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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REPLY 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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INTRODUCTION

Uncomfortable with both the plain language of the Definitization clauses in these contracts, and this Court's cases construing the jurisdictional provisions of the Contract Disputes Act ("CDA") and the definition of "Government claim" in Federal Acquisition Regulation ("FAR") 2.101, the Government urges the Court to start afresh. Specifically, to elide the clear right to appeal conferred on the contractor by the FAR Definitization clauses in these contracts, and by the case law interpreting the CDA and FAR 2.101, the Government proposes various self-serving, narrowing interpretations of the words in FAR 2.101 and the Definitization clauses, which the Government suggests are straightforward. But there is nothing straightforward or plain about the Government's proposed definitions, whether as applied to "appeal," "against the contractor," "other relief," or "adjustment." The Government's proposed definitions are in every instance at odds with at least one reasonable interpretation of these terms, and often with the most common meaning of these terms and this Court's precedents applying these terms. Under the plain language of the Definitization clauses, and the principles that guide the interpretation of the meaning of "claim" in FAR 2.101, the Armed Services Board of Contract Appeals ("ASBCA" or "Board") has jurisdiction over the written decisions of the Contracting Officer ("CO") prescribing prices for these contracts.

The Government is also wrong in its contrived principles of interpretation of the CDA and congressional policy, which it argues ought to guide this Court's analysis. The Government posits that the purposes underlying the CDA require that any regulations suggesting a contractor's right to appeal the definitization decisions as Government claims are improper. But the Government's effort to narrow the purposes of the CDA is manufactured for litigation. This Court's cases reflect that the purposes underlying the CDA were to allow the efficient determination of a broad range of disputes between the Government and its contractors. Nothing in the CDA suggests that the Board lacks jurisdiction over a CO's unilateral definitization decision.

As seen below, and as reflected in Lockheed Martin's opening brief, this Court's cases defining Government claims, and the language of FAR 2.101 itself (as well as the Definitization clauses in these contracts), fully support the conclusion that the Board has jurisdiction over definitizations imposed on a contractor by the CO. The decision of the Board to the contrary should be reversed.

ARGUMENT

I. THE DEFINITIZATION CLAUSES EXPRESSLY PERMIT A DIRECT RIGHT OF APPEAL FROM UNILATERAL DEFINITIZATION MODIFICATIONS.

A. The Plain Language of the Definitization Clauses Provide Contractors the Right to Directly Appeal Unilateral Definitizations Under the Disputes Clause.

The applicable Definitization clause[1] in each contract provides for negotiation between the parties. Each then specifies that, if those negotiations do not produce a definitive contract by a target date, the CO has the right to unilaterally definitize contract prices or fees, subject to contractor "appeal" under the Disputes clause:[2]

> If agreement on a definitive contract to supersede this letter contract is not reached by the target date . . . the 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) (emphasis added); DFARS 252.217-7027(c) (emphasis added); *see also* App. Br. 26-27.

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[1] The Singapore Contract included FAR 52.216-25 CONTRACT DEFINITIZATION (OCT 2010) and the Korea Contract included Defense FAR Supplement ("DFARS") 252.217-7027, CONTRACT DEFINITIZATION (DEC 2012) (collectively, "Definitization clauses"). Appx101, Appx1388-1389. 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.

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

The plain language of the regulation states the contractor may "appeal" the unilateral definitization decision; it does not state or suggest that the contractor must instead initiate a dispute or submit a claim. "Appeal" means to proceed from a lower to higher authority/tribunal for review. App. Br. 27 n.17. It would have been easy enough to specify the need for a claim to the CO, but there is no such specification. *See, e.g.*, *Do-Well Mach. Shop, Inc. v. United States*, 870 F.2d 637, 641 (Fed. Cir. 1989).

The Disputes clause itself mentions only *one* "appeal"—from a CO's decision to a Board of Contract Appeals ("BCA") or the U.S. Court of Federal Claims ("COFC"). *See* FAR 52.233-1(f) ("The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in [the CDA]"). There is, therefore, only one reasonable interpretation of "appeal" when these clauses are read together: the decision to definitize prices (a *decision* that requires "approval of the head of the contracting activity"[3]) is a "Contracting Officer's decision" that contractors may "appeal" to a BCA or COFC "as provided in the Disputes clause[.]" FAR 52.233-1(f); FAR 52.216-25(c); DFARS 252.217-7027(c).

The Government makes two arguments: (1) that the regulatory instruction for contractors to "appeal" somehow means to submit a "claim," which later may

[3] FAR 52.216-25(c); DFARS 252.217-7027(c).

be appealed; and (2) the regulatory language in the Definitization clauses is somehow irrelevant to the interpretation of "claim." Gov't Br. 27-31. Both theories are unsupportable.

Under the Government's theory, the contractor would first have to submit a monetary claim with a sum certain. It would then be the CO's decision denying the claim (*i.e.*, rejecting the contactor's alleged sum certain) that would be the *decision* "subject to contractor appeal." Gov't Br. 28-31. That is not what the Definitization clauses say. The Definitization clauses specify that what is "subject to contractor appeal" is the *CO's definitization decision* regarding a reasonable price. FAR 52.216-25(c); DFARS 252.217-7027(c) (CO's "determin[ation]" of a "reasonable price" is "subject to contractor appeal"). To adopt the Government's interpretation would nullify that regulatory text.

The Government, nonetheless, insists that "as provided in the Disputes clause" refers only to the parts of the Disputes clause addressing *contractor* claims. Gov't Br. 16-17. But nothing in the plain language or case law supports this supposition. The Disputes clause addresses both contractor and government claims. *Government* claims take the form of a "Contracting Officer's decision," which may be "appeal[ed]" to the BCA or COFC. FAR 52.233-1(f). The Definitization clauses use the specific term "appeal" of the *CO's definitization decision*. When read together, the term "appeal" has only one meaning that does

not render it superfluous—it means the contractor may appeal the CO's "decision" to a tribunal to review the reasonableness of the CO's "decision." Any other interpretation of the clauses strains the plain language.

Regarding the Government's second argument, the Government portrays the regulatory language of the Definitization clauses as irrelevant to "claim" analysis. The Government contends that the meaning of government "claim" must, and can be, determined abstractly and conclusively from the plain language of *only* FAR 2.101.[4] Gov't Br. 27-28 ("the meaning of 'claim' in FAR 2.101 is grounded in its plain language, not in unrelated FAR provisions"). This narrowing theory of regulatory interpretation is contradicted by this Court's precedent regarding "claim" analysis. In addition, nothing about the Government's interpretation of FAR 2.101 is, in fact, clear or plain on the face of that regulation; indeed (as shown below in Section II), the Government's reading is flatly incorrect.

This Court has repeatedly emphasized that regulations, like statutes, must be read in their context and with a view to their place in the overall regulatory scheme. *See Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1577 (Fed. Cir. 1995) (en banc) (construing CDA "claim" jurisdiction by reconciling FAR 2.101 with FAR

[4] Contrary to the Government's assertion, Gov't Br. 27-28, Lockheed Martin has consistently explained that written unilateral definitization decisions are Government "claims" within the plain language of FAR 2.101, as discussed in the Opening Brief and again below. App. Br. 3-4; *infra* Section II.

33.201: "This interpretation, based on the plain language of the FAR, examines and reconciles the text of the entire regulation, not simply isolated sentences.").

Consistent with *Reflectone*, this Court explained long ago that the analysis of what is, and is not, a CDA "claim" extends beyond FAR 2.101, given FAR 2.101's somewhat unilluminating—but unmistakably broad—plain language: "whether an action amounts to a claim" must be assessed by looking at the "language of the contract in dispute," *Garrett v. Gen. Elec. Co.*, 987 F.2d 747, 749 (Fed. Cir. 1993), the "facts of the case," *id*., and the CDA's "implementing regulations[,]" *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1564 (Fed. Cir. 1995). The CDA's "implementing regulations" are broader than FAR 2.101 alone. Thus, all parts of the FAR must be read together in harmony: Where two provisions speak to the same subject matter, *e.g*., jurisdiction over claims/disputes, "[i]t is well established that the specific governs over the general[.]" *Emerald Maint., Inc. v. United States*, 925 F.2d 1425, 1428–29 (Fed. Cir. 1991) (specific language in FAR labor dispute clause regarding CDA jurisdiction trumped more general claim jurisdictional analysis).

In *Emerald Maint.*, this Court found that certain labor/wage disputes cannot be CDA claims because the language of a specific FAR clause[5] expressly described these disputes as outside the CDA. *Id*. at 1428 ("The Disputes provision of the

[5] Currently codified at FAR 52.222-14, *Disputes Concerning Labor Standards*.

contracts clearly provides that disputes arising out of the labor standards provisions of the contracts are not to be subject to the [CDA]"). In determining the meaning of the word "claim" in the context of that case, the Court did not rely abstractly on the words of FAR 2.101 to the exclusion of all other FAR provisions. To the contrary, this Court looked to the *more specific* FAR provision to clarify whether labor disputes were CDA claims, and held that they were not because the specific FAR provision controlled for BCA jurisdictional purposes:

> [A]n objective reading of the contracts indicates that the parties intended that the specific Disputes provision, stating that disputes arising out of labor standards are not to be subject to the general disputes clause, but are to be resolved in accordance with the procedures of the Department of Labor, predominates over the general provision that the Board has jurisdiction to decide any appeal from a contracting officer.

Id. at 1429; *Collins Int'l Serv. Co. v. United States*, 744 F.2d 812, 815 (Fed. Cir. 1984) ("Labor [Department] has final authority to settle wage disputes"); *accord Herman B. Taylor Constr. Co. v. Barram*, 203 F.3d 808, 811 (Fed. Cir. 2000).

And in *Reflectone* itself, this Court reached the conclusion that a Request for Equitable Adjustment could be a CDA "claim" by harmonizing FAR 33.201 with FAR 2.101. 60 F.3d at 1577. The Court emphasized the need to "examine[] and reconcile[] the text of the entire regulation [FAR], not simply isolated sentences." *Id*.

The Government's theory—that "the meaning of 'claim' in FAR 2.101 is grounded in its plain language," such that the question presented in this case can be answered simply by reading the words of that provision in a vacuum—is unrealistic and unreasonable. Gov't Br. 27. The Government's position requires that this Court ignore the plain language of the Definitization clauses and the contractor's right of "appeal" from a Government definitization decision/claim. Neither this Court nor any tribunal has mandated such tunnel-vision. Indeed, both *Reflectone* and *Emerald Maint.* squarely contradict the Government's argument. As required by the plain meaning and precedent, this Court should analyze the relevant, *specific* FAR and FAR Supplement clauses (here, the Definitization clauses) and conclude that unilateral definitization "decisions" are Government claims "subject to contractor appeal."

B. The History of the Definitization Clauses Further Supports Appellant's Plain Language Interpretation that Contractors Can Directly Appeal the CO's Unilateral Definitization Decisions.

While the Court need only look at the plain language of the Definitization clauses (and its own precedents defining the meaning of "claim" under the CDA and the FAR) to determine that Lockheed Martin has a right to appeal from unreasonable definitizations, the history of the Definitization clauses provides further support. The Government's brief fails to address Lockheed Martin's argument about the history of the Definitization clause. Before passage of the

CDA, the Definitization clause and Termination clause included the same language concerning contractors' right of direct appeal. *Compare* 32 C.F.R. § 7.802-5(c) (1971), *with* 32 C.F.R. § 8.701(g) (1971); *see also* App. Br. 29-30. BCAs, specifically the ASBCA, took jurisdiction over direct contractor appeals of both Government definitization and termination decisions. *See, e.g.*, *Lab. for Elecs., Inc.*, ASBCA No. 13019, 69-2 BCA ¶ 7945 (noting that the contracts were "letter contracts," also known as undefinitized contract actions ("UCAs"), and stating, without elaborating, that the contractor *appealed directly* from the CO's unilateral price definitization decision);[6] *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[.]").

After passage of the CDA and the FAR, the Definitization clause's direct appeals language remained untouched. And nothing in the CDA or the FAR purported to change or overrule the prior practice. This basic regulatory history further supports an interpretation that the FAR drafters intended to maintain contractors' direct appeals rights. The Government failed to address this argument in its briefing.

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[6] *Lab. for Elecs.* involved an earlier version of the Definitization clause, under which COs were to terminate contracts instead of unilaterally definitizing it. Nevertheless, in this case, the ASBCA took jurisdiction over a contractor's direct appeal of a *CO's unilateral definitization*. *See* App. Br. 30.

II. THE PLAIN LANGUAGE OF THE CDA AND FAR FULLY SUPPORT THE CONCLUSION THAT THE UNILATERAL DEFINITIZATIONS ARE GOVERNMENT CLAIMS.

In addressing whether a particular decision is subject to appeal under the CDA, this Court's observation that a broad reading is required where "Congress has chosen expansive, not restrictive, language" provides the foundational guidance. *Todd Constr., L.P. v. United States*, 656 F.3d 1306, 1311 (Fed. Cir. 2011) (*quoting Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1268 (Fed. Cir. 1999)).

Here, the CDA requires that "[e]ach claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer." 41 U.S.C. § 7103(a)(3).[7] The unilateral definitization modifications are "written" and reflect a "decision" approved by the head of the contracting agency. App. Br. 3, 10-12, 25-26. The Government does not dispute this. Gov't Br. 4, 16-17. Such decisions are unquestionably "against" the contractor for the reasons discussed below. This satisfies the statutory plain language.[8]

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[7] The Government's description of the CDA certification requirement, for *contractor* claims, creates unnecessary ambiguity. Gov't Br. 8-10. *Government* claims do not require certification. 41 U.S.C. § 7103(b)(1) ("made by a contractor"); *Placeway Constr. Corp. v. United States*, 920 F.2d 903, 906 (Fed. Cir. 1990) ("certification is not required for government claims").

[8] "Magic words" are not required. *Garrett* held that a Government directive under the relevant Inspections clause was a *final decision* (and a Government claim),

Under the regulatory plain language, the FAR defines "claim" as "a written demand or written assertion . . . 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"—*i.e.*, providing three distinct species of claims (1) monetary, (2) nonmonetary adjustment/interpretation claims, and (3) nonmonetary claims for "other relief."[9] FAR 2.101.

For the reasons discussed in the Opening Brief and below, the COs' unilateral definitization modifications satisfy all elements of the FAR definition to be Government "claim[s]." App. Br. 25-31. The decisions took the form of *written* modifications. Each SF-30 modification facially "asserted" the Government's entitlement to impose unilateral prices "as a matter of right" by citing—on Block 13(D) of each modification—the applicable Definitization clause as the "authority" for each unilateral decision. FAR 2.101; Appx639 (Singapore), Appx1673 (Korea); *see* App. Br. 25. And the asserted relief was nonmonetary in nature: either "other relief" relating to the contract or "adjustment" of contract terms. App. Br. 25-26. Through the modifications, the Government imposed

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despite the FAR not labeling such directives as a "final decision." *See* 987 F.2d at 748 (citing FAR 52.246-2(l) (1991)). Similarly, in *Placeway Constr.*, this Court did not look to the label on the communication; the CO's letter represented a final decision because the dispute was ripe for judicial review. 920 F.2d at 906-07.

[9] This Court may hold that the unilateral definitizations are any of the three species of claims. *See* App. Br. 4, n.2.

prices and demanded performance, which meets this Court's precedent for "other relief" under *Garrett* and its progeny. *See* App. Br. 24-26, 32-49. Alternatively, the modifications "adjusted" the terms of the Contracts by inserting new prices.[10] App. Br. 53-55. In sum, the unilateral definitizations satisfy all elements of a Government "claim" under the plain language of FAR 2.101.

A. In an Effort to Show Definitization Decisions Are Not Government Claims, the Government Avoids Plain Meaning and This Court's Precedent.

The Government insists that the unilateral definitizations cannot be Government claims because they are not "against a Contractor." Gov't Br. 13-14. The Government's attempt to read some narrowing theory into the word "against" fails as a matter of plain language and precedent.

1. Unilateral Definitizations are "Against" Contractors.

To support its "against" argument, the Government paints unilateral definitizations as non-contentious, required actions that are not "against" contractors because they are permitted by the Definitization clauses and do not involve a demand for "payment." Gov't Br. 13-14. This argument misses the mark; unilateral definitizations are unquestionably "against" the contractor for five reasons.

[10] Before the modifications, the pricing terms were undefinitized ceiling amounts. The COs *adjusted* those terms to insert the Air Force's unilaterally determined final prices. App. Br. 53-54.

(a) Unilateral Definitizations are "Against" Contractors According to the Dictionary Definitions.

The plainest of plain meanings demonstrates why this is so. "Against" means "in opposition to," *i.e.*, not aligned with the interests of the other party. *Borden v. United States*, 141 S. Ct. 1817, 1826, 210 L. Ed. 2d 63 (2021) (dictionaries indicate against can mean "in opposition to"); Concise Oxford English Dictionary 24 (10th ed. 2002) ("in opposition to"); Merriam-Webster's Collegiate Dictionary 23 (11th ed. 2012) ("in opposition . . . to"). Similarly, the First Circuit considered the definition of "adverse" and likened it to "against." *Mr. I. ex rel. L.I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 16 (1st Cir. 2007) (defining "adverse" for a case involving the Individuals with Disabilities Education Act). There, adverse and against meant "acting against or in a contrary direction"—having a "negative effect." *Id.* (citing dictionary definitions). The Government's definitions do not materially differ from these meanings, yet the Government's application of the terms diverge from their definitions. Gov't Br. 11-15.

The unilateral definitizations are unquestionably "against" Lockheed Martin under these definitions. Paragraphs (a) and (b) of the Definitization clauses set forth how the parties should reach *bilateral* price agreement. Such a bilateral agreement would not be "against" Lockheed Martin. In contrast, a *unilateral* definitization by the Government under paragraph (c) reflects the Government's

discretionary choice to cut off bilateral negotiations, impose a lower contract price than the contractor offered or was willing to accept, and demand full performance under dispute. Appx14-15 (ASBCA Judge Clarke, in dissent, discussing nature of unilateral definitizations). These unilateral actions were "against" Lockheed Martin in that they were diametrically opposed to Lockheed Martin's stated position and interests. Indeed, Lockheed Martin opposed ending negotiations and disputed the Air Force's decision to unilaterally impose lower prices. App. Br. 10-12. And the unilateral definitizations will have a negative effect because Lockheed Martin will be required to complete performance at an unreasonably low price—inevitably leading to cost overruns during performance. App. Br. 47-48. The Government's brief does not explain how unilaterally imposing lower prices would not have a "negative effect" on Lockheed Martin, or be "in opposition to" Lockheed Martin's stated positions or interests.

(b) Unilateral Definitizations are "Against" Contractors Under the Definitization Clauses.

The Definitization clauses leave no doubt that unilateral definitizations are "against" contractors because they expressly state that such decisions are "subject to contractor appeal as provided in the Disputes clause." FAR 52.216-25(c); DFARS 252.217-7027(c). Unilaterally selecting and imposing final contract prices is hardly as routine or innocuous as the Government makes it out to be—it is an extraordinary action that requires approval by the head of the contracting activity.

The CO was not required to issue such unilateral decisions—the parties could have continued negotiating and reached a bilateral agreement, as Lockheed Martin sought to do. The CO has the right to take this action; but the Definitization clauses' instructions for how the contractor should "appeal" such action (*i.e.*, pursuant to "Disputes clause") leaves no doubt that the CDA's implementing regulations consider unilateral definitizations to be in opposition to, or against, the contractor.

(c) Caselaw Following Garrett Supports Holding Unilateral Definitizations are Against Contractors.

The case law fully supports the understanding that unilateral definitizations by the CO are "in opposition to" and have a "negative effect" on contractors in the same way that other no-cost administrative actions can be Government claims. For example, no-cost rework directives (*Garrett*, 987 F.2d at 749), terminations for default (*Malone v. United States*, 849 F.2d 1441, 1443 (Fed. Cir. 1988)), and no-cost Cost Accounting Standard ("CAS") noncompliance determinations (*Newport News Shipbuilding and Dry Dock Co. v. United States*, 44 Fed. Cl. 613, 618 (1999); *CACI Int'l, Inc*., ASBCA No. 57559, 12-1 BCA ¶ 35,027 at 172,139), have each been held to be Government claims. Each was an administrative action, did not involve payment, and were held to be Government nonmonetary claims subject to CDA jurisdiction—and thus necessarily "against" the contractors.

(d) This Court's Precedent Supports a Non-Restrictive Interpretation of "Against."

A non-restrictive reading of "against" comports with this Court's interpretative lodestar that "we should read the definition of 'claim' broadly" because "Congress has chosen expansive, not restrictive, language." *Todd Constr.*, 656 F.3d at 1311 (*quoting Alliant*, 178 F.3d at 1268).[11]

(e) Statutory Interpretation Requires the Parties to be Only Procedurally "Against" Each Other.

Indeed, the rigorous opposition that the Government would attribute to "against" is fundamentally inconsistent with the broad meaning generally attributed to "against" as used in the same CDA section with parallel structure. 41 U.S.C. § 7103(a)(1)-(2) (*contractor* claims "against the Federal Government"). Thus, in certain situations, the CDA only requires parties to be procedurally or nominally "against" each other, even if they agree on both liability and amount before claim submission. That is true, for example, with respect to CDA claims following settlement agreements presented for the purpose of accessing Judgment

[11] The Government faults Lockheed Martin for citing to *Todd Constr.*, a Tucker Act case, concerning this Court's orientation toward CDA jurisdiction. Gov't Br. 20-21. The Government is wrong. *Todd Constr.* unambiguously interpreted *CDA* jurisdiction as expansive. 656 F.3d at 1311. Moreover, as this Court has explained, in 1992 Congress amended the Tucker Act (28 U.S.C. § 1491) to create "jurisdiction parity" between BCAs and COFC. *Garrett*, 987 F.2d at 750; *accord Alliant*, 178 F.3d at 1268-69. Thus, the amendment to the Tucker Act confirms Congressional intent about the breadth of CDA jurisdiction.

Fund payment under 31 U.S.C. § 1304(a)(3)(C).[12] In contrast to this friendly adversity that, nevertheless, permits CDA jurisdiction under 41 U.S.C. § 7103(a)(1)-(2), the adversity here in connection with the Air Force's unilateral definitization decision is direct, real, and tangible because the CO unilaterally imposed price terms that Lockheed Martin declined to agree to.

For the five reasons above, the plain language of the CDA, the dictionary definitions of "against," the language of the Definitization clauses, analogous case law, the expansive interpretative instructions, and statutory parity necessitate the conclusion that the Government's unilateral definitizations—imposing lower prices and curtailing negotiations—are "against the contractor" within the plain language of the CDA.

[12] In a pre-claim dispute, if a CO acknowledges liability and the amount owed but lacks contract funds to pay, overlapping statutes permit the parties to obtain "settlement" payment from the Judgment Fund. 31 U.S.C. § 1304(a)(3)(C). Mechanically, the parties stipulate to an amount and then follow the CDA's procedural steps necessary to obtain a consent judgment from the tribunal—*i.e.*, the contractor submits a claim for the undisputed/settlement amount, the CO nominally denies it, and the contractor appeals. At the tribunal, the parties jointly move for stipulated/consent judgment, which the tribunal issues, and the Judgment Fund then pays the "settlement." 31 U.S.C. § 1304(a)(3)(C). This occurs regularly and for a variety of sound fiscal and administrative reasons. There is CDA jurisdiction, despite the lack of "adversity" or "opposition to" the settlement amount by either party at the time of claim submission.

2. The Government Creates a False Dichotomy Between "Against" and "Administration" That Contradicts This Court's Plain Language Precedent.

Despite arguing that this Court should adhere to the plain language of the CDA, the Government runs away from it by creating a false dichotomy between actions "against a contractor" (*i.e.*, Government claims) and "contract administration." The Government equates "contract administration" with COs exercising their contractual rights and duties.[13] Gov't Br. 14-15. Certainly, not every act of contract administration action is a Government claim.[14] But it is equally true that certain acts of nonmonetary contract administration can constitute Government claims under the CDA. *See, e.g.*, *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 762 (Fed. Cir. 1987) (Government claim under Termination for Default clause); *Malone*, 849 F.2d at 1443-44 (same); *Garrett*, 987 F.2d at 748-49 (Government claim under the Inspections clause). Judge Clarke, dissenting in

[13] The Government mis-cites the "FAR" when defining "contract action" and "undefinitized contract action." Gov't Br. 14. In reality, the Government is citing the DFARS. The cited definition applies only to that DFARS subpart, not to the FAR. DFARS 217.7401 ("As used in this subpart"). The Singapore Contract under dispute contains only the FAR Definitization Clause—FAR 52.216-25—and *not* the DFARS Definitization Clause. App. Br. 9 n.7; *supra* note 1.

[14] *See* Appx14-15 (Clarke, J., dissenting) ("*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.") (emphasis added).

the decision below, correctly observed that "[t]his 'contract administration' approach [from *Bell*] has not been followed in later cases." Appx23.[15]

3. Lockheed Martin's Interpretation of the FAR's Definition of a Claim is Consistent With the CDA.

In an effort to manufacture some tension between the CDA and the FAR's own definition of "claim," the Government argues that Lockheed Martin's interpretation of the FAR, based on this Court's precedents, somehow conflicts with and seeks to override the CDA's language and Congressional intent about what constitutes a Government claim. Gov't Br. 18-21. The Government argues that this Court should not "adhere to a regulatory definition (in FAR 2.101) if it frustrates Congressional intent related to what constitutes a Government claim." *See* Gov't Br. 19. The Government's argument on both points is without merit.

First, the Government is bound by its own regulations; the Government cannot simply discard the regulations implementing the CDA. *See Align Tech., Inc. v. Int'l Trade Comm'n*, 771 F.3d 1317, 1325 (Fed. Cir. 2014) (citing *United States v. Nixon*, 418 U.S. 683, 696, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)).

[15] Following this Court's precedent in *Garrett*, BCAs and COFC also hold the Government has submitted a claim when it is exercising other contractual rights and duties. *See, e.g.*, *Newport News*, 44 Fed. Cl. at 615 (CAS administration was Government nonmonetary claim); *CACI Int'l, Inc*., 12-1 BCA ¶ 35,027 at 172,139 (same); *Alenia N. Am., Inc*., ASBCA No. 57935, 13-1 BCA ¶ 35,296 at 173,270-21 (data rights administration was Government nonmonetary claim); *Outdoor Venture Corp.*, ASBCA No. 49756, 96-2 BCA ¶ 28,490 at 142,273 (inspection administration was Government nonmonetary claim).

Whether or not a private party might have the right to dispute the lawfulness of a regulation that it views as inconsistent with the governing statute, the Government cannot disavow its own regulations. *See id*.

Second, and equally fundamental, there is no conflict between the CDA and FAR when defining a "claim." *H.L. Smith*, 49 F.3d at 1564-65 ("The CDA does not define 'claim,' so this court looks for guidance to its implementing regulations."). The CDA does not define a claim; it merely sets forth the requirements described above. See Section II.A. There is no inconsistency between the CDA and the FAR.

Third, as explained in Sections II.B and II.C, Lockheed Martin's understanding of the FAR's definition of a "claim" fits squarely within the plain language of the controlling regulation and this Court's precedent.

4. The Government Ignores Clear Congressional Intent and this Court's Precedent.

The Government asks this Court to read the CDA narrowly, contrary to Congress's intent and this Court's precedent. Gov't Br. 12-13. Congress enacted the CDA to provide "informal, expeditious, and inexpensive resolution of [contract] disputes." *Malone*, 849 F.2d at 1444 (quoting S.Rep. No. 1118, 95th Cong., 2d Sess. 12, *reprinted in* 1978 U.S. Code Congr. & Admin. News 5235, 5246). Moreover, review of contract claims should be "relatively easy to obtain."

Todd Constr., 656 F.3d at 1311 (quoting *Alliant*, 178 F.3d at 1271).[16] To support Congress's intent, "claim" should be defined broadly. *Id.* ("Congress has chosen expansive, not restrictive, language."). And to this end, under the CDA, contractors need not wait and incur monetary damages before appealing claims. *Alliant*, 178 F.3d at 1266-67.[17]

5. Not Every CO Action with a "Deleterious" Effect is a Government Claim.

Contrary to the parade of horribles asserted by the Government, Lockheed Martin's plain language interpretation of the CDA, FAR, and Definitization clauses will not open the floodgates to deeming every CO action with a "deleterious" effect as a Government claim. Gov't Br. 15, 19. The Definitization clause gives the Government a one-time right to cut off bilateral negotiations, impose unilateral final contract prices, and demand full performance. At the same time, the plain language of the Definitization clauses gives contractors the right to challenge the propriety of this Government claim against the regulatory definition of "reasonableness" by directly *appealing* this claim/decision. App. Br. 1-2. The Definitization clauses are materially different from other contract clauses that do

[16] *See supra*, note 11.

[17] The Government mischaracterizes the nature of this appeal, arguing Lockheed Martin has asserted a right to payment. Gov't Br. 11. This is incorrect. Lockheed Martin requested the ASBCA review the propriety of the Air Force's unilaterally imposed final prices. Appx2030.

not afford the contractor a direct right of appeal. App. Br. 39-41. Moreover, the nature of the definitization decision makes it easily distinguishable from most run of the mill issues of contract administration.

B. The Government's Unilateral Definitizations are Claims for "Other Relief."

While no case has yet articulated the precise parameters of "other relief" claims, the plain language of FAR 2.101, this Court's *Garrett* decision (and the BCAs' and COFC's decisions following *Garrett*), make clear that it is a distinct category of claim that is not redundant with the other two types of claims, *i.e.*, monetary demands or contract adjustments. The Air Force's unilateral definitizations constitute Government claims for "other relief" because through them, similar to *Garrett*, the Air Force issued directives (*i.e.*, contract modifications) imposing unilateral prices and demanding performance. App. Br. 38-39. This matter is similar to other cases where COFC and the BCAs, following this Court's precedent in *Garrett*, held a Government directive to be a Government claim. *See, e.g.*, *Newport News*, 44 Fed. Cl. at 615 (Government nonmonetary claim concerning CAS directive); *Alenia N. Am., Inc*., 13-1 BCA ¶ 35,296 at 173,270-21 (Government nonmonetary claim concerning data rights directive); *Outdoor Venture Corp.*, 96-2 BCA ¶ 28,490 at 142,273 (Government claim concerning warranty work directive); *see also* App. Br. 43-49.

1. The Government's Definition of "Other Relief" Cannot be Squared with This Court's Precedent.

As if it were writing on a clean slate, the Government proposes a narrow definition of "other relief"—essentially limiting it to injunctive relief or specific performance. Gov't Br. 22-23. But this proposed definition is wholly inconsistent with how this Court has interpreted "other relief" claims, *see Garrett*, 987 F.2d at 749, and how the COFC and BCAs have interpreted "other relief" claims following *Garrett*. *See* Section II.B.

2. The Government's Interpretation Would Render "Other Relief" Meaningless.

The Government's narrow interpretation would render "other relief" under the CDA meaningless. Neither the BCAs nor COFC have the authority to grant injunctive relief or specific performance in connection with CDA claims. *See Massie v. United States*, 226 F.3d 1318, 1321 (Fed. Cir. 2000) ("Except in strictly limited circumstances, *see* 28 U.S.C. § 1491(b)(2) [bid protests], there is no provision in the Tucker Act authorizing the Court of Federal Claims to order equitable relief."); *Schnitzer Steel Indus., Inc.*, ASBCA No. 48012, 95-2 BCA ¶ 27,705 at 138,098 ("We have no power to grant specific performance."). Therefore, the Government's restrictive interpretation of "other relief" renders this entire category of "claim" meaningless and superfluous because neither the Government nor contractors could seek review and relief at BCAs or COFC. *See*

Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (contract interpretations should give "reasonable meaning" to all parts and avoid "leav[ing] a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achiev[ing] a weird and whimsical result.").

C. Alternatively, the Government's Unilateral Definitizations Are Contract "Adjustment" Claims.

The Government evades the plain language in the FAR and argues that the Air Force only "established" the contracts' prices but did not adjust them. Gov't Br. 38-42. Again, there is nothing plain or clear about the definition that the Government would ascribe to "adjustment." The contract set forth an open price term, leaving it subject to negotiation. The Government elected to take a different approach, unilaterally modifying the contracts to insert new pricing terms. These modifications plainly adjusted both the contract document and to the method under which the parties were proceeding. The term "adjustment" is assuredly broad enough to encompass Government unilateral modifications.

CONCLUSION

The Board's decision should be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2022, 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.

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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 5,686 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.

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