted "claims," and specifically Government nonmonetary claims, to include a variety of analogous Government unilateral determinations. Challenging the reasonableness or propriety of a Government unilateral determination (claim) is common under this precedent.[3] The ASBCA Majority decision below wrongly prioritized 30-year-old Board precedent over this Court's more recent decisions clarifying CDA jurisdiction. Because ASBCA precedent is not binding on this Court, the Majority's logic and conclusions are wholly irrelevant for this Court's consideration.

Only the jurisdictional question is before this Court. Whether the Air Force's definitization determinations were reasonable in accordance with FAR 15.4 and FAR 31 goes to the merits, after remand. *See Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1265 (Fed. Cir. 1999). Consistent with the plain language of the CDA, regulations, and precedent, the unilateral definitization determinations

[3] As explained in detail in Section II, the following Government unilateral determinations are CDA nonmonetary "claims" that contractors may appeal to challenge the *reasonableness* or *propriety* of the determination: default terminations; certain CAS noncompliance determinations; unilateral directions to perform corrective work at no additional cost; certain unilateral determinations of final indirect rates for flexibly priced contracts in accordance with FAR 52.216-7; and others.

here are Government CDA claims. Lockheed Martin may appeal the propriety of these Government claims and seek declaratory relief.

Jurisdiction to immediately challenge unilateral definitizations and obtain declaratory relief is valuable in this scenario where the Government disregards the regulatory guardrails in place to protect the fairness of the UCA definitization process in accordance with the objective legal criteria of FAR 15.4 and FAR 31. A contrary ruling is inconsistent with this Court's "expansive" view of CDA jurisdiction, and would create inefficient incentives for the Government to unilaterally impose unreasonable prices, which could only be rectified years later through contractor monetary claims and evidentiary hearings where the contractor's *entitlement* to any particular amount is not contractually contemplated, let alone granted, under any clause. In contrast, recognizing direct appeal of Government unilateral definitizations, as Government claims, is consistent with this Court's precedent regarding CDA jurisdiction, and would incentivize the Government to act in accordance with the regulations, or provide for efficient resolution of contractor disputes consistent with the CDA's goals.[4]

[4] Alternatively, this Court may hold that the Board improperly relied on a single, inapposite case (*Bell Helicopter Textron*, ASBCA No. 35950, 88–2 BCA ¶ 20,656 *motion for recon. denied* 88-3 BCA ¶ 21,048) that did not mention or consider, let alone rule upon, Lockheed Martin's argument that unilateral definitizations are Government nonmonetary claims for "other relief." That was legal error and this Court may remand the decision to the Board for further proceedings on that basis alone.

JURISDICTIONAL STATEMENT

On February 12, 2020, the Government issued two unilateral modifications definitizing the total contract prices under two separate F-16 contracts. On May 8, 2020, Lockheed Martin timely appealed both determinations as Government claims to the ASBCA. 41 U.S.C. §§ 7103(a)(3), 7104(1). On May 11, 2020, the Board docketed the appeals as ASBCA Nos. 62505 and 62506.

On June 24, 2021, the Board held the Government's determinations were not CDA claims and, accordingly, dismissed the appeals for lack of jurisdiction. On October 7, 2021, Lockheed Martin timely filed a notice of appeal to this Court under 41 U.S.C. § 7107(a)(1)(A). Under 28 U.S.C. § 1295(a)(10), this Court has jurisdiction to review the Board's June 24, 2020 decision.

STATEMENT OF THE ISSUE

Whether the Armed Services Board of Contract Appeals erred in holding that it lacked subject matter jurisdiction over Lockheed Martin's appeal from two Air Force modifications that unilaterally definitized contract prices on two separate undefinitized contracts. Specifically, the question is whether these written unilateral modifications establishing contract prices are Government claims under the CDA, its implementing regulations, and this Court's precedent.[5]

[5] *See* FAR 52.216-25(c), DFARS 252.217-7027(c).

STATEMENT OF THE CASE

I. BACKGROUND

This appeal involves two similar contracts, both awarded with open pricing terms. The contracts required the parties to negotiate for final pricing after Lockheed Martin commenced performance. But, instead of negotiating a reasonable price, the Air Force unilaterally definitized the contracts—adjusting the pricing terms significantly below Lockheed Martin's supported positions—and offered no explanation or support for the pricing terms set. Lockheed Martin was, nonetheless, obligated to complete performance. Lockheed Martin appealed the COs' decisions as Government nonmonetary claims in accordance with the plain language of the Definitization clauses. However, in a divided opinion, the Board dismissed the appeals for lack of jurisdiction.

A. The Government Awarded Two Undefinitized Contract Actions ("UCAs")

In December 2015 and November 2016, respectively, the Air Force awarded Contract No. FA8615-16-C-6048 ("the Singapore Contract") and Contract No. FA8615-17-C-6045 ("the Korea Contract") as UCAs. Appx56, Appx1345. Both contracts required Lockheed Martin to upgrade and repair F-16 aircraft for foreign allies.

The Air Force awarded the Singapore Contract with Fixed-Price-Incentive ("FPI") Contract Line Item Numbers ("CLINs") and contemplated Cost-Plus-Fixed-

Fee ("CPFF") CLINs. The pricing terms for these CLINs were left open (*i.e.*, "to be determined"). Appx91.[6]

Similarly, the Korea Contract included a combination of FPI CLINs, Time and Materials, CPFF, and Cost-Plus-Incentive-Fee ("CPIF") CLINs. Again, the pricing terms were left undefined. Appx1369-1370.

Because both contracts were awarded as UCAs, the contracts included Definitization clauses. Appx101, Appx1388.[7] The Definitization clauses provide that the parties agree to promptly begin negotiating a definitized final price of the subject contract upon award, with a schedule of negotiations, initial submittals, and a target date for contract definitization.

Paragraph (c) of the Definitization clauses acts as a safeguard, should the parties not come to an agreement:

> If agreement on a definitive contract to supersede this letter contract is not reached by the target date in paragraph (b) of this section, 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,

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[6] The Singapore Contract defined "TBD" as to be determined. Appx536.

[7] The Singapore Contract included FAR 52.216-25 CONTRACT DEFINITIZATION (OCT 2010) and the Korea Contract included DFARS 252.217-7027, CONTRACT DEFINITIZATION (DEC 2012). The only substantive difference between the clauses is that the DFARS clause contains an additional paragraph, not applicable here. Because of the similarities of the FAR and DFARS clauses, Lockheed Martin will simply refer to one, either, or both of them as the Definitization clause(s), unless otherwise specified.

> 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).[8] Under this paragraph, the FAR and DFARS permit the CO to unilaterally definitize the contract price if the parties do not within the scheduled period. To ensure fairness, the CO must definitize the contract at a "*reasonable* price or fee *in accordance with* [FAR] 15.4 and part 31."[9] *Id.* (emphasis added). The Definitization clauses provide that this decision by the CO is "subject to Contractor appeal as provided in the Disputes clause."[10] Id. Finally, contractors must continue to perform to completion notwithstanding any dispute.

B. The Government Unilaterally Definitized the Contracts

The Singapore Contract. Beginning in July 2016, Lockheed Martin submitted its initial cost and pricing data sweep and first proposal to the Air Force to begin negotiation of the Singapore Contract's final price. Between July 2016 and

[8] DFARS 252.217-7027 contains only slight variations in wording but otherwise mirrors the FAR's version.

[9] Generally, FAR 15.4 permits the Government, in certain circumstances, to obtain contractor certified cost or pricing, giving the Government to the same data available to contractors. And under FAR 31, the Government dictates cost principals to contractors, allowing and disallowing certain costs and practices. Through these parts of the FAR, the Government regularly makes reasonableness determinations.

[10] Both contracts include FAR 52.233-1 DISPUTES (MAY 2014) – ALTERNATIVE I (DEC 1991) ("Disputes clause"). Appx102, Appx1386.

December 2019, Lockheed Martin provided a series of proposals and offers that were substantiated by the then-available cost and pricing information. The Air Force provided counteroffers with lower pricing terms but did not explain the underlying rationale. In December 2019, the Air Force provided its final settlement offer. Appx625-626. A month later, the Air Force issued its notice of intent to unilaterally definitize the contract price based on its final offer. Appx630-634. On February 12, 2020, despite Lockheed Martin's attempts to continue negotiations, the Air Force definitized the contract price by issuing Contract Modification PZ0010. Appx369.

The Air Force's unilaterally-set contract price was significantly lower than Lockheed Martin's last counteroffer. The one-page Air Force decision did not attempt to substantiate its position, state its considerations for risk (affecting fee) or any disallowance/decrements, nor explain how this determination was made "in accordance with FAR 15.4 and part 31." *See* Appx633. Based on Lockheed Martin's then-available incurred cost and estimates, the Air Force's definitized contract price necessarily decremented or disallowed Lockheed Martin's legitimate costs of performance. Thus, the Air Force's unilaterally-definitized price did not constitute a "*reasonable* price or fee in accordance with [FAR] 15.4 and part 31" as

required under the Definitization clause. The Air Force simply set a new price by fiat.

The Korea Contract. The Korea Contract followed the same pattern as the Singapore Contract, resulting in an Air Force notice of its intent to definitize the contract in December 2019. Appx1659-1660. On February 12, 2020, the Air Force unilaterally definitized the contract through Modification PZ0012. Appx1673.

Again, this unilateral price was significantly lower than Lockheed Martin's position. And again, the Air Force, in its one-page decision did not address any purported decremented/disallowed costs and did not explain how this determination was made in "in accordance with FAR 15.4 and part 31." Appx1664, Appx1668.

C. Lockheed Martin Appealed the Air Force's Unilateral Definitizations in Accordance with the Definitization Clauses

Following the Air Force's unilateral definitization of the contracts, on May 8, 2020, Lockheed Martin directly and timely appealed these decisions as Government nonmonetary claims. The Complaint presented two counts, one for each contract, requesting the Board to hold that the Air Force's unilateral definitizations did not comply with the Definitization clauses' requirement that the COs establish a "reasonable price or fee in accordance with [FAR] 15.4 and part 31." Appx2027-2030.

D. The Board Dismissed Lockheed Martin's Appeals Based on a Single Inapposite 33-Year-Old Board Decision

In lieu of an Answer, the Air Force moved to dismiss the Appeal and Complaint for lack of subject matter jurisdiction. The Air Force's position was that a unilateral definitization cannot, as a matter of law, be a Government claim. Appx2040.

Following the full briefing, the presiding judge (Judge Clarke) agreed with Lockheed Martin that the Board has jurisdiction to hear Lockheed Martin's appeal because the unilateral definitizations constituted Government nonmonetary claims. However, the Majority overruled Judge Clarke and dismissed the Appeal.

Majority Opinion. The majority opinion concluded that the Air Force's unilateral definitizations could not be Government nonmonetary claims. It relied entirely on *Bell* to reach its holding, a Board decision that narrowly addressed whether a unilateral definitization is one specific type of CDA nonmonetary claim—a claim for the interpretation or adjustment of contract terms. Appx12; *Bell Helicopter Textron*, ASBCA No. 35950, 88–2 BCA ¶ 20,656 *motion for recon. denied* 88-3 BCA ¶ 21,048. However, *Bell* did not consider whether a unilateral definitization constituted another type of Government nonmonetary claim—a claim for "other relief." Whether the Air Force's unilateral definitizations are Government nonmonetary claims for "other relief" is the issue in the present case.

Disregarding this important distinction, the Majority held that *Bell* necessitated dismissal of Lockheed Martin's appeals—stating that the Board was bound by its own precedent to dismiss the case. In short, the Majority erroneously relied on a past decision that did not even speak to the issue before the Board.

The Majority's decision also failed to appropriately consider this Court's decisions regarding CDA claims for "other relief." *Bell* was issued before this Court's seminal decisions in *Malone,* 849 F.2d at 1443-45 (holding the CDA granted jurisdiction to the Board over Government nonmonetary claims for termination for defaults) and *Garrett*, 987 F.2d at 749 (holding the Government's directive to re-perform work at no cost was another form of Government nonmonetary claim for "other relief"). Both of those decisions expanded and explained CDA jurisdiction over Government nonmonetary claims for "other relief" in a way not available to the Board at the time of *Bell*. The Majority's failure to adequately consider this Court's precedent regarding "other relief" claims led it to follow *Bell*, which has never been followed by this Court and cuts against more recent precedent articulating the Court's approach to nonmonetary claims for "other relief."

Dissenting Opinion. Presiding Judge Clarke's dissenting opinion explained that *Bell* did not apply to Lockheed Martin's appeal because it did not consider—let alone decide—whether unilateral definitizations are Government nonmonetary claims for "other relief." Judge Clarke stated, "*Bell* was wrongly decided and rightly

ignored over the last 40 years," stating that it and the reasoning supporting the decision—a distinction between claims and contract administration actions—had not been followed in decades of subsequent decisions issued by the Boards of Contract Appeals ("BCAs"), U.S. Court of Federal Claims ("COFC"), or this Court.[11] In the end, Judge Clarke correctly concluded that the Air Force's unilateral definitization of the contracts should be considered "a government claim over which we take jurisdiction." Appx24.

SUMMARY OF THE ARGUMENT

On appeal, the question is whether a Government's resort to unilateral price determinations under the Definitization clauses, implemented via written modifications, constituted Government claims under the CDA. The answer is yes, for the following reasons.

First, in Section II.A., the plain language of the CDA, the FAR, the DFARS, and this Court's precedent interpreting those authorities make clear that modifications unilaterally imposing prices, requiring a contractor to continue performing at no additional costs, and adjusting the contract terms constitute a Government *nonmonetary* "claims" under the CDA. The Definitization clauses expressly direct contractor to "appeal" the CO's unilateral determination, the

[11] Judge Clarke also held that, even if the reasoning in *Bell* applied, a unilateral definitization is *not* routine contract administration. Appx14-15.

modifications were written, they asserted the Government's authority as a matter of right, and the modifications sought a form of relief, discussed below (Section II.B-C). For decades this Court has construed CDA jurisdiction over nonmonetary claims broadly to encompass analogous unilateral decisions, because the CDA is "expansive" and has "substantial breadth." *Todd Constr., L.P. v. United States*, 656 F.3d 1306, 1311–12 (Fed. Cir. 2011).

Second, specific to what type of Government nonmonetary claim, the Government's definitization decisions are cognizable as Government "other relief" claims under the plain language of the CDA and FAR, and this Court's analogous holdings in *Garrett*, *Malone*, and similar cases (Section II.B). *Third*, in the alternative, definitization decisions are cognizable as Government "adjustment" claims under the plain language and this Court's rationale of *Alliant* and related cases (Section II.C).[12]

Lastly, Section III sets forth a more limited basis for remand. The ASBCA Majority Decision incorrectly relied upon and found controlling a single, virtually uncited, 33-year old Board decision (*Bell*), but such reliance was improper because *Bell* did not consider or rule upon all of the issues in dispute. *Bell* cannot be controlling on what it did not address. And *Bell*, issued in 1988, is bad law because it is inconsistent with this Court's subsequent three decades of decisions.

[12] *See supra* note 2.

ARGUMENT

I. STANDARD OF REVIEW

The Board granted the Air Force's motion to dismiss for lack of subject matter jurisdiction. Pursuant to 41 U.S.C. § 7107(b), this Court reviews the Board's legal determinations *de novo*. *Triple Canopy, Inc. v. Sec'y of Air Force*, 14 F.4th 1332, 1337–38 (Fed. Cir. 2021).

II. THE GOVERNMENT'S UNILATERAL DEFINITIZATION MODIFICATIONS CONSTITUTE GOVERNMENT CDA CLAIMS

It is a matter of first impression for this Court whether a CO's unilateral definitization modification may be cognizable as a *Government* claim. This Court's views on the "expansive" scope and "substantial breadth" of nonmonetary claims is well-explained and encompasses the Air Force's unilateral actions, as discussed in Section II.A. *Todd Constr.*, 656 F.3d at 1311–12 (challenging fairness of performance evaluation was nonmonetary CDA claim). The unilateral definitization modifications here meet all prongs of this Court's plain language test for a *Government* "claim" under the CDA, FAR 2.101, and precedent. And the plain language of the Definitization clauses makes clear that definitization modifications are *Government* claims that contractors may directly "appeal" to a tribunal. FAR 52.216-25(c); DFARS 252.217-7027(c).

More specifically, Section II.B. analyzes this Court's analogous precedent to demonstrate why the definitization modifications qualify as "other relief" claims or, alternatively, in Section II.C., as "adjustment" claims.[13]

Lockheed Martin does not ask this Court to assess whether the Air Force actually complied with its obligations—that is a question for the merits after remand. *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1265 (Fed. Cir. 1999). Rather, Lockheed Martin asks this Court to follow its precedent interpreting the plain language of the CDA and regulations to hold that the definitization modifications are Government CDA claims. Such a finding would permit Lockheed Martin to seek declaratory judgment on the propriety of the Government's compliance with the regulatory guardrails in place to protect the fairness of the UCA definitization process—*i.e.*, the need for the parties to negotiate reasonable prices based on the objective legal criteria of "[FAR] subpart 15.4 and part 31." FAR 52.216-25(c); DFARS 252.217-7027(c).[14]

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[13] *See supra* note 2.

[14] And, on the merits, the Air Force's decision was not "reasonable . . . determined in accordance with" FAR 15.4 and FAR 31 because the Air Force refused—in the definitization modifications and throughout negotiations—to ever identify any cost or pricing rule or objective basis to purport to disallow, decrement or disagree with any of Lockheed Martin's submitted cost data of incurred or forecasted costs. Appx2027-2030.

A. These Definitization Modifications Are Government Claims Within the Scope of This Court's "Expansive" Interpretation of the Plain Language and Drafting History of the CDA and FAR

The plain language and drafting history of both the CDA and the FAR inform this Court's "expansive" orientation toward CDA claims, generally, including nonmonetary claims. *Todd Constr.*, 656 F.3d at 1311–12. Here, the unilateral definitization modifications meet all prongs of this Court's plain language test for a *Government* "claim"—either for "other relief" or "adjustment" of contract terms—under FAR 2.101.[15]

The CDA merely states that a Government "claim" must be "the subject of a written decision by the contracting officer." 41 U.S.C. § 7103(a)(3).

Because the CDA does not define the term "claim," this Court looks to the "implementing [FAR] regulations." *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1564-65 (Fed. Cir. 1995). The FAR broadly defines "claims" to encompass all "written assertion[s] . . . 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. Moreover, "this court assesses whether an action amounts to a claim on the basis of 'regulations implementing [the CDA], the language of the contract in dispute, and the facts of the case.'" *Garrett*, 987 F.2d at

[15] *See supra* note 2.

749 (quoting *Dawco Constr., Inc. v. United States*, 930 F.2d 872, 877 (Fed. Cir. 1991)).

Giving meaning to all parts of the definition, there are three distinct species of CDA claims: (1) monetary claims, (2) nonmonetary adjustment/interpretation claims; and (3) nonmonetary claims for "other relief arising under or relating to the contract." *Garrett*, 987 F.2d at 749; *see also Alliant*, 178 F.3d at 1266–67 (broad CDA jurisdiction includes "requests for 'adjustment or interpretation of contract terms, or other relief arising from or relating to the contract.'").

The two species of nonmonetary claims, while not precisely defined, are broad, distinct, and include a wide variety of challenges to CO actions. "Other relief" claims include: (1) the propriety of a CO's exercise of its contractually-granted right to unilaterally require replacement or correction of allegedly defective work at no additional cost, *Garrett*, 987 F.2d at 749; (2) the "propriety" of a CO's exercise of its contractually-granted right to unilaterally terminate a contract for alleged default, *Malone*, 849 F.2d at 1446; and (3) the accuracy of a CO's unilateral evaluation of the contractor's performance, *Todd Constr.*, 656 F.3d at 1312–15.

The other type, "adjustment" claims, includes: (1) challenges to the CO's exercise of its contractually-granted right to unilaterally exercise an option, *Alliant*, 178 F.3d at 1266–67; and (2) requests for schedule extensions based upon excusable

delay, *see M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1331–32 (Fed. Cir. 2010).

When analyzing potential nonmonetary claims, one of this Court's most recent jurisdictional decisions explained that the plain language and drafting history of both the CDA and the FAR inform this Court's approach to addressing nonmonetary claims. *Todd Constr.*, 656 F.3d at 1311–13. Relying on this approach, this Court has recognized that a "claim" is broadly defined, stating:

> Congress' overall purpose to confer comprehensive jurisdiction under the CDA *confirms that we should read the definition of 'claim' broadly*. We have previously recognized that "[i]n defining the jurisdiction . . . over CDA disputes, Congress has chosen *expansive, not restrictive, language*."

Id. at 1311 (quoting *Alliant*, 178 F.3d at 1268) (emphasis added).

This Court has specifically rejected allegations that an arguable monetary consideration, consequence, or nexus thwarts this Court's Congressionally-mandated inclusiveness for permitting nonmonetary claims, explaining:

> In *Alliant*, the government argued that "nonmonetary disputes" should be read narrowly to exclude "disputes arising prior to the completion of work on a contract" and "disputes that have not yet ripened into a monetary dispute but . . . could" if the contractor "could convert the claim into one for monetary relief" by its own actions. 178 F.3d at 1268 (internal quotation marks omitted). *We rejected this narrow reading*, emphasizing that the provision "begins by broadly granting the court jurisdiction over 'any claims,'" uses the "nonrestrictive term ('including')," and ends the provision with "equally nonrestrictive language" concerning "nonmonetary disputes." *Id.* We also explicitly recognized that "[t]he FAR has . . . ensured that review of

> contract claims will be relatively easy to obtain, by defining the term 'claim' broadly, to include a demand or assertion seeking . . . relief arising under or relating to the contract." *Id*. at 1271. Therefore, the broad language of the statute and FAR provision supports a broad reading of the term "claim."
>
> The legislative history of the CDA and Tucker Act also supports a broad reading of the term "claim."

Id. (emphasis added). The Court further explained that:

> Not only is the term "claim" broad in scope, the "relating to" language of the FAR regulation itself is a term of *substantial breadth*. The term "related" is typically defined as "associated; connected." *See* RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1626 (2d ed. 1998); *see also* BLACK'S LAW DICTIONARY 1288 (6th ed. 1991) (defining "related" as "[s]tanding in relation; connected; allied; akin"); OXFORD ENGLISH DICTIONARY 1695 (3d ed. 1947) (defining "relation" as "any connection, correspondence, or association, which can be conceived as naturally existing between things").
>
> The Supreme Court has interpreted the term "related to" broadly. . . . In line with this authority, we have previously held that to be a claim "relating to the contract" under the CDA, the claim "must have some relationship to the terms or performance of a government contract." *Applied Cos. v. United States*, 144 F.3d 1470, 1478 (Fed. Cir. 1998).

Id. at 1312 (some internal citations omitted). Several other decisions have reiterated that Congress intended contractors to have ready access to judicial review of nonmonetary claims and CO's final decisions. *See, e.g.*, *Alliant*, 178 F.3d at 1270–71 ("Congress has granted relatively free access to the boards of contract appeals and the Court of Federal Claims by authorizing review final decisions of contracting officers on 'any claim' by a contractor . . . and 'any appeal [from a contracting

officer's decision on a claim] relative to the contract made by [an] agency[.]'") (quoting the CDA (brackets in original); *Malone*, 849 F.2d at 1444 ("The CDA, however, broadened the [Boards of Contract Appeals'] jurisdiction to permit those tribunals to hear all disputes relating to a contract . . . .").[16]

This Court's approach toward CDA jurisdiction over nonmonetary claims also involves jurisdictional parity between the BCAs and COFC. In the seminal case of *Garrett*, which explicitly addressed "other relief" claims for the first time, this Court explained:

> One primary purpose of the CDA, invoked by both parties in this appeal, is to achieve parity between the jurisdiction of [COFC] and the boards. The CDA has as one of its purposes the elimination of differences in the jurisdictions of the forums which decide Government contract disputes. . . . Congress specifically afforded [COFC] jurisdiction over "other nonmonetary disputes on which a decision of the contracting officer has been issued" under [the CDA]. *Id*. Thus, *the Board's decision* to take jurisdiction over this Government claim, in light of [COFC's] new jurisdiction, preserves jurisdictional parity between [COFC] and the boards.

Garrett, 987 F.2d at 749–50 (citing 28 U.S.C. § 1491(a)(2)) (emphasis added).

Either party may be found to have asserted a nonmonetary claim, even if the written instrument was not labeled a claim/final decision or lacked boilerplate language, such as appeal rights. *See, e.g.*, *Malone*, 849 F.2d at 1445 (holding that a

[16] In *Alliant* and *Todd Constr.*, this Court considered the breadth of COFC's jurisdiction to hear contract disputes under the CDA and the Tucker Act, as amended in 1992, to create parity between the BCAs and COFC.

termination modification was a Government claim); *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764 (Fed. Cir. 1987) (same); *accord Alliant*, 178 F.3d at 1267 ("A letter can be a final decision under the CDA even if it lacks the standard language announcing that it constitutes a final decision."); *Placeway Constr. Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990) ("The decision is no less final because it failed to include boilerplate language usually present for the protection of the contractor.").

When the Government presents a cognizable written claim to a contractor (monetary or nonmonetary), the contractor may directly appeal the claim to the appropriate BCA or COFC without the need for a certified claim of its own. *Malone*, 849 F.2d at 1446 (holding that CDA permits contractors to directly appeal the "propriety" of the Government's decision to terminate); *Garrett*, 987 F.2d at 749 (explaining how CDA "provides that a contractor may appeal a Government claim to the appropriate board without submitting a claim of its own to the CO"); *Lisbon*, 828 F.2d at 764–65 (recognizing BCAs jurisdiction over appeals of Government termination for default "claims").

Here, the plain language of Lockheed Martin's Definitization clauses makes clear that a CO's non-routine, one-time decision to end negotiations and unilaterally set the contract price is a *Government* claim under the CDA, FAR 2.101, this Court's precedent, and the Definitization clauses at issue.

First, the CO's definitization modifications meet all prongs of this Court's plain language test for a "claim." FAR 2.101. The modifications were "written." *Garrett*, 987 F.2d at 749 (quoting FAR 2.101); *see* 41 U.S.C. § 7103(a)(3) (only statutory requirement for *Government* "claim" is that it be "written"). Next, 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. Appx639, Appx1673; *Alliant*, 178 F.3d at 1265 ("[T]he phrase 'as a matter of right' in the regulatory definition of a 'claim' requires only that the [party] specifically assert entitlement to the relief sought.").

And lastly, the Air Force's modifications sought and obtained "relief" by unilaterally determining the price to pay the contractor, curtailing negotiations, adjusting the contract price terms, and requiring continued performance for no additional money above those prices in accordance with its unilateral modification. *Garrett*, 987 F.2d at 749. Consistent with this Court's precedent, these unilateral modifications sufficiently "assert[ed]" a form of "other relief arising under or relating to the Contract" or, alternatively, the "adjustment" of contract terms, as contemplated by this Court's CDA jurisdictional test. *Id*.

Regarding which type of Government claim, the sections below detail the analogous precedent establishing the definitization modifications as either "other relief" (Section II.B) or "adjustment" (Section II.C.) nonmonetary claims. But the

plain language of the CDA and FAR 2.101 leaves no dispute that these written modifications satisfy the requirements for some form of CDA-cognizable Government claim because each was a "written assertion . . . seeking, as a matter of right . . . the adjustment . . . of contract terms [or] other relief arising under or relating to the contract." FAR 2.101; *see Garrett*, 987 F.2d at 749. Written instruments that lack boilerplate appeal right language, like these modifications, may still be Government claims. *See, e.g.*, *Malone*, 849 F.2d at 1445; *Lisbon*, 828 F.2d at 764; *accord Alliant*, 178 F.3d at 1267; *Placeway Constr.*, 920 F.2d at 907.

Second, the plain language of the FAR and DFARS already address the instant jurisdictional question that definitization determinations, implemented by written modification pursuant to a Definitization clause, constitute *Government* CDA claims that can be directly appealed. The Definitization clauses state that a CO's decision to unilaterally a definitize price is "subject to Contractor *appeal* as provided in the Disputes clause." This plain language and history are discussed below; the Board Majority ignored this plain language.

An "appeal," as used in the CDA and FAR, contemplates the existence of an underlying CDA claim which can be appealed to a tribunal. *See* 41 U.S.C. § 7104(a); *id*. § 7103(g); FAR 52.233-1(i) (juxtaposing "appeal" and "claim" to make clear that

they are distinguishable procedural actions); FAR 52.233-1(f); FAR 33.211(g); FAR 33.212; FAR 33.214(c).[17]

This Court, consistent with the plain language of the CDA and FAR, has held that the prerequisite to every CDA appeal is an underlying CDA claim. *E.g.*, *Garrett*, 987 F.2d at 749 (holding a Government directive met the jurisdictional requirement for a claim); *James M. Ellett*, 93 F.3d at 1541 ("for the court to have jurisdiction under the CDA, there must be [ ] a valid claim").

For certain types of CO actions or decisions, the FAR drafters used unambiguous language to indicate, explicitly or implicitly, that such actions were CDA claims. For example, the default termination clause for fixed-price construction contracts states that "the *findings* of the [CO] shall be . . . *subject to appeal under the Disputes clause*." FAR 52.249-10(b)(2) (emphasis added). The referenced "Disputes clause" instructs the contractor to "appeal" such Government decision to the BCAs or COFC. FAR 52.233-1(f). The plain language of FAR 52.249-10(b)(2) thus shows that the predicate action—the unilateral "findings of the

[17] In addition, the plain-language dictionary definition of the term "appeal" is consistent with Lockheed Martin's interpretation of its meaning in the Definitization clauses. The term "appeal" means to proceed from a lower authority's decision (here, the CO) to a higher authority (BCAs and COFC) for review. *See, e.g.*, *Appeal*, BLACK'S LAW DICT. (11th ed. 2019) ("A proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal <the case is on appeal>.").

[CO]" to terminate—constitutes a *Government* claim (here, a nonmonetary claim) that may be "appeal[ed]" directly to a tribunal. This understanding is supported by this Court's holding in *Malone*, which confirms that a Government default termination is a Government nonmonetary "other relief" claim that may be directly appealed. 849 F.2d at 1443 ("Caselaw supports the proposition that a government decision to terminate a contractor for default is a government claim. . . . This position follows directly from the language of the CDA. The only guidance Congress provided concerning the definition of a government claim exists in the language of section 605(a) [now 41 U.S.C. § 7103(a)(3).]").[18]

The Definitization clauses, similar to the FAR 52.249-10(b)(2) default termination clause discussed above, give the contractor the right of "appeal as provided in the Disputes clause." FAR 52.216-25(c); DFARS 252.217-7027(c). The Definitization clauses similarly identify a Government "decision" (here, the decision to unilaterally definitize prices) as a predicate to the contemplated "appeal." *Id*. Because the Government's "decision" to terminate "subject to appeal" constitutes a Government nonmonetary CDA claim—FAR 52.249-10(b)(2); *see Malone*, 849 F.2d at 1444-45—here, by interpretative analogy, the CO's "decision"

[18] Again, the CDA merely requires a *Government* "claim" to be "the subject of a written decision," 41 U.S.C. § 7103(a)(3), and this Court assesses the existence of a "claim" by looking to the language used by the drafters of the FAR and DFARS (the implementing regulations), "the language of the contract in dispute, and the facts of the case." *Garrett*, 987 987 F.2d at 749.

to unilaterally definitize prices subject to "appeal" similarly indicates that the definitization decisions are cognizable as Government CDA *claims*.

Parsing the plain language of the Definitization clauses to assess CDA jurisdiction does not conflict with the FAR 2.101 definition of "claim," discussed above, because "this court assesses whether an action amounts to a claim on the basis of 'regulations implementing [the CDA], the language of the contract in dispute, and the facts of the case.'" *Garrett*, 987 F.2d at 749 (finding Government direction to perform corrective work at no additional cost was a Government nonmonetary claim for "other relief") (quoting *Dawco*, 930 F.2d at 877). Here, the plain language of the Definitization clauses implementing the CDA, as well as this Court's precedent, make clear that CO definitization decisions should be considered Government CDA claims that Lockheed Martin properly appealed.

Lastly, the historical purpose of the Definitization clauses also supports a right of direct "appeal" of unilateral definitization claims. When the Definitization clauses were first codified in 1970 (eight years prior to the CDA and 14 years before the FAR), the purpose of this language was to create a direct right to appeal to BCAs for contractors. *See* 35 Fed. Reg. 6,829 (Apr. 30, 1970) (implementing the Definitization clause, which is largely the same as the current version); 32 C.F.R. §

7.802-5(c) (1971).[19] At that time, this direct right of "appeal" language was unique to this Definitization clause and the Termination clause. *See, e.g.*, 32 C.F.R. § 8.701(g) (Termination clause for fixed-price contracts) (1971) ("The Contractor shall have the right of appeal, under the clause of this contract entitled 'Disputes', from any determination made by the Contracting Office"). And, the Board took jurisdiction over direct appeals from CO's decisions under both clauses. *See, e.g.*, *Lab. for Elecs., Inc.*, ASBCA No. 13019, 69-2 BCA ¶ 7945 (noting that the contracts were "letter contracts," also known as UCAs, and stating, without elaborating, that the contractor *appealed directly* from the CO's unilateral price definitization decision);[20] *Marvin Eng'g Co., Inc.*, ASBCA No. 18356, 74-1 BCA ¶ 10,587 ("This appeal, arising out of a unilateral decision of a Termination Contracting Officer[.]").

Following the implementation of the CDA (expanding the BCAs' jurisdiction)[21] and the major reorganization of procurement regulations, the drafters

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[19] Under the prior version, if the parties failed to agree to a final, definitized price, the contract was terminated. *See* 32 C.F.R. § 7.802-5 (1969) ("This letter contract is terminated by the Contracting Officer, in the event it is not superseded by a definitized contract").

[20] This case involved the earlier version of the Definitization clause but, nevertheless, the Board took jurisdiction over the CO's unilateral definitization decision.

[21] *Malone*, 849 F.2d at 1444 ("Congress in the CDA actually expanded the BCAs' jurisdiction"); *Todd Constr.*, 656 F.3d at 1311 ("Congress' overall purpose to confer comprehensive jurisdiction under the CDA confirms that we should read the definition of 'claim' broadly").

of the FAR kept this direct appeals language in the Definitization clause. FAR 52.216-25(c); *see also* DFARS 252.217-7027(c). This Court should uphold the purpose of this language and permit contractors to appeal directly to BCAs or COFC from a CO's non-routine, unilateral definitization under the Definitization clause.[22]

In sum, the plain language, context, and history of the Definitization clauses demonstrates that CO definitization decisions are necessarily the prerequisite *Government* claims that contractors may "appeal" to a tribunal. This Court looks to those "implementing regulations" to assess CDA "claim[s]." *H.L. Smith*, 49 F.3d at 1564. Any other interpretation ignores the plain meaning and purpose of the Definitization clause and improperly restricts contractors' access to judicial review of these Government claims.

B. Specifically, the Government's Definitization Modifications Are Cognizable as "Other Relief" Claims under This Court's Interpretative Precedent of the CDA and FAR

Both Definitization clauses grant the Government the right to unilaterally establish previously unpriced contract prices *if*, in doing so, the Government "determine[s] a reasonable price or fee *in accordance with subpart 15.4 and part 31* of the FAR[.]" FAR 52.216-25(c); DFARS 252.217-7027(c) (emphasis added).

Here, during negotiations, Lockheed Martin submitted voluminous cost data showing incurred and forecasted costs, and reasonable fees, that would have

[22] *See* supra note 1.

permitted the parties to reach a bilateral agreement on price and/or fee. *See generally* Appx2014-2027. But the Air Force took the non-routine, one-time action to end negotiations, unilaterally set the price that it wishes to pay Lockheed Martin, adjust the contract's price terms, and require Lockheed Martin to continue performing for no additional cost.[23] For the reasons set forth below, the Air Force's definitization modifications are most closely analogous to, and fall within this Court's parameters for, Government claims for "other relief arising under or related to the contract," FAR 2.101, discussed below.

1. This Court's Plain Meaning Analysis in Garrett and Malone Permit a Finding that the Definitization Modifications Are "Other Relief" Claims

This Court's seminal decision in *Garrett* recognized that Government actions can constitute appealable "other relief" Government claims, even where there are ancillary monetary considerations. 987 F.2d at 750-51; *see infra* Section II.B.2.

Garrett explained that although the Government may have unilateral contractual rights "arising under" the contract, the exercise of such contractual rights

[23] And, on the merits, the Air Force's price is unreasonable because the Government refused to *ever* identify *any* FAR "subpart 15.4 and part 31" basis for disallowing, decrementing, or disagreeing with any of Lockheed Martin's submitted cost data. Appx633, Appx1668. Although the Air Force has the right to definitize, the Definitization clauses provide the countervailing right for the contractor to directly "appeal" these Government claims and challenge the propriety and "reasonable[ness]" of the Government's unilateral modifications. This is consistent with this Court's precedent, discussed in Section II.B.1.

can constitute Government "other relief" claims. *See id*. The Government must exercise its administrative rights properly and in compliance with the contractual provisions. The Government's directions can be cognizable as a nonmonetary "other relief" claim when no money is directly demanded or withheld (even if monetary considerations are ancillary to the direction). *See id*. *Garrett* remains controlling law and is frequently cited by this Court and tribunals. In the nearly 30 years since *Garrett*, numerous decisions have followed *Garrett* and interpreted CDA jurisdiction broadly to include direct appeals from Government nonmonetary "other relief" claims.

In *Garrett*, the Navy believed that certain engine parts were "defective" and "directed [the contractor] to replace the defective parts in those engines at no additional cost." *Id.* at 748. The "inspection clause" of FAR 52.246-2 provided the Government with this contractually-authorized right/remedy to demand re-work at no cost. *Id*. The contractor, General Electric ("GE"), "refused and submitted a proposal to replace the parts at a substantial additional cost to the Navy." *Id*. at 748–49. The Government rejected this cost proposal and by written directive "require[ed] GE to correct the problem at no additional cost to the Navy." *Id*. at 749.

Requiring GE to continue performance and correct or replace engine parts meant that GE would have *necessarily* incurred additional costs and suffered monetary injury—indeed, GE performed under dispute and subsequently filed a

certified claim for such additional costs. *Id.* at 757 (Nies, J., dissenting) ("In ASBCA No. 36005, the parties have already proceeded further and the contractor has filed a claim for the costs of the directed repairs and corrections." (quoting *Gen. Elec. Co.*, ASBCA Nos. 36005 *et al*., 91-2 BCA ¶ 23,958 (Riismandel, J., dissenting))). And, separately, after revoking acceptance, the Government demanded that GE return $1.25 million paid to investigate the cause of and suggest a solution for the engine failures, *Garrett*, 987 F.2d at 748–49, but this monetary demand "was not treated as part of the demand for repair or replacement," *id*. at 752 n.* (Nies, J., dissenting).

GE appealed the Government's no-cost direction directly to the ASBCA. *Id.* at 749. GE did not initially submit a certified monetary claim. *Id*. Rather, GE alleged that the Government's direction to perform corrective work for no additional cost was a Government "other relief" claim. *See id*. There was apparently no dispute that the Navy possessed the contractual/administration right under FAR 52.246-2 to unilaterally direct such corrective work. *See id*. Rather, GE argued that the Navy's decision qualified as a "claim" within the FAR 2.101 definition because the direction was in writing, was made as a matter of right pursuant to FAR 52.246-2, and required no-cost corrective performance, which was cognizable as "other relief arising under or relating to the contract." *Id.*

The ASBCA's full Senior Deciding Group agreed with GE. *Gen. Elec. Co.*, 91-2 BCA ¶ 23,958 at 119,947. The Board held that the Navy's written direction qualified as a CDA-cognizable "claim" under FAR 2.101—specifically, a Government nonmonetary claim for "other relief." *Id.* The Board held: "[N]otwithstanding the absence of monetary claims by either party, the Government demands for correction or replacement of accepted work containing alleged latent defects, under the Inspection clauses of the several contracts in the three instant appeals, were Government claims for "other relief arising under . . . the contract[s][.]" *Id.* Thus, the *propriety* or reasonableness of the Navy's basis for ordering such no-cost corrective performance could be directly challenged on appeal to the Board.

This Court affirmed the ASBCA and, in doing so, drew new boundaries of CDA jurisdiction. *Garrett*, 987 F.2d at 749. This Court acknowledged that the FAR "inspection clause" expressly authorized the Government to demand/direct that "the contractor correct or replace the item at no increase in contract price" if the engines were defective. *Id.* at 748. This Court held that the "regulations, [the] contract, and the facts of [*Garrett*] suggest[ed] that the Navy's choice of relief"—*i.e.*, the "directive to correct or replace defective engines"—"constitute[d] 'other relief' within the FAR's third category of 'claims.'" *Id.* at 749. Persuaded by the analogous holding in *Malone* that a contractor could directly appeal the "propriety" of a

Government's default termination decision, which was held to be a Government *nonmonetary* claim, *Malone*, 849 F.2d at 1446, the *Garrett* Court affirmed the ASBCA Senior Deciding Group's decision and held that "[t]he Board correctly extended the rationale in *Malone* to cover the nonmonetary substitute for monetary relief requested in this case." *Garrett*, 987 F.2d at 750–51.

From a *relief* perspective, the Court affirmed that GE could seek declaratory relief by directly appealing the *propriety* of the Navy's basis for ordering such no-cost corrective performance. *See id*.; *accord Gen. Elec. Co.*, 91-2 BCA ¶ 23,958 at 119,945 (noting the Board has authority to "'determine the parties' respective legal rights and obligations, as in a declaratory judgment.'" (quoting *McDonnell Douglas Corp*., ASBCA No. 26747, 83–1 BCA ¶ 16,377 at 81,422, *aff'd in part, rev'd in part on other grounds, McDonnell Douglas Corp. v. United States*, 754 F.2d 365 (Fed. Cir. 1985))).

In *Malone*, the CO issued a written modification terminating the contract for default. 849 F.2d at 1442. No related monetary claim was filed. *Id*. at 1443. The Court considered "whether the CDA grants the BCAs jurisdiction over default terminations absent a monetary claim" and held "that the ASBCA had jurisdiction over the *propriety* of Malone's default termination apart from a claim for a specific sum by either Malone or the government relating to the termination." *Id*. at 1444, 1446 (emphasis added).

The *Malone* Court found precedential support for its holding that the CO's unilateral modification was a *Government* nonmonetary claim that the contractor could directly appeal (and challenge the propriety of), as follows:

> [T]his case is analogous to *Nuclear Research Corp. v. United States*, 814 F.2d 647 (Fed. Cir. 1987), and the reasoning of that decision applies here. In *Nuclear Research*, the CO terminated a contract for default. *Id*. at 649. Three months later, the CO issued a decision demanding that the contractor return certain unliquidated progress payments. *Id*. The contractor appealed both decisions to the ASBCA. *Id*. On appeal to this court, the government argued that the ASBCA did not have jurisdiction to consider the validity of the default termination because it did not involve a claim for money. *Id*. We held that the ASBCA properly exercised jurisdiction over the default termination and the progress payment issues. *Id*. We explained that the default termination issue was inextricably linked to the government's monetary claim for return of progress payments, and therefore, that the ASBCA had jurisdiction to consider the validity of the default. *Id*.
>
> This case is no different. *The issue of the validity of a default termination is "money oriented*." *See Williams Int'l Corp. v. United States*, 7 Cl. Ct. 726, 731 (1985). As in *Nuclear Research*, the question here is inextricably linked to the financial liability of both the government and the contractor. If the default was *proper*, the contractor is liable for the government's excess reprocurement costs. If the default was *improper*, the government is liable for the contractor's termination for convenience costs. Because this case is analogous to *Nuclear Research*, that holding supports our conclusion that the *ASBCA had jurisdiction to consider the validity of Malone's termination for default*.

Id. at 1444–45 (emphasis added) (some internal citations omitted). The *Garrett* Court subsequently clarified that *Malone* involved a Government nonmonetary claim for *other relief*. *Garrett*, 987 F.2d at 750.

Both *Malone* and *Garrett* remain binding precedent.[24] Following *Garrett*, the BCAs and COFC have likewise recognized nonmonetary claims for "other relief" on similar bases of contractor challenges to the propriety of Government no-cost directions. *See, e.g.*, *Outdoor Venture Corp.*, ASBCA No. 49756, 96-2 BCA ¶ 28,490 at 142,273 (jurisdiction over a Government nonmonetary claim directing the contractor to re-perform alleged defective work); *Newport News Shipbuilding & Dry Dock Co. v. United States*, 44 Fed. Cl. 613, 618 (1999) (jurisdiction over a Government nonmonetary claim for CAS noncompliance); *CACI Int'l, Inc*., ASBCA No. 57559, 12-1 BCA ¶ 35,027 at 172,139 (same for CAS noncompliance).

Here, the Air Force's definitization modifications are properly cognizable as "other relief" Government claims similar to *Garrett* and *Malone*. Like the facts of *Garrett*—where the CO issued written directions that required GE to continue performance at no additional cost based on the CO's interpretation of FAR 52.246-2 and the allegedly defective engines—here, the Air Force similarly issued written

[24] Indeed, this Court's decision in *Securiforce*, involving a contractor allegation of material breach filed after the completion of a terminated contract, approvingly cited both *Garrett* and *Malone* for CDA jurisdictional propositions. *Securiforce Int'l Am., LLC v. United States*, 879 F.3d 1354, 1361, 63 (Fed. Cir. 2018).

modifications that required Lockheed Martin to continue upgrading F-16 aircraft at no additional cost (above the CO's unilaterally-imposed price caps).

And, similar to the holding in *Garrett*—that the Government's direction was a Government nonmonetary "claim" for "other relief" that GE could directly appeal—here, this Court should similarly hold that the Air Force's modifications definitizing final prices via written modifications were likewise Government nonmonetary claims for "other relief" within the meaning of the CDA, FAR 2.101, and Definitization clauses.

Lockheed Martin is not jurisdictionally required to relinquish its proper appeal of these Government claims (definitization modifications) and, instead, pursue contractor monetary claims.[25] The plain language of the CDA, FAR, and precedent require no such outcome. The Definitization clauses are distinguishable from standard remedy-granting clauses, such as "changes" (FAR 52.243-1) or convenience terminations (FAR 52.249-2 and FAR 31.205-42), and from breach allegations. For example, the Changes clause expressly entitles the contractor to an "equitable adjustment" for "increased costs" incurred in connection with the Government's action. FAR 52.243-1(b). Similarly, following a termination for

[25] After the Board's decision, and in light of the cautionary instruction in the last paragraph of that decision, Lockheed Martin submitted certified claims to the Air Force regarding these two contracts on October 28, 2021. The Air Force has since denied both claims. Lockheed Martin maintains that the Board's decision that it lacked jurisdiction was erroneous.

convenience, the FAR 31 "Terminations" cost principle expressly entitles the contractor to recover certain categories of "allowable" termination costs, amortized costs, settlement expenses, and other costs incurred both before or after the termination. FAR 31.205-42. A contractor's allegation of "breach" is compensable by proof of specific categories of breach damages.[26] In all three of these situations, if the parties disagree on the contractor's entitlement, the contractor may seek recovery of specific, defined types and amounts of recoverable allowable costs "as a matter of right" pursuant to the express language of the clause, cost principle, or common law, respectively.

In contrast, the plain language of the Definitization clauses do not entitle Lockheed Martin to monetary relief, an equitable adjustment for its increased/incurred costs, or entitlement to any particular amount. *See* FAR 52.216-25(c); DFARS 252.217-7027(c). The Definitization clauses expressly entitle Lockheed Martin to two things: (1) a "reasonable" unilateral determination of price/fee "in accordance with" FAR 15.4 and FAR 31; and (2) the right to "appeal" the reasonableness of the CO's price determination. *Id*. The term "reasonable" is not meaningless or superfluous—FAR 15.4 and FAR 31 expressly instruct the CO

[26] *See, e.g.*, *Securiforce Int'l Am., LLC v. United States*, 879 F.3d 1354, 1361, 63 (Fed. Cir. 2018).

how to determine "reasonable" costs and prices.[27] Thus, the plain language of the clauses directs the contractor to "appeal" the "reasonable[ness]" of the Government determination, *i.e.*, Government claim. *Id.* To hold that such language actually requires a *contractor* monetary claim would render the specific terms "appeal" and "reasonable," and the purpose of paragraph (c), meaningless or superfluous. *Id.* Such an interpretative outcome should be avoided. *Id.*

Lastly, this Court's holdings in *Garrett*, *Malone*, and *Alliant* all explain why a contractor may directly appeal a Government nonmonetary claim notwithstanding significant monetary consequences attendant to the Government directions/claim. The *Garrett* Court held that the CO's no-cost re-work direction was a Government nonmonetary claim even though it involved a clear connection to a monetary dispute, *viz.*, Navy's direction necessarily required GE to incur additional re-work costs, 987 F.2d at 749, the Navy demanded repayment of $1.25 million after revoking acceptance, *id.*, and shortly after appealing the CO's nonmonetary re-work direction GE filed a certified monetary claim for damages caused by the Navy's FAR 52.246-2 direction, *id.* at 757 (separately docketed as ASBCA 36005). The *Malone* Court similarly held that CO unilateral modifications terminating the contract for default

[27] *E.g.*, FAR 15.404-1(a)(3) (instructing COs that "Cost analysis shall be used to evaluate the *reasonableness* of individual cost elements when certified cost or pricing data are required. Price analysis should be used to verify that the overall price offered is fair and *reasonable*."); FAR 31.201-3, *Determining reasonableness.*

were "money oriented" but still found them to be Government nonmonetary claims that a contractor could directly appeal. 849 F.2d at 1445. And the *Alliant* Court summarized and explained this Court's rule, as follows:

> To hold that Alliant has a contractual obligation to perform in accordance with the [CO's] decision until it receives a different ruling on the scope of the contract *does not mean that it must postpone seeking such a ruling* from [COFC or BCA] until it has performed in full and seeks compensation for the additional work that the contract did not require.
>
> . . . .
>
> [T]he Garrett case stands for the proposition that non-monetary claims are not outside the jurisdiction of the [CDA] simply because the contractor could convert the claims to monetary claims by doing the requested work and seeking compensation afterwards.

178 F.3d at 1266, 1270 (emphasis added). Such precedent is still controlling here.

Assessing "claim" jurisdiction is the only issue before this Court. The Board, on remand, can examine the merits, *i.e.*, whether the Air Force's unexplained prices that did not attempt to provide a FAR 15.4 or FAR 31 basis for disallowing or disagreeing with any of Lockheed Martin's submitted cost and pricing data were "reasonable . . . in accordance with" FAR 15.4 and FAR 31. FAR 52.216-25(c); DFARS 252.217-7027(c); *see Alliant*, 178 F.3d at 1265 ("proper sequence" is not to determine "jurisdiction only after determining that the claimant should win.").[28]

[28] To the extent that the merits are relevant here, the declaratory relief sought in *Garrett* concerned whether the CO's direction to perform corrective re-work at no cost was justified under FAR 52.246-2 and the circumstances. 987 F.2d at 749. The

For the reasons set forth in Sections II.A. and this Section II.B.1, the Air Force's unilateral modifications definitizing contract prices, a drastic step that ended negotiations and required Lockheed Martin to continue performing at no additional cost above those price caps, are CDA-cognizable Government nonmonetary "claims" for "other relief" under the plain language of the CDA, FAR 2.101, the Definitization clauses, and this Court's on-point precedent in *Garrett* and *Malone*.

2. Other Decisions Interpreting the Plain Language of CDA "Claims" Permit a Finding that the Definitization Modifications Are "Other Relief" Claims

Several other analogous types of CO actions have been found to be "other relief" claims by this Court, the ASBCA, and/or COFC, demonstrating that the definitization modifications are properly cognizable as "other relief" claims.

First, this Court has recognized that the propriety of performance evaluations can provide a basis for a nonmonetary CDA claim for "other relief." In *Todd Constr.*, this Court held that the fairness and accuracy of a CO's unilateral rating/evaluation of the contractor's performance, which was a discretionary right of the Government under the contract, could be challenged as a CDA-cognizable "other relief" claim. 656 F.3d at 1311–13. There, the CO negatively rated the contractor's

declaratory relief in *Malone* was whether the default termination was justified, "proper," and "valid." 849 F.2d at 1444-45. CDA jurisdiction attached to both. It should likewise permit Lockheed Martin to seek a declaration that the definitized prices were not reasonably determined in accordance with FAR 15.4 and FAR 31.

performance and published the "unsatisfactory" evaluations to a Government database. *Id*. at 1308–09. The FAR at the time specified that "a [performance] report shall be prepared . . . in accordance with agency procedures" and that "[e]ach performance report shall be reviewed to ensure that it is *accurate and fair*." *Id*. at 1308 (quoting FAR 36.201 (2006)) (emphasis added) (brackets in original). There was no dispute that the CO possessed the unilateral, administrative right to render such discretionary evaluations and then post them. *See id*. at 1310. However, the *accuracy and fairness* of such ratings was an attendant regulatory requirement under FAR 36.201 and FAR 42.1502. *Id.* at 1308, 1314–15. COFC's Judge Wheeler "held that it had subject matter jurisdiction over the suit under the CDA because the claim that the performance evaluations were inaccurate and improper 'relat[ed] to the contract,' as required by the CDA." *Id*. at 1310 (citing *Todd Constr., L.P. v. United States*, 85 Fed. Cl. 34, 44–45 (2008)).

This Court agreed. *Id*. at 1312–13. The Court first chronicled the "expansive" scope and "substantial breadth" of CDA jurisdiction over nonmonetary claims pursuant to the plain language and drafting history of the CDA and FAR. *Id*. at 1311–12. The Court then held that, although the Government has the administrative right to issue such performance ratings, a contractor may challenge the *propriety* of the Government's compliance with the predicate FAR requirement that such performance evaluations be "accurate and fair." *Id*. at 1316 ("Todd clearly does

have standing to sue based on its substantive allegation that the government acted arbitrarily and capriciously in assigning an inaccurate and unfair performance evaluation."). Such a challenge is properly cognizable as a claim for "*other relief arising under or relating to the contract*." *Id*. at 1311 (emphasis in original). The Court explained:

> The performance evaluations at issue have a direct connection and association with Todd's government contracts and, under this "ordinarily broad understanding of the phrase," [ ] appear to be "*relat[ed] to* the contract." While the unsatisfactory performance evaluations may not relate to the terms of the contract itself, they *relate to* Todd's performance under the contract.

Id. at 1312–13 (emphasis added) (internal citations omitted).

Here, the propriety of the Air Force's compliance with its predicate regulatory requirement to only definitize prices that are determined "reasonable" in "accordance with" FAR 15.4 and FAR 31 (FAR 52.216-25(c); DFARS 252.217-7027(c)) is sufficiently similar to the "accurate and fair" requirement at issue in *Todd Constr*. to permit this Court to include such definitization modifications within the "expansive" CDA jurisdiction over "other relief" claims, *see* 656 F.3d at 1311.

Second, the Government's determination that a contractor's proposed accounting changes would violate the Cost Accounting Standards ("CAS"), 48 C.F.R. § 9904 *et seq*., whereby the CO directs nonmonetary accounting changes, is instructive of another type of Government nonmonetary "other relief" claim that a

contractor may directly appeal. *See, e.g.*, *Newport News*, 44 Fed. Cl. at 617–18 (citing *Garrett*, 987 F.2d at 749)); *CACI Int'l*, 12-1 BCA ¶ 35,027 at 172,139.

COFC's decision in *Newport News* squarely analyzed and applied the "other relief" basis of nonmonetary jurisdiction articulated in *Garrett* to CAS non-compliance. *Newport News*, 44 Fed. Cl. at 618. Relying on *Garrett*, the court held that a Government CAS non-compliance determination that required the contractor to change its accounting practices—and, while not stating a sum certain, would unquestionably result in the contractor paying CAS non-compliance costs down the road—constituted a Government non-monetary claim (seemingly an "other relief" claim) in light of *Garrett*. *See id*. The Court explained:

> In *Garrett*, the Federal Circuit held that a Navy directive that [GE] correct or replace defective engines under its contract constituted the **"**other relief" referred to above in the FAR definition of a "claim." In this case, the alleged "claim" would involve a requirement that plaintiff pay the costs of noncompliance with CAS 415, and *change its accounting practices to comply with the ACO's understanding of CAS 415*. Without question, the government did not request a "sum certain" as to the costs. *But that does not mean the government did not make a specific demand for relief*. The ACO's letter asking for "the total impact cost" of the change in accounting on plaintiff's contracts would not make sense if a noncompliance letter did not *require plaintiff to change its accounting to meet the ACO's compliance determination*. The court finds . . . that the government had made a final decision which *demanded plaintiff change its accounting for all of its CAS contracts* to meet the determination of the ACO that plaintiff was CAS 415 noncompliant. *This demand constitutes a government "claim"—even if plaintiff were assessed zero costs* for its alleged failure to meet CAS 415 in the past, *it would have to change its accounting*

> *for all of its contracts* based on the November 5, 1997 letter. . . . Inasmuch as the government made a final decision on a government claim, plaintiff has a *right to seek declaratory relief*[.]

Id. (emphasis added) (internal citations omitted).

While the Government's claim in *Newport News* was not a monetary claim seeking a sum certain, the Government made a "specific demand for [other] relief" by "requir[ing] plaintiff to change its accounting to meet the ACO's compliance determination." *Id*. There was no dispute that the Government's "demand for [other] relief" was "arising under" and permitted by the contract's CAS clause. *Id.* That being so, the contractor had the CDA right to appeal the *propriety* of the Government's "other relief" CAS noncompliance claims, *i.e*., whether the Government *complied* with the CAS clause in exercising its contractually-authorized right to "require plaintiff to change its accounting to meet the ACO's compliance determination." *Id*. The contractor "has a right to seek declaratory relief" when appealing the Government's nonmonetary claim. *Id*. The Board has likewise held that a Government CAS non-compliance determination may be appealed as a Government nonmonetary claim. *See CACI Int'l*, 12-1 BCA ¶ 35,027.

Here, the Air Force's unilateral definitization modification—requiring continued performance and invariably forcing cost overruns down the road—is jurisdictionally similar to a CAS non-compliance Government claim that requires the contractor to change its accounting practices and invariably requires the

contractor to "pay the costs of noncompliance" down the road. *Id.* Retaining jurisdiction over Lockheed Martin's appeal of the Government's unilateral contract definitization would be consistent with *Newport News* and *CACI International*. First, the Air Force's unilateral definitization of contract price caps—that Lockheed Martin will invariably exceed down the road[29]—is no different from a Government CAS non-compliance determination requiring a contractor to "change its accounting practices to comply with the ACO's understanding of CAS 415" that will invariably require the contractor to "pay the costs of noncompliance with CAS 415." *Newport News*, 44 Fed. Cl. at 618.

Second, in all three cases, the Government-directed requirement to continue performance while abiding with the Government's unilaterally-directed cost and performance requirements, as permitted by the CAS clause and Definitization clauses, respectively, constitute the Government's nonmonetary "specific demand for [other] relief." *Id*. And, third, the definitization modifications and CAS non-compliance determination were both "written" and asserted "other relief" "as a matter of right" as authorized by and "arising under" the respective contracts. FAR 2.101. While *Newport News* and *CACI Int'l* are merely persuasive authority for this

[29] Throughout the years that the parties negotiated the Contracts' prices, Lockheed Martin continually provided the Government with updated incurred and forecasted costs and associated profit. Based on the latest such information available, Lockheed Martin will significantly exceed the unilaterally-definitized prices. Appx2020-2021, Appx2026-2027.

Court, the logic of both decisions—which expressly follow and implement this Court's instructions in *Garrett*—are worthy of this Court's consideration when construing the Air Force's definitization modifications as CDA-cognizable nonmonetary "other relief" claims.

For the reasons discussed, the persuasive factual analogies between challenging the fairness and accuracy of a performance evaluation in *Todd Constr.* and challenging the propriety of a CAS noncompliance determination in the COFC and ASBCA cases discussed permit this Court to find that the Air Force's definitization modifications are properly cognizable as "other relief" claims.

C. Alternatively, the Government's Definitization Modifications Are Cognizable as Government "Adjustment" Claims under this Court's Plain Meaning Analysis in *Alliant* and Its Progeny

Alternatively, there is no question that the Air Force's unilateral modifications actually "adjusted" the contract terms by establishing prices pursuant to the Definitization clauses. As a result, this Court could classify the Air Force's modifications establishing new contract prices as nonmonetary "adjustment" claims under this Court's analogous precedent.

This Court's leading decision on adjustment/interpretation claims is *Alliant*, 178 F.3d at 1264–67. There, the CO issued a unilateral modification purporting to exercise an option in August. *Id*. at 1264. The option required the contractor to continue performance and deliver at specified rates by October. *Id*. The contractor

initially complied, but a month later (September) objected, alleging that the CO's right to exercise the option had "expired" by its terms, and thus the CO's purported exercise was "legally ineffective." *Id.* The CO, by letter, argued that the option was timely. *Id*. The contractor then "filed a complaint in [COFC] seeking a declaration that it was not required to perform the option." *Id*. The contractor then ceased performance, having performed for a month but stopping before making the October deliveries. *See id*.

COFC held that "Alliant was required to perform the option, but at a rate lower than that ordered by the contracting officer." *Id*. Both parties cross-appealed, with the Government challenging jurisdiction. *Id*.

This Court framed the contractor's appeal as a "question whether the court has jurisdiction to address Alliant's claim that the contract does not require it to perform." *Id*. at 1266. The Government argued that the contractor must perform, incur costs, and then assert a monetary claim. *See id*. at 1265–67. The Government variously argued that the Disputes clause might also bar judicial review over such administrative action. *See id*.

The Court emphatically held that the contractor's challenge to the efficacy of the Government's unilateral option modifications was a nonmonetary interpretation/adjustment claim within the meaning of FAR 2.101 and precedent. *Id.* at 1266–67. First, the Court characterized the challenge to the CO's compliance

with the terms of the option clause—*i.e.*, whether it had been effectively exercised by timely modification—as a nonmonetary "claim seeking an interpretation of contract terms. *Id*. at 1266–67. The Court then explained that the contractor could make such a challenge under the CDA:

> [T]o hold that the disputes clause required Alliant to perform the option and limited Alliant's relief to post-performance compensation for work that it contends it was not required to perform would be contrary to the language of the regulatory definition of "claim." That definition does not limit claims to requests for monetary relief, but includes . . . requests for "adjustment or interpretation of contract terms, or other relief arising from or relating to the contract."

Id. The Court held that jurisdictionally preventing contractors from asserting such nonmonetary challenges "would render largely *meaningless* those portions of the definition of claim that refer to requests for nonmonetary relief." *Id*. at 1267 (emphasis added). The Court held that nothing in the CDA required a contractor to "postpone seeking such a [nonmonetary] ruling from [COFC] until it has performed in full and [then] seek[] compensation for the additional work that the contract did not require." *Id*. at 1266.

The *Alliant* Court also properly framed the rule, created by *Malone* and *Garrett*, that the CDA permitted nonmonetary claims even where there was unavoidable monetary consequence that would give rise to parallel monetary claims:

> The court's analysis in *Garrett* is inconsistent with the government's theory of this case, since [GE] *could have* performed as directed and sought *monetary compensation* for its

> work afterwards. Instead, the court held that the nonmonetary claim provided a viable basis for board jurisdiction. . . . [T]he *Garrett* case stands for the proposition that non-monetary claims are not outside the jurisdiction of the [CDA] *simply because the contractor could convert the claims to monetary claims by doing the requested work and seeking compensation afterwards*.

Id. at 1270 (emphasis added). The Court explained:

> To hold that Alliant has a contractual obligation to perform in accordance with the [CO's] decision until it receives a different ruling on the scope of the contract *does not mean that it must postpone seeking such a ruling* from [COFC] until it has performed in full and seeks compensation for the additional work that the contract did not require.

Id. at 1266 (emphasis added). Such precedent is still applicable here.

Turning to the question of declaratory relief, the Court held that the *form* of relief that a court could fashion was unequivocally a decision on the merits to be decided after "jurisdiction" was exercised. *Id*. at 1270. The Court explained:

> The government's argument, however, confuses the question whether [COFC] had *jurisdiction* to entertain Alliant's complaint with the question whether the court *should grant relief on the merits and what form such relief should take*. We have held above that the Tucker Act grants [COFC] jurisdiction to grant nonmonetary relief in connection with contractor claims, including claims requesting an *interpretation of contract terms*. The jurisdiction of that court is defined by Congress, and the "prudential considerations" that the government presses upon us *cannot alter the jurisdictional lines that Congress has drawn*.
>
> . . . .

> We therefore reject the government's argument that [COFC] should have dismissed Alliant's complaint for lack of jurisdiction or denied its request for declaratory relief for prudential reasons.

Id. at 1270, 1272 (emphasis added) (internal citations omitted).

After categorically rejecting all challenges to subject-matter jurisdiction, *see id*., the Court then turned to the merits and, ultimately, agreed that the Government had defectively exercised the option, *id*. at 1275, but denied Alliant's appeal for failure to continue performance under dispute, *id.* at 1275–76.

Here, the Air Force's definitization modifications unquestionably "adjust[ed] . . . contract terms" because the modifications established new prices, inserted these new prices into the contract documents, and commensurately adjusted the contract's applicable terms, conditions, and applicable clauses. More specifically, the Air Force awarded these UCA contracts with unpriced terms. *See, e.g.*, Appx91 ("Target Cost: TBD[;] Target Profit: TBD[;] Target Price: TBD[;] Ceiling Price: TBD"); Appx1369-1370 ("Target Cost, Target Profit, Target Price, and Ceiling Price are negotiated values to be established at contract definitization . . . Estimated Cost and Fixed Fee are negotiated values to be established al contract definitization."). By unilateral modification, the Air Force's modifications *adjusted* the contracts by inserting the newly definitized prices. *See* Appx640 ("This unilateral modification will definitize the contract as a [firm-fixed price] contract with a value of . . ."); Appx1675-1676 (listing the CLINs affected by definitization determination). The

sole purpose of the definitization modifications was to adjust or change the unpriced pricing terms of the contract and applicable related terms.

The Air Force's modifications were thus "adjustment" claims under the plain language of FAR 2.101 and this Court's precedent in *Alliant*. The modifications were "written assertion[s] . . . seeking, as a matter of right, . . . the adjustment [ ] of contract terms. . . ." FAR 2.101; FAR 33.201.[30] Unilateral definitization modifications are analogous to the unilateral option modifications in *Alliant*. In addition, trial-court decisions support this interpretation that a unilateral definitization modification adjusting contract terms and prices could be reasonably cognizable as nonmonetary "adjustment" claim. *See, e.g.*, *The Boeing Co.*, ASBCA No. 37579, 89-3 BCA ¶ 21,992 at 110,597 (holding a "modification, asserting the Government's right to adjust the contract terms to permit the late exercise of an option and perpetuate contractual ceiling prices, *as a contracting officer's decision*

[30] There is also a live dispute over whether the Government's assertions of what the firm-fixed prices and cost ceilings should be were reasonable. Over several years the parties negotiated the reasonable firm-fixed prices ("FFP") and cost ceilings for the Contracts before the COs abruptly and unilaterally definitized the FFPs and cost ceilings for both Contracts. *See* Appx2010. The COs' definitizations were based on the Government's determination of what prices and ceilings were reasonable, which was different from what Lockheed Martin found to be reasonable. The parties' dispute is analogous to the dispute in *The Boeing Co.*, where the Board found that the Government's unilateral modification exercising its right to an option "crystalized into a dispute" when the CO proposed a bilateral modification and the contractor refused to sign the modification. *The Boeing Co.*, ASBCA No. 37579, 89-3 BCA ¶ 21,992 at 110,597.

asserting a Government claim from which Boeing could properly appeal"); *Gen. Elec. Co.*, 91-2 BCA ¶ 23,958 at 119,945 ("In *McDonnell Douglas*, a contract *interpretation* case under the CDA involving the Government's assertion of the Comptroller General's right to examine certain contractor records pursuant to the Examination of Records clause, the Board recognized this as an appropriate subject matter for a nonmonetary Government 'claim' to be asserted in a contracting officer's decision (though in that case it had not yet been), and recognized the Board's authority to 'determine the parties' respective legal rights and obligations, as in a 'declaratory judgment.'"); *Litton Sys., Inc., Guidance & Control Sys. Div.*, ASBCA No. 45400, 94-2 BCA ¶ 26,895 at 133,908 (certain CAS determinations of non-compliance, requiring accounting change, without sum certain, constituted Government nonmonetary claim "seeking . . . the adjustment or interpretation of contract terms").

Here, because the definitization modifications are cognizable as "adjustment" claims, Lockheed Martin properly sought declaratory relief by appealing the Air Force's noncompliant execution of its right to definitize and adjust prices. *See* Section II.B.1. Whether the Air Force was noncompliant, and whether declaratory relief is appropriate, is a decision "on the merits" after remand. *Alliant*, 178 F.3d at 1270. This Court, like in *Alliant*, is only presented with the question of whether definitization modifications that adjust contract prices fall within the expansive CDA

jurisdiction over nonmonetary claims under the plain language of FAR 2.101 and this Court's precedent. They do. Despite the Government's arguments, "jurisdiction . . . is defined by Congress, and the 'prudential considerations' that the government presses upon us cannot alter the jurisdictional lines that Congress has drawn." *Id*. at 1272. Therefore, this case should be remanded to the ASBCA for proceedings on the merits.

III. ALTERNATIVELY, REMAND IS WARRANTED BECAUSE THE BOARD IMPROPERLY RELIED UPON NONCONTROLLING PRECEDENT AS CONTROLLING

This Court could alternatively remand to the Board because the Majority improperly relied on its inapposite jurisdictional precedent when it determined that *Bell* was controlling on the disputed question of whether unilateral modifications are cognizable as Government claims for "other relief." *See* Appx4; *Bell Helicopter Textron,* ASBCA No. 35950, 88–2 BCA ¶ 20,656 *motion for recon. denied* 88-3 BCA ¶ 21,048. *Bell* did not. The Board erred. This decision can be remanded with instructions to properly analyze CDA claim jurisdiction without reliance on inapposite case law.

The Supreme Court has explained that: "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925). This Court has similarly explained that prior decisions

are not binding on an issue "[w]hen an issue is not argued or is ignored in a decision." *Nat'l Cable Television Ass'n v. Am. Cinema Eds., Inc.*, 937 F.2d 1572, 1581 (Fed. Cir. 1991).

Here, the Board Majority conceded that *Bell* "did not explicitly cite" to "other relief" claims in its decision. *See* Appx4. Notwithstanding that significant concession, the Majority proceeded to note that the CDA and FAR both existed at the time of *Bell*. *Id*. Thus, according to the Majority, the mere existence of the term "other relief" *in the FAR* necessarily meant that *Bell* must have considered "other relief" claims (tacitly) within its decision. That the term "other relief" may have lurked in the FAR (not "the CDA" as the Majority stated), does not make *Bell* controlling precedent because "[w]hen an issue is not argued or is ignored in a decision, such decision is not precedent to be followed in a subsequent case in which the issue arises." *Nat'l Cable*, 937 F.2d at 1581; *Webster*, 266 U.S. at 511.

A buried footnote in the Majority Decision also posited that the word "recourse" in *Bell* could potentially mean that *Bell* did, in fact, consider "other relief" claims. Appx4. This mischaracterizes *Bell*'s use of the term "recourse," which *Bell* used in the sense of monetary recourse other than transmission of payment, such as withholdings, price reductions, and deductive actions.[31] Based on these

[31] The Majority plucked "recourse" from its context and misapplied it to "other relief" claims, which is error. Appx4. Placing the term "recourse" in its proper context, which the Majority did not do, the full quote from *Bell* reads:

assumptions, the Majority then treated this decision—virtually uncited by any tribunal in three decades—as controlling on Lockheed Martin's allegation that the Government's unilateral definitization modifications were cognizable as "other relief" claims. *Id*.

But *Bell* is inapposite. In *Bell*, the contractor *narrowly* alleged—and the Board *exclusively* analyzed—whether unilateral modifications could be viewed as "contract interpretation or adjustment" claims. *Bell*, 88-2 BCA ¶ 20,656 at 104,392. Claims cognizable as "other relief" are jurisdictionally distinct from the other two types of claims defined in FAR 2.101, *viz*., interpretation/adjustment claims and monetary claims. Lockheed Martin's appeal and Complaint assert that the Government's unilateral definitization modifications are properly cognizable as Government claims for "other relief," similar to those found in *Garrett* and *Malone*.

> While *Perkins* dealt with Government withholding and in *Brunswick* the Government sought actual payment from appellant, in both cases Government claims essentially were involved. In this appeal, however, the Government has not and is not seeking any *recourse or payment* from appellant. The contracting officer's decision did no more than establish the contract price. . . . Therefore, the contracting officer's decision did not amount to a Government claim.

Bell, 88-2 BCA ¶ 20,656 at 104,392 (emphasis added). Instead, as the Dissent correctly stated, in *Bell*, "[t]his Board did not . . . consider 'other relief arising under or relating to this contract." *See* Appx14.

This "other relief" type of claim was *not* mentioned**,** analyzed, or decided in *Bell*, and, thus, it does not control the current appeal.

Despite *Bell*'s silence regarding claims for "other relief," the Majority deferred to it as binding precedent on that very issue, and held that the Board lacked jurisdiction to hear Lockheed Martin's appeal. Appx4 ("[O]ur decision today is not based upon what we would do if we were working on a blank slate and the Board had not issued *Bell Helicopter*; instead our decision – and the analysis which we must undertake in addressing LM's arguments – is premised upon *Bell Helicopter* being the law, which we do not have the power to overrule."). But silence is not the same as binding precedent. *See Webster*, 266 U.S. at 511. The fact that *Bell* did not consider, let alone rule, on whether a unilateral definitization constitutes a Government claim for "other relief" means that the decision does not "constitute precedent." *Id*. The Board erred.

Thus, as an alternative, this Court should vacate the Board's decision and remand it so that the Board can properly address Lockheed Martin's challenge to the propriety of the Air Force's claim for "other relief."

CONCLUSION

The Board's decision should be reversed.

December 28, 2021

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MAJORITY OPINION BY ADMINISTRATIVE JUDGE PROUTY

The question presented by these appeals is whether a unilateral contract definitization[1] action by a contracting officer (CO) constitutes a government claim that may be directly appealed to the Board by the contractor (as happened here), or whether it is an act of contract administration, subject to a claim by the contractor, but not a direct appeal. It turns out, we answered this question 33 years ago in *Bell Helicopter Textron*, ASBCA No. 35950, 88-2 BCA ¶ 20,656, *aff'd on mot. for recon.*, 88-3 BCA ¶ 21,048. In 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 CO and then appeal to us if it is dissatisfied with the results. Appellant here, Lockheed Martin Aeronautics Company (LM), is well aware of *Bell Helicopter*, but appealed the unilateral definitization directly to us anyway, arguing that *Bell Helicopter* has been effectively, if not expressly, overruled in the years since its issue. Judge Clarke, in dissent, agrees with LM.

Though we certainly agree that the definition of "claim" and the universe of actions subject to a claim has grown more liberal since the issuance of *Bell Helicopter*,

[1] Contract definitization is the setting of a final price for a contract that was awarded without a set price.

see, e.g., Todd Constr. v. United States, 656 F.3d 1306, 1311-12 (Fed. Cir. 2011), we respectfully disagree with Judge Clarke's conclusion that it has changed so much as to effectively overrule that decision. That being the case, we must follow our prior precedent, *see SWR, Inc.*, ASBCA No. 56708, 15-1 BCA ¶ 35,832 at 175,220, and continue to hold that a unilateral contract definitization does not constitute a government claim and may not be directly appealed to us. The government motion to dismiss on these grounds is granted.

STATEMENT OF FACTS FOR THE PURPOSES OF THE MOTION

Strictly speaking, the motion before us is a motion to dismiss for lack of jurisdiction. The government submitted with its motion a statement of undisputed material facts, in the style of a motion for summary judgment. Those proposed facts – at least those which we find material to our decision today – may be gleaned almost completely from LM's complaint in this action.[2] The salient ones are below.

These appeals involve two contracts in which the Air Force contracted with LM to upgrade F-16 fighter aircraft on behalf of two different foreign governments pursuant to the Foreign Military Sales program. Contract No. FA8615-16-C-6048 (the Singapore contract) was entered in December 2015 and was for the purpose of upgrading the avionics of F-16s owned by Singapore. Contract No. FA8615-17-C-6045 (the Korea contract) was entered into in November 2016. (*See* compl. ¶¶ 1-2).

Each contract was an undefinitized contract action (UCA), meaning that the contract was awarded before the final price was set (*see* compl. ¶ 2). In each case, LM was entitled to charge the government for the costs that it incurred as it performed the contract until it was definitized (*see* compl. ¶ 3). Each contract also included a "not to exceed" (NTE) amount, which limited the costs that LM could incur before the contract price was definitized (*see* compl. ¶ 17 (Singapore contract); ¶ 19 (Korea contract)).

The contract provisions governing definitization came from different sources for each contract, though they were identical for our purposes. The relevant provision for the Singapore contract came from the Federal Acquisition Regulation (FAR) 52.216-25(c); the provision for the Korea contract came from the Department of Defense Supplement to the Federal Acquisition Regulation (DFARS) 252.217-7027(c). (*See* compl. ¶ 5). Each

[2] In a motion to dismiss for lack of jurisdiction, well-pleaded facts in the complaint are generally treated as true unless controverted. *See, e.g., Reynolds v. Army and Air Force Exch. Svs.*, 846 F.2d 746, 747 (Fed. Cir. 1988).

provided that, in the event the parties were unable to come to agreement upon the definitized price within the time set by the contract:

> 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.

See compl. ¶ 10 (citing FAR 52.216-25(c); DFARS 252.217-7027(c)).

And, speaking of the Disputes clause, each contract included the same Disputes clause, FAR 52.233-1, DISPUTES (MAY 2014) ALTERNATE I (DEC 1991)) (*see* compl. ¶ 11; R4, tab 1 at 47 (Singapore contract); R4, tab 7 at 42 (Korea contract)).

LM submitted proposals for definitization of the contracts in a timely manner and included cost data to support its proposals (*see* compl. ¶¶ 20-43 (Singapore contract); ¶¶ 47-65 (Korea contract)). Nevertheless, after a period of several years, the parties were unable to come to agreement upon the contract prices and, on February 12, 2020, the CO issued contract modifications to unilaterally set the price for each contract. In the case of the Singapore contract, Modification No. PZ0010 unilaterally definitized the total project price at $1,008,584,243 (*see* comp. ¶ 44). In the case of the Korea contract, Modification No. PZ0012 unilaterally definitized the total project price at $970,462,643 (*see* compl. ¶ 66).

LM did not file a claim with the CO challenging these definitization actions. Instead, on May 8, 2020, LM filed Notices of Appeal of each definitization action with the ASBCA, stating that it was appealing directly from the government's two unilateral modifications. (*See* compl. ¶ 12). At the time of its submission of the appeals, LM asserts, both contracts had over a year of performance remaining and in neither contract had LM's costs exceeded the unilaterally definititzed price set by the CO (*see* compl. ¶ 9).

The appeals have since been consolidated.

DECISION

I. *Bell Helicopter* is Dispositive (if it Remains Good Law)

As noted above, the government has moved to dismiss these appeals upon the ground that LM has not filed claims with the CO challenging the two definitization actions at issue. Without a decision upon claims to appeal, of course, there is no

jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. *Islands Mechanical Contractor, Inc.*, ASBCA No. 59655, 17-1 BCA ¶ 36,721 at 178,809.

LM recognizes the need for a CO final decision for Board jurisdiction, but argues that it has that in the CO's definitization decision, which LM asserts is a government claim against the contractor which may be directly appealed (*see* app. opp'n at 15-16 (citing *Garrett v. Gen. Elec. Co.*, 987 F.2d 747, 749-50 (Fed. Cir. 1993))). Unfortunately for LM, that argument was rejected by the Board in *Bell Helicopter*, where we held that a "contracting officer's decision [that] did no more than establish the contract price in accordance with [the terms of the contract] did not amount to a government claim." 88-2 BCA ¶ 20,656 at 104,392. The CO's decisions challenged here, likewise, established the contract price in accordance with the contracts' terms, and are thus not government claims – so long as *Bell Helicopter* remains binding.

II. *Bell Helicopter* Remains Good Law

As will be discussed herein, LM's challenges to *Bell Helicopter* come in two primary categories. The first is that the judicial expansion of the meaning of "other relief" as a category of claim under the CDA, which happened subsequent to the *Bell Helicopter* decision, now embraces definitization, making it a claim.[3] The second category of challenge to *Bell Helicopter* is premised upon the notion that it was decided incorrectly in the first place. Neither category of challenge is persuasive in the context we are operating under here: our decision today is not based upon what we would do if we were working on a blank slate and the Board had not issued *Bell Helicopter*; instead our decision – and the analysis which we must undertake in addressing LM's arguments – is premised upon *Bell Helicopter* being the law, which we do not have the power to overrule.[4] Our

[3] LM also argues that *Bell Helicopter* did not address whether definitization constituted "other relief", thus, technically, making it unnecessary for us to actually overrule that decision (app. sur-reply at 4-8). Contrary to LM's argument, *Bell Helicopter* 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. 88-2 BCA ¶ 20,656 at 104,392. In any event, we find that LM's argument cuts things too finely: the *Bell Helicopter* decision considered whether a unilateral definitization was a government claim and found that it was not; the "other relief" text was, of course, part of the CDA at the time and we presume our predecessors were familiar with it, even if they did not explicitly cite it. In any event, in dealing with the argument that the law on "other relief" expanded post-*Bell Helicopter*, we largely deal with LM's argument that the *Bell Helicopter* panel ignored "other relief."

[4] To be clear, we do not mean to imply that, without *Bell Helicopter*, we would necessarily rule in LM's favor or that we disagree with the outcome of that case. We do not reach those questions because, if *Bell Helicopter* remains the law (as

authority to disregard the holding of *Bell Helicopter* can only rest on its being directly overruled by a body with the authority to do so, such as the Board's own Senior Deciding Group (SDG) [5] or the Federal Circuit, or its foundational underpinnings having been so changed as to effectively overrule it. *See Lighting Control Ballast, LLC v. Phillips Elecs. N. Am. Corp.*, 744 F.3d 1272, 1282 (Fed. Cir. 2014), *vacated on other grounds sub nom. Lighting Control Ballast, LLC v. Universal Lighting Tech., Inc.*, 574 U.S. 1133 (2015); *cf. Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).[6]

A. The Ascendance of "Other Relief" Does Not Sufficiently Change the Basis of *Bell Helicopter* to Overrule it.

The decision that LM and Judge Clarke's dissent argue is most salient to this appeal is the Board's SDG decision in *Gen. Elec. Co.*, ASBCA Nos. 36005, 38152, 91-2 BCA ¶ 23,958, which was affirmed by the Federal Circuit in *Garrett*, *supra* (*see* app. opp'n at 23-24). *General Electric* involved the CO's direction to appellant to repair a number of non-complying jet engines produced under the contract. Since the government's demand was nonmonetary, it had been argued that prior Board decisions requiring a monetary aspect to a CO's directive to make it a government claim – *H.B. Zachry Co.*, ASBCA No. 39202, 90–1 BCA ¶ 22,342, was the primary example – precluded that direction from being a government claim. *See Gen. Elec.*, 91-2 BCA ¶ 23,958 at 119,945-46. The SDG decision overruled any such decisions, recognizing that "other relief" under the FAR's definition of "claim" embraced the CO's directive to repair the engines and that any notion of limiting government claims to ones specifically seeking money was wrong. *Id.* at 119,946. The Federal Circuit's opinion essentially agreed with this, holding that the government's direction to the contractor was a government claim despite its choice to pursue a nonmonetary remedy. *See Garrett*, 987 F.2d at 749.

None of this directly addresses *Bell Helicopter*, about which the SDG was conspicuously silent, despite its explicitly overruling of *Zachry*. *See Gen. Elec.*, 91-2 BCA ¶ 23,958 at 119,946. To be sure, *Bell Helicopter* was mentioned in one of the three dissenting opinions in which it was included in a string cite for the proposition that directions by contracting officers to perform additional work were not considered to be

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we find that it is), there is no more reason to second guess it than any other binding precedent.

[5] The SDG is the way that the Board overturns its past precedents. *See SWR*, 15-1 BCA ¶ 35,832 at 175,220. It may be considered the equivalent of an *en banc* decision, but it does not involve every member of the Board, just the most senior.

[6] In footnote four of its sur-reply, LM cites four prior opinions of ours in support of its assertion that we have routinely "jettisoned" our past precedent when the Federal Circuit has "signal[led] a new jurisdictional trajectory" (app. sur-reply at 6, n.4). That particular test is not to be found in any of our opinions. A change in foundational underpinnings, the proper test, is different than a vague "signal."

claims. *See Gen. Elec.*, 91-2 BCA ¶ 23,958 at 119,947 (Spector, J., dissenting). But, with due respect to that dissenting opinion, that alleged holding of *Bell Helicopter*'s is not, in fact, an accurate representation of its actual holding, for the unilateral contract definitization in *Bell Helicopter* entailed no requirement for *additional* work, and nothing in *Bell Helicopter* is premised upon the notion that only monetary claims can be government claims.

Judge Clarke argues that concerns expressed by the dissenters in *General Electric* – that finding a government claim in those circumstances would unduly intrude into contract administration – show that those concerns are now relegated to dissents. In other words, they have been rejected by the winning side of that decision and the same rejection should apply to *Bell Helicopter*, which is (supposedly) premised upon similarly misplaced views of keeping the Board's hands out of contract administration. But not everything said in a dissent is necessarily wrong. Judge Williams' concurring opinion in *General Electric* shared the dissenters' "legitimate concern that the Board not become embroiled in matters that are primarily contract administration." *Gen. Elec.*, 91-2 BCA ¶ 23,958 at 119,947. He, nevertheless, found that the circumstances in *General Electric* did not go too far into such administration. *Id*. Indeed, the Federal Circuit's opinion in *Garrett* recognized the problematic aspects of judicial intrusion into contract administration, but, like Judge Williams (with whom it agreed), 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. *Garrett*, 987 F.2d at 751-52.

Hence, in and of themselves, neither *General Electric* nor *Garrett* overruled *Bell Helicopter*, either explicitly or implicitly. Moreover, they did not appreciably change the legal terrain regarding "other relief" as a basis for government claims. As the SDG opinion in *General Electric* noted, the Board had ample past precedent prior to that case (and *Bell Helicopter*) in which the Board found the government's availing itself of other relief constituted a claim. *Gen. Elec.*, 91-2 BCA ¶ 23,958 at 119,944-45 (citing cases).

LM argues that the Federal Circuit's more recent decision in *Todd Construction, supra*, further opened up the definition of claim so as to embrace a definitization action. A more accurate reading of *Todd Construction* would be to say that it opened up the matters that could be subject to claims. Importantly, *Todd Construction* did not hold that the challenged performance evaluations[7] were, themselves, government claims; rather, it held that seeking relief from those evaluations was the proper subject of a claim. *See Todd Constr.*, 656 F.3d. at 1313-14. This, we think, 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;

[7] The issue in *Todd Construction* was whether the CDA permitted a contractor to file a claim challenging contractor performance reports. The Federal Circuit decided that it did. *See* 656 F.3d. at 1313-14.

instead, it is the seeking of relief from those actions that is the claim. The Federal Circuit in *Todd Construction* never concluded that the performance evaluations were, themselves, government claims. *Id.*

And it is a very good thing for the private contracting community that *Todd Construction* did not do so: if an adverse performance evaluation were, in fact, a government claim, then a contractor would be subject to the CDA's statute of limitations to appeal it to the Board or the Court of Federal Claims. *See* 41 U.S.C. § 7104. Does *Todd Construction* really mean that, in all acts of contract administration by the government that the contractor may later dispute, the contractor must immediately vault to the courthouse door prior to filing its own claim or risk losing its appeal rights? Under LM's reading of the case, it must.[8] But we think not. Instead, the CDA, sensibly, gives the contractor ample time to decide whether to file a claim in the first instance (6 years, *see* 41 U.S.C. § 7013(a)(4)), and a much shorter period of time after the claim is denied (90 days for appeals to the Board; a year for appeals to the Court of Federal Claims) to appeal the claim denial. 41 U.S.C. § 7104. To its credit, *Todd Construction* did not change this.

LM cites a number of other types of appeal which do not, in and of themselves, expand the definition of "claim" but that it argues are the "progeny" of *General Electric* and, by analogy, suggest the definitization here must be a claim (*see generally*, app. opp'n at 18-19; 25-42). To put it slightly differently, LM's argument is that, "if these other things are government claims, surely a contract definitization must be." We generally question whether argument by analogy is sufficiently direct to cause us to recognize that one of our precedential opinions had been since overturned by our reviewing court. But, in any event, the analogous cases cited by LM are all distinguishable from contract definitization or were taken into consideration by the Board when *Bell Helicopter* was issued, thus precluding their use as bases to set aside that case.

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[8] Perhaps LM might argue here that, since performance evaluations and other such CO actions do not include appeal rights, they are not necessarily government claims unless the contractor wishes them to be. But such an argument would both be contrary to the position it is taking in this appeal, that a decision may be a government claim even if the appeal rights are left off (*see* app. opp'n at 47), and be mistaken. We have long held that CO final decisions with defective notification of appeal rights can, nevertheless, be considered valid and not toll the statute of limitations – in particular, when the contractor has not detrimentally relied on the defective notification. *See Mansoor Int'l Dev. Servs.*, ASBCA No. 58423, 14-1 BCA ¶ 35,742 at 174,926; *cf. Decker & Co v. West*, 76 F.3d 1573, 1579-80 (Fed. Cir. 1996). This law does not provide room for the contractor to pick and choose which CO's decisions were ripe for appeal and which it would prefer to let lie and perhaps later submit a claim upon.

The first set of "analogous" cases cited by LM are a number involving the use of the contract's inspection clause by the government to direct the contractor to do new work on the contract (*see* app. opp'n at 25-28). These cases are all similar to *General Electric* and present similar fact patterns. Inasmuch as we have already discussed *General Electric* above, and find that it does not change the viability of *Bell Helicopter*, we may dispose of these arguments out of hand: the cases cited all involved directing the contractor to incur additional costs of performance – that has not happened here.
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LM next argues that cost accounting standard (CAS) non-compliance determinations, which are government claims, are similar to the definitization here (app. opp'n at 28-32). In support of this conclusion, LM relies principally on one of our opinions: *CACI Int'l, Inc*., ASBCA No. 57559, 12-1 BCA ¶ 35,027, and a Court of Federal Claims opinion cited in *CACI*, *Newport News Shipbuilding & Dry Dock Co. v. United States*, 44 Fed. Cl. 613 (1999) (*see* app. opp'n at 28-30). Those cases stand for the (hardly novel) proposition that a CAS non-compliance determination, which imposes the cost of a new accounting system on the contractor, is a government claim. *See CACI*, 12-1 BCA ¶ 35,027; *Newport News*, 44 Fed. Cl. at 616-17. LM asserts that a unilateral cost definitization is like a non-compliance finding because it will "invariably forc[e] cost overruns down the road" (app. opp'n at 28).

That is quite some assertion. Especially given how foundational it is to LM's argument. Absent 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.[9] In any event, it is safe to say that the reasoning in *CACI* did not overturn *Bell Helicopter* and that neither it, nor *Newport News*, a case in a court that is not binding upon us, could have overturned *Bell Helicopter* in any event.

We also note that *CACI* is not the first case of ours finding a CAS non-compliance finding to be a government claim. In 1983, five years before *Bell Helicopter*, we came to that very conclusion in *Brunswick Corp.*, ASBCA No. 26691, 83-2 BCA ¶ 16,794, obviating LM's suggestion that there was any change in law supporting setting aside *Bell Helicopter*.[10]

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[9] LM asserts in its complaint that it is being wronged by tens of millions of dollars (*see* comp. ¶¶ 73, 80), but it does not argue that such figures may be found in the CO's definitization decision or that all unilateral priced definitizations will "invariably" cause cost overruns.

[10] *Newport News*, the Court of Federal Claims case cited by LM here, also relied upon one of the Board's pre-*Bell Helicopter* decisions for its holding that CAS non-compliance findings could constitute government claims. 44 Fed. Cl. at 616 (citing *Systron Donner, Inertial Div.*, ASBCA No. 31148, 87-3 BCA ¶ 20,066).

Equally meritless is LM's argument that cases holding terminations for default to be government claims necessarily overturned *Bell Helicopter* (*see* app. opp'n at 32-34). This holding was the law prior to *Bell Helicopter*, and was indeed discussed by the panel that considered *Bell Helicopter*, and dismissed by it. *See* 88-2 BCA ¶ 20,656 at 104,392. It is not a basis to argue that the law has changed since we issued the *Bell Helicopter* decision.

LM's penultimate argument by analogy is to compare the present circumstances to data rights claims, in which the government's ordering the removal of restrictive data rights markings (or its unilateral removal of such markings), which we have held constitutes a government claim (*see* app. opp'n at 34-38). First, as LM recognizes, such data rights issues were recognized as government claims even before *Bell Helicopter*, *see, Bell Helicopter Textron*,[11] ASBCA No. 21192, 85-3 BCA ¶ 18,415 (cited by app. opp'n at 37), and were cited immediately after it. *See Ford Aerospace & Comms. Corp*., ASBCA No. 29088, 88-2 BCA ¶ 20,748 at 104,829 (cited by app. opp'n at 37). Indeed, two of the three judges who signed *Bell Helicopter* (Spector, J., and Ruberry, J.) also signed *Ford Aerospace*, so it is rather clear that the consideration of the data rights actions to be government claims is not a change to the law since *Bell Helicopter*, indicating that its time has passed. Moreover, the data rights cases are easily distinguishable from the definitization we are dealing with here: perhaps there had been no monetary impact by the government's arrogation of contractor-owned data rights, but they involved the taking of property from the contractor by the government – a wrong that was ripe for relief. The unilateral contract definitization, however, as the *Bell Helicopter* Board put it, sought nothing from the contractor and merely established the price as required by the contract. *See* 88-2 BCA ¶ 20,656 at 104,392. The two types of cases are consistent – and are certainly not so inconsistent as to compel the reversal of *Bell Helicopter*.

LM's final argument by analogy is that the government's unilateral establishment of indirect cost rates constitutes a government claim, which would mean that the government's unilaterally establishing the contract's price should also be a government claim (app. opp'n at 38-42). In some ways, this is LM's strongest argument because there are commonalities in the circumstances – namely that the government is setting a price for a portion of contract performance that is different than what the contractor requested. But there are reasons that it is not dispositive.

First, LM's brief rests largely on an interpretation of our decision in *Fiber Materials, Inc.*, ASBCA No. 53616, 07-1 BCA ¶ 33,563, which, LM argues, demonstrates that unilateral indirect cost rate determinations by the CO may be directly

[11]This is not to be confused with the appeal which is central to our opinion today, though it does bear the same name.

appealed as non-monetary claims[12] (*see* app. opp'n at 38-41). But *Fiber Materials* (issued in 2007) did not see itself as plowing new ground. Instead, in rather summary form, it plainly stated that, "[t]he government's disallowance of appellant's indirect costs, as reflected in the ACO's unilateral rate determination, and her imposition of penalties, are government claims subject to appeal under the CDA" and cited four prior Board decisions in support of that holding – every one of them pre-dating *Bell Helicopter*. *See* 07-1 BCA ¶ 33,563 at 166,251 (citing cases). Thus, the notion that the unilateral setting of indirect cost rates constitutes a government claim is longstanding and not a change to the legal landscape after *Bell Helicopter*. Indeed, as discussed at length above, *Bell Helicopter* does not rest on the price definitization being a non-monetary claim. Hence, LM's fixation on *Fiber Materials'* allowance of a non-monetary government claim is of far less moment than LM appears to think.

Moreover, on the merits, the CO's unilateral establishment of indirect cost rates, coming, as it must, after provisional billing and payment for indirect costs is different than unilateral price definitization when already-incurred costs have been paid, but the definitive price has not. The former almost always will entail a refund to the government, even if the amount is not necessarily calculated by the CO and demanded at the time she or he issues their decision establishing the rate. To be sure, LM has proposed a hypothetical in which it is possible that the contractor's rejected indirect cost rates were higher than those for which it billed, thus leading to the imposition of rates lower than it requested, but equal to the amount that it had billed such that no money was owed to the government (*see* app. opp'n at 41), but that strikes us as highly unlikely and none of the cited cases show that to have actually occurred and been held to be a government claim. Perhaps it might happen on rare occasion, but the general character of a unilateral indirect cost rate determination by the government is the taking away of money expected by the contractor.[13]

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[12] LM's brief makes the statement that *Fiber Materials* clarified that such claims "must" be non-monetary (app. opp'n at 39). We do not follow this argument. There is no reason apparent to us that a CO decision unilaterally setting indirect cost rates could not also expressly demand the return of a sum certain from the contractor.

[13] The government did not address unilateral rate determinations in its reply brief and this issue was not addressed by LM, so we make the following observation without the benefit of argument: we note that, under the FAR provision governing *Fiber Materials*, FAR 52.216-7(d)(4), a disagreement about rates is considered a contract dispute, subject to the Disputes clause, *see* 07-1 BCA ¶ 33,563 at 166,235 (quoting the FAR), while the law tells us that the CO's deciding a unilateral rate (presumably *after* the disagreement) is the subject of the claim. The clauses governing unilateral price definitization here do not refer the parties to the Disputes clause until *after* the CO has issued her or his determination. *See* FAR 52.216-25(c) and DFARS 252.217-7027(c). Thus, though we do not

B. Arguments That We Have Ruled Contrary to *Bell Helicopter* Are Mistaken

Judge Clarke argues that prior opinions of ours have held that definitization actions are government claims, thus reflecting the Board's determination that *Bell Helicopter* is no longer good law. We have not so found.

The primary case discussed by Judge Clarke for this proposition is *Litton Sys., Inc., Applied Tech. Div.*, ASBCA No. 49787, 00-2 BCA ¶ 30,969, which he characterizes as stating that a unilateral determination constituted a government claim. To be sure, if *Litton* said as much, we would be facing a very different legal terrain! But it does not. The 2000 opinion cited by Judge Clarke, in fact, is merely reporting the result of a 1993 decision in the same case on a motion to dismiss. *See Litton Sys., Inc., Applied Tech. Div.*, ASBCA No. 49787, 93-2 BCA ¶ 25,705. The 1993 opinion did not hold that a unilateral determination was a government claim; rather, it held that in a case involving a firm fixed price contract, a unilateral reduction in the price, requiring the return of money by the contractor, constituted a government claim. This is consistent with our view of the law, which is that CO decisions requiring the return of money to the government (somewhat like was seen in *General Electric*, where it was a possibility), are government claims. Again, this does not affect the continued viability of *Bell Helicopter*. If it did, we would have expected the case to have been referenced in *Litton*, but it was not.

C. Arguments That *Bell Helicopter* was Decided Incorrectly are Unhelpful

A number of the arguments advanced by LM and Judge Clarke are premised, either explicitly or implicitly, upon the notion that the Board erred in the first instance when it issued *Bell Helicopter*. No matter how compelling such arguments might be to the persons advancing them, they are not helpful to us today. As discussed above, being bound by precedent means that we do not afford ourselves the power to second-guess our prior opinions, but only to determine whether they, or their legal underpinnings, have been overruled since they were issued.

One example of LM's implicitly arguing that *Bell Helicopter* was incorrectly decided is its reliance on the portion of the FAR governing definitizations and that provision's referring the parties to the Disputes clause as a means for the contractor to appeal. This, LM argues, indicates that the FAR Council intended the contractor to have the right to direct appeal to the Board in the event of a unilateral definitization action. (*See* app. opp'n at 9). The problem with this argument is that our predecessors who wrote *Bell Helicopter* faced circumstances involving an almost identical clause providing recourse to the Disputes clause. *See Bell Helicopter*, 88-2 BCA ¶ 20,656 at 104,392. If

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necessarily see this as dispositive, the two contracting actions may not be treated quite so much alike as LM argues.

that clause did not cause our predecessors to question their result, it would be disingenuous of us to find that it provided a basis for revisiting the opinion now.

LM also argues throughout its motion that the CO's decision here is an "adjustment or interpretation of contract terms" (app. opp'n at *passim*). But, again, that argument was squarely rejected by both the original *Bell Helicopter* decision and the decision denying the contractor's request for reconsideration. *See* 88-2 BCA ¶ 20,656 at 104,392; *Bell Helicopter Textron*, 88-3 BCA ¶ 21,048 (denial of request for reconsideration). And for that reason, we continue to reject it here: nothing has changed justifying a different result.

Moreover, we reject LM's request, made in a footnote (app. opp'n at 48, n.19), to permit a "protective appeal" in a matter over which we possess no jurisdiction. We are confident that LM has the means and the time to submit a claim it deems appropriate before the expiration of the statute of limitations.

CONCLUSION

For the reasons discussed above, we are unpersuaded that the holding of *Bell Helicopter*, that a unilateral contract definitization is not a government claim, has been overturned or that its legal underpinnings have been sufficiently eroded as to effectively overrule it. Accordingly, we dismiss these appeals for lack of jurisdiction because LM has submitted no claims to the CO for final decision.

Dated: June 24, 2021

J. REID PROUTY
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

JAMES SWEET
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

BRIAN S. SMITH
Administrative Judge
Armed Services Board
of Contract Appeals

I dissent (see attached opinion)

CRAIG S. CLARKE
Administrative Judge
Armed Services Board
of Contract Appeals

JUDGE CLARKE'S DISSENTING OPINION

I respectfully dissent. I was the original judge assigned to this appeal and drafted the decision with which my colleagues disagree. Rather than appending my entire draft decision as my dissent as I have done before, I present only a portion thereof.

Bell did not Consider "Other Relief"

This appeal involves the question of if a government unilateral definitization of an Undefinitized Contract Action (UCA) is a government claim supporting Board jurisdiction similar to a termination for default. The majority cites *Bell Helicopter Textron*, ASBCA No. 35950, 88-2 BCA ¶ 20,656, *aff'd on mot. for recon.*, 88-3 BCA ¶ 21,048 to justify denying jurisdiction. *Bell* does indeed hold that a unilateral definitization of a UCA is not a government claim. In *Bell* we held the unilateral definitization was routine contract administration and not a contract adjustment. Aside from the fact I do not agree with that holding, I rely on the Disputes Clause, FAR 52.233-1 that 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, for the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. In *Bell* this Board based its decision on only the first two elements of a claim:

> The contracting officer's decision was not premised on an issue of contract interpretation or adjustment. Instead, the contracting officer's action was the initial establishment of the contract price pursuant to Clause H–1.

(*Bell*, 88-2 BCA ¶ 20,656 at 104,392). This Board did not analyze H-1, or consider "other relief arising under or relating to this contract." It seems to me that this omission in the 1988 decision limits *Bell*'s scope and leaves the door open for this Board to consider if a unilateral definitization is a government claim based on, "other relief arising under or relating to this contract." If my colleagues had allowed such consideration, I believe we would have found jurisdiction based on "other relief." This approach would leave *Bell* intact but limit it to consideration of "contract interpretation or adjustment." Our decision in this appeal by Lockheed Martin (LM) would allow our jurisdiction over a unilateral definitization as "other relief" relating to the contract and not conflict with *Bell*.

Bell Has Not Been Followed

In addition to my primary argument stated above, I trace the evolution of case law in this area concluding that unilateral definitization of a UCA is a government claim. I believe *Bell* was wrongly decided and rightly ignored over the last 40 years. *Bell* relies on a finding that unilateral definitization of a UCA is a matter of routine contract administration, like appointing a new Contracting Officer's Representative (COR).

Unilateral Definitization is not routine contract administration. It is the contracting officer, after reaching an impasse on price, unilaterally imposing a lower contract price on a contractor. *See Bell*, 88-2 BCA ¶ 20,656 at 104,392 quoted below. Because unilateral definitization is not routine contract administration, it is an "adjustment of contract terms" as envisioned by the Disputes Clause. I understand that bad decisions may never-the-less be binding law, but I am not inclined to resurrect *Bell* after 40 years of conflicting treatment to affirm its bad decision as good law today.

Developing Case Law

The parties, particularly LM, cited numerous cases and made alternative arguments. I selected cases cited by the parties that represent the development of the law in this area and discuss them in chronological order to understand where the somewhat chaotic jurisdictional case law is today. I agree with LM that "the modern interpretation of a CDA-cognizable "claim" is "broad" and "expansive" which supports my argument.

I start where the Air Force (AF) starts in its motion to dismiss, with the March 21, 1988 decision in *Bell Helicopter Textron*, ASBCA No. 35950, 88-2 BCA ¶ 20,656, *aff'd on mot. for recon.*, 88-3 BCA ¶ 21,048. In *Bell* we dealt with its appeal of the AF's unilateral definitization of a UCA with which Bell disagreed. We held that the unilateral definitization was not a government claim but an initial establishment of the contract price required by the contract:

> On 13 September 1985, appellant was awarded subject Advance Acquisition Contract (AAC) for the production of certain aircraft and associated data and support. Clause H–1 of the contract provided that the parties would promptly enter negotiations to definitize the contract price. The clause further provided that "the Contracting Officer may, with the approval of the Head of the Procuring Activity, determine a reasonable price in accordance with Federal Acquisition Regulation subject to appeal by the Contractor as provided in the 'Disputes' clause of the contract." After nearly two years of negotiations, the contracting officer, on 30 September 1987, issued a unilateral modification establishing a total contract price of $79,076,088 (later amended to $76,463,678). In an accompanying cover letter, the contracting officer stated that the unilateral modification was his final decision and advised the contractor of its appeal rights.
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> . . . .

> Appellant argues further that the contracting officer's decision was a Government claim in that it was a written assertion that "sought 'as a matter of right' ... pursuant to Clause H–1 of the contract ... 'the adjustment or interpretation of contract terms....'" We disagree. The contracting officer's decision was not premised on an issue of contract interpretation or adjustment. Instead, the contracting officer's action was the initial establishment of the contract price pursuant to Clause H–1. The contracting officer was merely performing the duty prescribed by the contract when the parties failed to reach agreement on a price. Again, the contracting officer's action did not amount to a Government claim.

(*Bell*, 88-2 BCA ¶ 20,656 at 104,392). This is the case the AF relies upon in support of its motion. Significantly, the Board's analysis of H-1 relies on "contract interpretation or adjustment" but fails to consider the third element of a claim / jurisdiction in the Disputes Clause, FAR 52.233-1(c), "or other relief arising under or relating to this contract." As argued above, I believe this is a fatal omission from the analysis of H-1 in view of the subsequent decisions that increasingly rely on this third element of jurisdiction and the fact that *Bell* has not been followed in 40 years of subsequent decisions.

On June 16, 1988, the Court of Appeals for the Federal Circuit (CAFC) issued *Malone d/b/a/ Precision Cabinet Co. v United States*, 849 F.2d 1441 (Fed. Cir. 1988) where the Court held that a termination for default was a government claim: "This case, however, concerns a *government* claim against a contractor. Caselaw supports the proposition that a government decision to terminate a contractor for default is a government claim (Case Cites Omitted)." *Malone*, 849 F.2d 1441, 1443. This unremarkable decision that a termination for default is a government claim is used later in our case analysis to expand the Board's jurisdiction. *See Appeals of General Electric Company and Bayport Construction Corporation*, ASBCA Nos. 36005, 38152, 39696, 91-2 BCA ¶ 23,958.

On March 21, 1998, the ASBCA issued *LTV Aerospace and Defense Co.*, ASBCA No. 35674, 89-2 BCA ¶ 21,858 where the Armed Services Board of Contract Appeals (ASBCA or "Board") held that a unilateral price reduction pursuant to an Economic Price Adjustment Clause was a government claim. The Board distinguished the Board's decision in *Bell*:

> Further, unilateral reduction of the contract price pursuant to an EPA clause is analagous to cases concerning alleged defective cost or pricing data in which the Government seeks

> a contract price reduction. We have held that those cases involve a Government claim, not a contractor claim.
>
> The Government's reliance on *Bell Helicopter Textron*, ASBCA No. 35950, 88-2 BCA ¶ 20,656, aff'd on mot. for recon, 88-3 BCA ¶ 21,048 is misplaced. In that case, the contracting officer unilaterally definitized the total contract price because a clause in the contract required him to do so. In that case, we specifically found that "the Government has not and is not seeking any recourse or payment from appellant." 88-2 BCA ¶ 20,656 at 104,392. In this case, the Government by final decision unilaterally reduced the contract price by $914,830 and subsequently, by modification, deobligated contract funds by that amount.

(*LTV*, 89-2 BCA ¶ 21,858 at 109,951). I see that the Board relied on a sum certain price reduction and deobligation of that amount to support its finding of a government claim. This view of what constitutes a government claim is relaxed in later decisions.

On September 29, 1989, the ASBCA issued *H.B. Zachry Co.*, ASBCA No. 39202, 90-1 BCA ¶ 22,342 where the Board held that a government order that *Zachry* replace or repair defective piping was not a government claim because the government did not demand payment for the defective work. *Zachry*, 90-1 BCA ¶ 22,342 at 112,287. As I explain below, the Senior Deciding Group (SDG) overruled *Zachry*. I include it to show the Board's change in thinking over time.

On April 23, 1991, the ASBCA SDG issued *Appeals of General Electric Company and Bayport Construction Corporation*, ASBCA Nos. 36005, 38152, 39696, 91-2 BCA ¶ 23,958 where the SDG held that contracting officer's direction to the contractor to correct or replace previously accepted contract work because of alleged latent defects, and not demanding or asserting any right to the payment of money is a government claim:

> A demand for refund of part of the contract price in the present cases would indisputably have represented seeking "the payment of money in a sum certain"—the first category of "claim." The parallel, alternative remedy elected by the Government instead—a direction to correct or replace the defective work at no increased cost—seems to us to fall squarely within the parallel third category of "claim" recognized by the FAR and Disputes clause definitions: i.e., "other relief arising under ... the contract." We see no reason to treat such a demand for correction or replacement under

> the Inspection clause, absent a demand for monetary relief, any differently for jurisdictional purposes than a termination for default under the standard Default clause, long recognized as a proper Government claim before there is any monetary claim by either party, as discussed earlier, or any differently than the various kinds of nonmonetary Government claims we discuss in III below.

(*General Electric*, 91-2 BCA ¶ 23,958 at 119,944). Unlike *Bell*, the SDG relied on the third type of claim "other relief" as do I. In its decision the SDG "overruled" *Zachry*:

> To the extent that *Zachry* suggests either (i) narrowly, that a Government demand for correction or replacement of accepted contract work because of alleged latent defects, in lieu of demanding payment for unsatisfactory work, is not the proper subject of a contracting officer's decision asserting a Government claim, or (ii) more broadly, that there can be no nonmonetary Government claims apart from default terminations, it conflicts both with the FAR 33.201 definition of the term "claim" and with the decisions of this Board recognizing various kinds of nonmonetary Government claims other than terminations for default (discussed in III above).
>
> . . . .
>
> To the extent any part of the decision in *Zachry* is inconsistent with the holdings herein, it is overruled.

(*General Electric*, 91-2 BCA ¶ 23,958 at 119,946). There was one concurring decision by Judge Williams and three dissenting decisions by Judges Spector, Gomez and Riismandel. Judge Williams wrote in part:

> While I share the dissenting judges' legitimate concern that the Board not become embroiled in matters that are primarily contract, administration it is my opinion that revocation of "final acceptance" can, and under the circumstances of these appeals does, exceed the bounds of ordinary contract administration resulting in a Government claim under the FAR DISPUTES clause definitions. To hold otherwise would, in my view, unduly restrict the interpretation of the disputes clause definition of claims for "other relief arising under or relating to the contract."

(*General Electric*, 91-2 BCA ¶ 23,958 at 119,947). Dissenting Judge Spector cited *Bell Helicopter Textron*, ASBCA No. 35950, 88-2 BCA ¶ 20,656, *aff'd on mot. for recon.*, 88-3 BCA ¶ 21,048 and argues *General Electric* "smack[s]" of contract administration:

> Under our precedents the direction of the contracting officers to perform the alleged extra work, even if designated a "final decision," would not be a Government claim. H.B. Zachry Co., ASBCA No. 39202, 90–1 BCA ¶ 22,342; Winding Specialists Co., Inc., ASBCA No. 37765, 89–2 BCA ¶ 21,737. See also, Woodington Corporation, ASBCA No. 37272, 89–2 BCA ¶ 21,602; Bell Helicopter Textron, ASBCA No. 35950, 88–2 BCA ¶ 20,656, motion for recon. denied 88–3 BCA ¶ 21,048. As stated in H.B. Zachry Co., supra, "This is a classic case where a contractor should perform the work and file a claim."

(*General Electric*, 91-2 BCA ¶ 23,958 at 119,947). Dissenting Judges Gomez and Riismandel also express concern over extending claims jurisdiction to matters of contract administration. (*General Electric*, 91-2 BCA 23,958 at 119,948-949). This idea of not extending claims jurisdiction over contract administration is precisely the theory employed in *Bell* and is relegated to the dissent in *General Electric.*

The SDG's decision in *General Electric* was appealed to the CAFC. On February 24, 1993 the CAFC issued *Garrett v. General Electric Co.*, 987 F.2d 747 (Fed. Cir. 1993) where the Court affirmed *Appeals of General Electric Company and Bayport Construction Corporation*, ASBCA Nos. 36005, 38152, 39696, 91-2 BCA ¶ 23,958 holding that nonmonetary direction to correct or replace defective engines constitutes "other relief" supporting Board jurisdiction:

> The Navy directed GE to correct or replace the defective engines. Under 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 "other relief arising under ... the contract." The Navy's alternative to a monetary remedy—the directive to correct or replace defective engines—constitutes "other relief" within the FAR's third category of "claims." Thus, the regulations, GE's contract, and the facts of this case suggest that the Navy's choice of relief—a substitute for monetary remedies—fit within the CDA concept of "claim." Accordingly, the Board correctly

> determined its jurisdiction to adjudicate this Government claim.

(*Garrett*, 978 F.2d 747 at 749). The CAFC's affirmance of the SDG's reliance on "other relief" to support our jurisdiction over government direction to replace defective engines supports my belief that a unilateral definitization is likewise a government claim.

On August 12, 1996, the ASBCA issued *Outdoor Venture Corp.*, ASBCA No. 49756, 96-2 BCA ¶ 28,490 that involved the government's demand that Outdoor Venture repair or replace non-conforming tents that had already been accepted pursuant to the contract's warranty clause. Outdoor Venture appealed to this Board. The government moved to dismiss for lack of jurisdiction contending that the CO had not issued a final decision. In its decision holding that the demand pursuant to the warranty clause was a government claim, this Board commented on SDG's and CAFC's decisions in *General Electric*:

> We construed this regulation in *General Electric Co*., ASBCA Nos. 36005, 38152, 91-2 BCA ¶ 23,958, aff'd 987F.2d 747 (Fed. Cir. 1993). There, we held that a Government direction to a contractor to correct or replace work allegedly containing latent defects was appealable because it constituted a CDA claim, rather than merely being a matter of contract administration. More specifically, the Board ruled that such Governmental demands fell into the FAR 33.201 category of claims "related to" the contract. Because the decision asserting the claim was issued by the contracting officer, involved each party's rights under the contract, and was adverse to the contractor, we found that the CDA's jurisdictional requirements were satisfied.
>
> For similar reasons, we conclude that the Government's demand that OVC proceed with the warranty work constitutes a Government claim. Accordingly, OVC may waive the other defects contained in the letter of 15 April 1996.

(*Outdoor Venture*, 96-2 BCA ¶ 28,490 at 142,273)

On May 28, 1999, the CAFC issued *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260 (Fed. Cir. 1999) where the Court, relying on its decision in *Garrett v. General Electric Co.*, 978 F.2d 747, held that the Court of Federal Claims had

jurisdiction over a request for declaratory judgment that an option exercise was invalid. The CAFC discussed its decision in *Garrett*:

> In the *Garrett* case, the contracting officer directed General Electric to correct or replace certain allegedly defective engines after the engines had been accepted and certain latent defects had appeared. The Board of Contract Appeals treated the contracting officer's directive as a "claim" over which the Board of Contract Appeals had jurisdiction, and this court agreed. The court's analysis in *Garrett* is inconsistent with the government's theory of this case, since General Electric could have performed as directed and sought monetary compensation for its work afterwards. Instead, the court held that the nonmonetary claim provided a viable basis for board jurisdiction. Since the court further held that board jurisdiction is in "parity" with the jurisdiction of the Court of Federal Claims, the *Garrett* case stands for the proposition that nonmonetary claims are not outside the jurisdiction of the Court of Federal Claims simply because the contractor could convert the claims to monetary claims by doing the requested work and seeking compensation afterwards.

(*Alliant Techsystems*, 178 F.3d 1260, 1270). Again the CAFC affirms that nonmonetary claims support jurisdiction, this time at the Court of Federal Claims.

On April 28, 2000, the ASBCA issued *Litton Systems, Inc., Applied Technology Division*, ASBCA No.49787, 00-2 BCA ¶ 30,969 where the Board held it had jurisdiction over Litton's (ATD) claim because it was filed in response to a government nonmonetary claim:

> The Government moved to dismiss ATD's allegations of additional work for lack of jurisdiction because no claim had been submitted to the contracting officer. We found that ATD's allegations of additional work were raised only as a defense to the Government's unilateral definitization of the 4436 Contract and were sufficiently intertwined with the Government's claim for a reduction of the contract price to fall within the scope of our jurisdiction.

(*Litton Systems*, 00-2 BCA ¶ 30,969 at 152,834). Here the Board expanded its jurisdiction over a government nonmonetary claim for unilateral definitization, to cover a monetary claim by Litton that was not presented as a claim to the CO for a final decision.

More importantly for our purposes, the Board held that unilateral definitization was a government claim.

On August 29, 2011, the CAFC issued *Todd Construction v. United States*, 656 F.3d 1306 (Fed. Cir. 2011) where the Court affirmed the Court of Federal Claims jurisdiction over a Corps of Engineers performance evaluation:

> Todd Construction, L.P. ("Todd") is a government contractor. Todd filed suit in the Court of Federal Claims ("Claims Court") under the Tucker Act, 28 U.S.C. § 1491, and the Contract Disputes Act ("CDA"), 41 U.S.C. § 601 *et seq*., alleging that the United States Army Corps of Engineers (the "government") gave it an unfair and inaccurate performance evaluation. The Claims Court held that the CDA provided it with subject matter jurisdiction over such a claim, but dismissed Todd's complaint for lack of standing and failure to state a claim. *Todd Constr., L.P. v. United States*, 85 Fed.Cl. 34 (2008) ("*Todd I*"); *Todd Constr. L.P. v. United States*, 88 Fed.Cl. 235 (2009) ("*Todd II*"); *Todd Constr. L.P. v. United States*, 94 Fed.Cl. 100 (2010) ("*Todd III*"). We affirm both the Claims Court's determination that it had jurisdiction under the CDA and its dismissal of Todd's complaint on the grounds of lack of standing and failure to state a claim.
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> . . . .
>
> Not only is the term "claim" broad in scope, the "relating to" language of the FAR regulation itself is a term of substantial breadth. The term "related" is typically defined as "associated; connected."
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> . . . .
>
> As we made clear in *Applied Companies*, CDA jurisdiction exists when the claim has "some relationship to the terms *or performance* of a government contract." 144 F.3d at 1478 (emphasis added) [footnote omitted]. A contractor's claim need not be based on the contract itself (or a regulation that can be read into the contract) as long as it relates to its performance under the contract [Footnote omitted].

(*Todd*, 656 F.3d 1306, 1312, 1314). Jurisdiction over performance ratings must mark the outer boundary of our jurisdiction over non-monetary government claims.

On May 31, 2017, the Court of Federal Claims issued *L-3 Communications Integrated Systems L.P. v. United States*, 132 Fed. Cl. 325 (2017) where the Court held that in a unilateral definitization case, where L-3 sought sum certain damages, that L-3 was required to submit a certified claim to the CO:

> In this case, L–3 contends that it suffered monetary losses because the Air Force imposed arbitrary, capricious, and unreasonable rates for the two CLINs at issue here when it definitized the contract. The government argues that this Court lacks jurisdiction over L–3's complaint because, among other reasons, L–3 never presented a certified claim to the CO for payment of a sum certain to cover the losses it alleges it suffered. Def.'s Mot. at 5–6. The Court agrees.

(*L-3 Communications*, 132 Fed. Cl. 325, 331). In this case L-3 contended it suffered losses in a sum certain amount and submitted what it argued was a claim, but failed to certify its claim. The Court was not dealing with the facts in *Bell* or "administrative act" argument.

Summary and Conclusion

From the March 1988 *Bell* decision through the May 31, 2017 *L-3* decision to the present, I found no case actually deciding a case similar to *Bell*[14]. In our 1988 *Bell* decision, the Board declined to treat the unilateral definitization of a contract price as a government claim because "The contracting officer was merely performing the duty prescribed by the contract when the parties failed to reach agreement on a price." *Bell*, 88-2 BCA ¶ 20,656 at 104,392. This "contract administration" approach has not been followed in later cases. Additionally, the Board's jurisdictional analysis of H-1 relied on the Disputes Clause's, FAR 52.233-1(c), first two elements of a claim, "contract interpretation or adjustment" but failed to consider the third element of a claim in the Disputes Clause, "or other relief arising under or relating to this contract." In 1991 the Board's SDG relied upon "The parallel third category of 'claim' recognized by the FAR and Disputes clause definitions: i.e., 'other relief arising under . . . the contract'" to hold that a "demand for correction or replacement under the Inspection Clause, absent a demand for monetary relief," should be treated no differently than a termination for default which is a government claim. *General Electric*, 91-2 BCA 23,958 at 119,944-45. The SDG specifically overruled *Zachry* which required a demand for payment for defective work under the inspection clause as a prerequisite to being considered a government claim, a direct conflict with the SDG's *General Electric* decision. *General*

[14] According to Westlaw bell has been cited 17 times but not one of the citations was a decision actually dealing "administrative act" facts and argument in *Bell*.

Electric, 91-2 BCA 23,958 at 119,946. Although *Bell* was not similarly overruled, it was cited in Judge Spector's dissent and by inference its "contract administration" approach was not looked upon favorably by the majority of the SDG. I view this as significant. On appeal the CAFC affirmed agreeing that the "other relief" category of claims was "a substitute for monetary remedies" and "fit within the CDA concept of 'claim'" *General Electric*, 987 F.2d 747, 749. Again, a significant departure from the logic in *Bell*. In *Outdoor Venture,* the Board explained that *General Electric* established that government demands that a contractor correct or replace latent defects was a government claim. In *Alliant Techsystems,* the CAFC followed *Garrett's* holding that a nonmonetary claim provided a viable basis for board jurisdiction. In *Litton Systems, Inc., Applied Technology Division* (ADT) we found that the unilateral definitization of a contract was a government claim contradicting our 1988 decision in *Bell*. In *Todd Construction,* the CAFC affirmed that the Court of Federal Claims had jurisdiction over a challenge to a COE performance evaluation.[15] In our May 31, 2017 *L-3* decision L3 submitted an uncertified claim and that is what the court had before it, not the *Bell* argument. Our conclusion is inescapable, in 40 years of decisions, *Bell* has not been followed. Contrary to *Bell*[16], a unilateral definitization of a UCA should now be considered a government claim over which we take jurisdiction.

CONCLUSION

In accordance with the above analysis, I would deny the Air Force's motion.

Dated: June 24, 2021

Craig Clarke

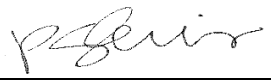
CRAIG S. CLARKE
Administrative Judge
Armed Services Board
of Contract Appeals

[15] As seen in *L-3 Communications*, *Securiforce*, *Greenland*, and *Parsons*, these non-monetary government claim cases do not abandon the fact that if the remedy sought by a contractor is essentially monetary, the contractor must file a claim with the contracting officer.

[16] *Bell* may still have precedential value for a yet unidentified act of minor contract administration, but why would any contractor choose to appeal such an action.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 62505, 62506, Appeals of Lockheed Martin Aeronautics Company, rendered in conformance with the Board's Charter.

Dated: June 25, 2021



PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Stephen J. McBrady
Stephen J. McBrady

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Federal Circuit Rule 32(b)(1). The brief contains 13,990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Federal Circuit Rule 32(b)(2).

This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared using Microsoft Word in Times New Roman, a proportionally spaced typeface, in 14-point size font.

In preparing this certificate of compliance, I have relied upon the word count function of Microsoft Word.

Dated: December 28, 2021

/s/ Stephen J. McBrady
Stephen J. McBrady