# No. 2023-1042

In the United States Court of Appeals
For the Federal Circuit

TEXTRON AVIATION DEFENSE LLC,
*Plaintiff - Appellant*

v.

UNITED STATES,
*Defendant - Appellee*

On Appeal from the United States Court of Federal Claims
Case No. 1:20-cv-01903, Hon. Matthew H. Solomson

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# CERTIFICATE OF INTEREST

| | |
|---|---|
| **Case Numbers** | 2023-1042 |
| **Short Case Caption** | *Textron Aviation Defense LLC v. US* |
| **Filing Party/Entity** | Appellant / Textron Aviation Defense LLC |

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

*/s/ William R. Peterson*
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Dated: February 13, 2023

| **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.<br><br>☑ 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.<br><br>☐ None/Not Applicable |
| Textron Aviation Defense LLC | | Textron Aviation Inc.; Textron Inc.; T. Rowe Price Associates, Inc.; The Vanguard Group, Inc. |

| **4. Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4). |
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| Thomas A. Lemmer (Dentons US, LLP) |

| **5. Related Cases.** Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b). |
|---|
| *Textron Aviation Inc. v. United States*, No. 1:20-cv-01883 (Fed. Cl.) |

| **6. Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6). |
|---|
| ☑ None/Not Applicable |

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## STATEMENT OF RELATED CASES

*Textron Aviation Inc. v. United States*, No. 1:20-cv-01883, in the United States Court of Federal Claims, involves identical claims and is stayed pending resolution of this appeal.

## STATEMENT OF JURISDICTION

The Court of Federal Claims had jurisdiction over this action involving a contract with the United States pursuant to 28 U.S.C. § 1491(a) and 41 U.S.C. § 7104(b)(1).

The Court of Federal Claims entered a final judgment on August 12, 2022. Appx27. Textron Aviation Defense LLC ("Textron") filed a timely notice of appeal on October 6, 2022. Appx488. This Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

## STATEMENT OF THE ISSUES

Textron alleges that the Government breached its contract when the Government refused to pay pension adjustment costs that Textron requested.

The Court of Federal Claims held that this claim was untimely because it was not "submitted within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4)(A); *see also* 48 C.F.R. (FAR) § 33.206(a). A claim accrues on "the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known." FAR 33.201. "For liability to be fixed, some injury must have occurred." *Id.*

1. Did the Government injure Textron (a requirement for claim accrual) (a) when Textron's predecessor-in-interest curtailed and terminated the pension plans in December 2012; or (b) when the Government disputed Textron's routine payment request in 2020?

2. Alternatively, even if Textron's claim accrued before the Government disputed the amount owed, did the Court of Federal Claims err in resolving limitations against Textron as a matter of law, when the record contains no evidence showing how long it should have taken Textron to determine the amount owed and when asserting a claim requires government contractors to certify the amount owed?

## INTRODUCTION

This appeal presents an important and recurring issue regarding the accrual of claims by government contractors.

This Court's precedent distinguishes between "routine" requests for payment, which can be asserted as claims only after disputed by the Government, and non-routine requests for payment, which can be asserted as claims immediately (i.e., without waiting for the government to dispute a request). This Court has applied a consistent rule: when a contractor has been injured by unexpected government action (analogous to a breach of contract), the contractor may immediately assert a claim.

Although this Court has not expressly linked this test for "non-routine" claims to the FAR's requirement that a claim accrue only after an "injury [has] occurred," FAR 33.201, the two align perfectly. A non-routine request arises from an injury caused by unexpected government action and may be asserted as a claim immediately. A routine request does not arise from unexpected government action that injured the contractor. For a routine request, the injury occurs (and the claim arises) only when the government disputes the request (and thus breaches the contract). FAR 33.201; FAR 2.101.

Not only should this Court reaffirm that "non-routine" requests must arise from unexpected government action, but it can place that test on firmer footing by expressly tying it to the "injury" requirement of FAR 33.201.

## STATEMENT OF THE CASE

This appeal concerns nearly $20 million in pension cost adjustments that Appellant Textron Aviation Defense LLC ("Textron") is owed by the United States Government. Although this appeal concerns when Textron's claim accrued, resolving this issue requires this Court to understand the contractual basis for the Government's liability.

### *The Government Share of Pension Adjustment Amounts*

The Federal Acquisition Regulation incorporates into many government contracts the Cost Accounting Standards, which include standards for the composition, measurement, adjustment, and allocation of pension costs and pension cost adjustments. *See* 48 C.F.R. (FAR) § 52.230-2; 48 C.F.R. § 9904.412; 48 C.F.R. § 9904.413, *et seq.* ("CAS 413").

These provisions require that when a contractor terminates a pension plan or curtails its benefits, the contractor must determine the difference between (a) the actuarial accrued liability for the plan and (b) the market value of the plan's assets. CAS 413-50(c)(12). If the liability exceeds the assets, the Government owes the contractor a portion of the underfunded amount. CAS 413-50(c)(12).[1] The

[1] "If the adjustment results in a surplus, the Government may be entitled to recover its share from the contractor." *Raytheon Co. v. United States*, 747 F.3d 1341, 1346–47 (Fed. Cir. 2014); *see also Gates v. Raytheon Co.*, 584 F.3d 1062 (Fed. Cir. 2009) (involving the Government recovering a surplus).

Government's share is the percentage of the total pension costs that are allocated to the contractor's government contracts and subcontracts. CAS 413-50(c)(12).

***The Pension Adjustment Owed to Textron***

In this case, Textron's rights arise out of the termination and curtailment of pension plans that occurred during a Chapter 11 (reorganization) bankruptcy of Hawker Beechcraft Defense Company, LLC (and several related entities). Appx5.[2] Hawker Beechcraft Defense Company was a government contractor, and while performing government contracts, it contributed to three employee pension plans: (1) the "Salaried Plan"; (2) the "Base Plan"; and (3) the "Hourly Plan." Appx5. Concurrent with the bankruptcy proceedings, the Salaried Plan and the Base Plan were terminated and the Hourly Plan curtailed. On February 13, 2013, the assets and liabilities of the Salaried Plan and the Base Plan, along with $11 million in cash, were transferred to the Pension Benefit Guaranty Corporation ("PBGC"). Appx5. The plans' liabilities exceeded their assets. Appx5.

After gathering the data, applying the accounting methodologies and performing the calculations required by the contract, on April 4, 2018, Textron Inc.—Textron's indirect parent—submitted a payment request seeking pension adjustment costs to the administrative contracting officer at the Government's

[2] In March 2013, Hawker Beechcraft Defense Company, LLC changed its name to Beechcraft Defense Company, LLC, and in April 2017, Beechcraft Defense Company changed its name to Textron Aviation Defense LLC. Appx5 n.10.

Defense Contract Management Agency. Appx5-6 & n.10; Appx99. Textron concluded that the Government owed a total of $18.9 million. Appx43-45; Appx111.

Textron's April 2018 payment request did not accuse the Government of breaching any contract, of increasing Textron's costs of performance, of injuring Textron, or of any type of wrongdoing. *See* Appx99-111. The payment request simply noted that under the terms of the relevant government contracts (which incorporate CAS 413-50(c)(12)), the Government owed Textron money. Appx111.

***The DCAA Determines that Textron Is Owed More Than $10 Million***

Almost two years later, in February 2020, after receiving Textron's comments on an initial draft, the Defense Contract Audit Agency issued an audit report analyzing the payment request. Appx218 ("the Audit Report"); *see also* Appx46. For the Hourly Plan (for which Textron sought $9.8 million), the Audit Report agreed that Textron's submission was correct. *See* Appx220 ("Textron's submission for the pension adjustment for the curtailment of Beechcraft's Hourly pension plan determined it complies with CAS 413-50(c)(12).").

For the Salaried Plan and Base Plan, the Audit Report disagreed with Textron's adjustment amount calculations, Appx222, but it concluded that the Government's share of the Salaried Plan should have been even higher than the percentage calculated in Textron's submission. Appx46 (9.13% rather than the

8.38% calculated by Textron); Appx227. In total, the Audit Report acknowledged that the Government owed more than $10 million to Textron.[3]

***Textron Submits a Certified Claim After It Suffers an Injury From the Government's Refusal to Pay***

Nonetheless, as of April 6, 2020, the Government informed Textron that it would not pay this amount. Appx46.

The Government's refusal breached the parties' contract, and on July 22, 2020, Textron[4] submitted a certified claim demanding payment of $19.4 million[5] "as a result of the Government's breach of contract." Appx47; Appx75-95. As Textron later explained at oral argument to the Court of Federal Claims, Textron was able to submit a claim at this time because there was "no injury until the Government fail[ed] to pay." Appx281.

[3] The Audit Report acknowledged that Textron was owed $9.8 million under the Hourly Plan and $657,360 under the Salaried Plan. Appx220; Appx228.

[4] On April 6, 2020, Textron Aviation Inc. (Textron's parent, Appx5 n.10) submitted a certified claim based on the failure to pay the pension adjustments. Appx46. In June 2020, the Government denied this claim because, *inter alia*, the test contract identified in the claim (Contract No. FA8617-07-D-6151) was a contract with Textron, not Textron Aviation Inc. Appx47.

[5] This is slightly higher than the amount in Textron's April 2019 payment request because it uses the 9.13% government share for the Salaried Plan calculated in the Audit Report. Appx47.

***Textron Sues in the Court of Federal Claims***

In September 2020, the Government denied Textron's certified claim. Appx36. In response, Textron filed this suit in the Court of Federal Claims, Appx32, asserting three claims for breach of contract. Appx48-53.

In February 2021, the Government filed a Motion to Dismiss or, Alternatively, for Summary Judgment. Appx64. The Government argued that Textron's certified claim was time-barred by the six-year statute of limitations:

> In July 2020, Textron AD submitted a certified claim based on events that had occurred in December 2012 or, at the very latest, February 2013. The claim is time-barred, and the Court should therefore dismiss the complaint under RCFC 12(b)(6) or, alternatively, grant summary judgment in favor of the Government.

Appx66 (citing 41 U.S.C. § 7103(a)(4)(A)). Notably, the Government's motion does not identify a date that Textron allegedly suffered an "injury."

Textron responded and cross-moved for partial summary judgment that its July 2020 certified claim was timely submitted under the Contract Disputes Act. Appx180. Textron first noted that the Government failed to carry its burden:

> First, the Government's Motion, as related to the motion to dismiss, fails because it is not apparent on the face of the Complaint that TA Defense's Claim is time-barred. . . .
>
> . . .
>
> Second, the Government's Motion, as related to the motion for summary judgment, fails because the government cannot meet its burden of proof as a matter of undisputed material fact and law. Summary judgment only is appropriate where there is no genuine dispute of material fact relevant to the issues and the movant is entitled to judgment as a matter of law.

Appx184-185. To the contrary, Textron explained that it "is entitled to judgment as a matter of law that its Claim was timely submitted." Appx185.

Textron explained that it "did not have a 'claim' until either: (a) the government disputed the CAS 413 Submission on February 26, 2020 in the Audit Report; or, more likely, (b) some reasonable time later when the government failed to act upon the CAS 413 Submission in a reasonable period of time." Appx192. "CDA claims related to non-routine requests for payment exist when the contractor has been injured by the government, creating immediate entitlement to recovery." Appx191. Here, Textron's "request for payment for an adjustment of previously recognized pension costs . . . does not arise from some unexpected or unforeseen action on the government's part." Appx191.

Following briefing and oral argument, the Court of Federal Claims granted the Government's motion. Appx26; *see also* Appx27 ("[J]udgment is entered in favor of defendant, and plaintiff's complaint is dismissed for failure to state a claim upon which relief may be granted.").

The Court of Federal Claims first concluded that "there simply is no dispute of material fact that Textron AD knew or should have known all of the information necessary to file a CDA claim at least as early as December 31, 2012, and certainly no later than February 15, 2013." Appx11-12. As support, the opinion relies on

various statements by Textron's counsel (primarily at the hearing) regarding when calculations could have been run. *See* Appx11-12 (citing various statements).

Second, the Court of Federal Claims concluded that Textron's April 2018 payment request was "a non-routine demand for payment—it is not remotely like an invoice—and thus could have been submitted long ago to the contracting officer in the form of a proper CDA claim." Appx18. For these reasons, the Court of Federal Claims granted the Government's motion. Appx26.

This appeal followed. Appx488.

## SUMMARY OF THE ARGUMENT

The first issue concerns whether a claim by a contractor that seeks money from the Government accrues immediately or only after the Government disputes the contractor's request. This Court's precedent has applied a consistent rule that follows from the FAR: when a contractor has been injured by unexpected government action (analogous to a breach of contract), the contractor may immediately assert a claim in the form of a non-routine demand for payment. Otherwise, a contractor's request for payment is a "routine" request. If the Government refuses to pay the routine request (and thus breaches the contract), then the contractor has been injured and may then assert a claim.

This Court's distinction between "routine" and "non-routine" requests tracks the FAR's requirement for a claim to accrue: the "alleged liability" be "fixed" and "[f]or liability to be fixed, some injury must have occurred." FAR 33.201. This Court's test for a "non-routine" payment request is consistent with these regulations: A contractor may assert an immediate claim if the contractor has "been injured by 'some unexpected or unforeseen action on the government's part that ties it to the [contractor's] demanded costs.'" *Kellogg Brown & Root Servs., Inc. v. Murphy*, 823 F.3d 622, 627 (Fed. Cir. 2016) ("*KBR*") (quoting *Parsons Glob. Servs., Inc. ex rel. Odell Int'l, Inc. v. McHugh*, 677 F.3d 1166, 1171 (Fed. Cir. 2012)).

The Court of Federal Claims misread this Court's precedent in holding that any unexpected or unforeseen circumstances would give rise to a non-routine claim. This Court rejected this view (which the Government argued) in *KBR*, and the "common thread" of every non-routine request ever recognized by this Court is "the presence of some unexpected or unforeseen action on the government's part that ties it to the demanded costs." *Parsons*, 677 F.3d at 1170-71. None of this Court's cases supports the decision below.

On these facts, where Textron asserts claims for breach of contract against the Government, claim accrual turns on when the Government injured Textron by breaching the contract. When Textron's predecessor curtailed and terminated its pension plans, the Government did not breach the contract, take any action analogous to a breach of contract, or injure Textron at all.

Because the Government did not breach the contract when Textron curtailed the pension plans, there was no injury to Textron at that time. Because there was no injury, there was no accrual of a claim. FAR 33.201. Because there was no accrual, the statute of limitations did not begin to run. 41 U.S.C. § 7103(a)(4)(A).

The Government first breached the contract—and Textron first suffered an injury—when the Government refused to pay Textron's request. Textron's claim accrued at that time, and its certified claim was submitted well within the statute of limitations.

Alternatively, even if Textron could have submitted a claim before the government disputed its payment request, the Court of Federal Claims erred in resolving limitations against Textron as a matter of law.

Not only must liability be fixed because "injury [has] occurred," but a claim accrues only after "all events, that . . . permit assertion of the claim" were "known or should have been known." FAR 33.201. Here, Textron's claim was untimely only if Textron "knew or should have known all of the information necessary to file a CDA claim" (Appx11-12) before July 2014, six years before it submitted its certified claim.

Dismissal was improper. The face of the Complaint does not reveal when Textron knew or should have known this information, and the Court of Federal Claims looked beyond the face of the Complaint in its ruling. Appx11-12.

Nor can the decision be affirmed as a summary judgment. The Government submitted no evidence demonstrating when Textron knew the necessary information, and inferences about what Textron "should have known" are unsuitable for resolution on summary judgment.

The Court of Federal Claims erred by relying on the statements of Textron's counsel. Not only does the decision conflate what Textron could have known with what Textron "should have known," but the statements on which it relied do not concede when calculations could (or should) have been completed. The only

evidence in the record indicates that calculating pension adjustment costs under CAS 413 is complex and time-consuming, and the Government (which bore the burden) failed to submit evidence proving how long these calculations should have taken (or actually took) and thus when a claim accrued.

Moreover, in evaluating whether a contractor possessed sufficient information to "permit assertion of [a] claim," FAR 33.201, courts cannot overlook the certification requirement. FAR 33.207. An incorrect certification exposes a contractor to significant civil liability and potentially even criminal liability. In determining when a contractor should have known the information necessary to assert a claim, courts should consider not only when the contractor should have performed calculations but also when the contractor would have had sufficient certainty to certify the amount owed in good faith.

## ARGUMENT

### *Standard of Review*

This Court "review[s] the summary judgment of the Court of Federal Claims, as well as its interpretation and application of the governing law, de novo." *Premier Office Complex of Parma, LLC v. United States*, 916 F.3d 1006, 1011 (Fed. Cir. 2019). The same is true of whether the Court of Federal Claims properly granted a motion to dismiss for failure to state a claim upon which relief could be granted. *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1286-87 (Fed. Cir. 1999).

### I. Textron Was Injured—and Its Claim Accrued—Only When the Government Refused to Pay Its Routine Request for Pension Adjustment Costs.

A contactor's claim against the Government relating to a contract "shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4)(A).

> *Claim* means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. . . . A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

FAR 2.101. The FAR provides that a contractor's claim accrues only after the contractor suffers an injury:

> *Accrual of a claim* means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred.

FAR 33.201.

This Court's cases distinguishing between "routine" and "non-routine" requests for payment are consistent with the "injury" requirement. A contractor may assert an immediate claim if the contractor has been "injured by some unexpected or unforeseen action on the government's part." *KBR*, 823 F.3d at 627; *see also Parsons*, 677 F.3d at 1171 ("unexpected or unforeseen action on the government's part that ties it to the demanded costs").

Otherwise, the contractor must make a "routine" request for payment. If the Government disputes the payment, then the contractor has been injured and may assert a claim. FAR 2.101; *Parsons*, 677 F.3d at 1172.

The Government did not breach the contract—and Textron was not injured by the Government—when Textron curtailed and terminated its pension plans in 2012. Textron's April 2018 payment request was a "routine" request for payment under the contract's terms. The Government disputed Textron's request (and thus breached the contract and injured Textron by refusing to pay) in 2020, and on July 22, 2020, Textron filed its certified claim for breach of contract. Appx46. Because Textron filed its certified claim with the contracting officer well within 6 years of the Government's breach, Appx47, its claim was timely.

The Court of Federal Claims erred by holding that Textron could have asserted a certified claim for its pension adjustment costs immediately, before any dispute with the Government. Appx17.

### A. Only a Contractor that "Has Been Injured by Some Unexpected or Unforeseen Action on the Government's Part" May Assert a Claim Before the Government Disputes Its Request.

Whether (and when) a contractor owed money by the Government can assert a claim depends on why the Government owes the money.

If the Government has injured the contractor through unexpected action analogous to a breach of contract, then the contractor's demand is "non-routine" and may immediately be asserted as a certified claim, without "a pre-existing dispute as to either amount or liability." *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1573, 1577 (Fed. Cir. 1995) (en banc). In these circumstances, the contractor seeks to recover "outside" the contract. *Id.* at 1577. The contractor has "been injured by some unexpected or unforeseen action on the government's part that ties it to the demanded costs," so the contractor may "seek immediate payment of any damages flowing from the government's action." *KBR*, 823 F.3d at 627.

A contractor that has not been injured by the Government seeks money "under the contract's terms." *Parsons*, 677 F.3d at 1170; *see also Reflectone*, 60 F.3d at 1577 (noting payments "for work done or equipment delivered by the contractor" or "progress payments"). In these circumstances, the contractor may file a "routine

request for payment," FAR 2.101, but has not been injured (and cannot assert a claim) unless the Government breaches the contact by disputing the request and refusing to pay. *Reflectone*, 60 F.3d at 1578; FAR 2.101; FAR 33.201.

**1. A claim accrues before a dispute when the contractor is injured by an unexpected or unforeseen government action.**

During the course of a contract, the Government may take "unexpected or unforeseen action" that injures a contractor and allows the contractor to "deman[d] costs." *Parsons*, 677 F.3d at 1170. Because an "injury . . . ha[s] occurred," FAR 33.201, the contractor may immediately assert a "claim . . . in the form of a non-routine demand as of right." *Reflectone*, 60 F.3d at 1576.

This Court has explained that the "common thread" among these claims "is the presence of some unexpected or unforeseen action on the government's part that ties it to the demanded costs." *Parsons*, 677 F.3d at 1170-71. *Parsons* listed examples of non-routine requests for payment from earlier cases:

- for equitable adjustments for costs incurred from "government modification of the contract, differing site conditions, defective or late-delivered government property or issuance of a stop work order" and other government-ordered changes, *Reflectone*, 60 F.3d at 1577;
- for damages resulting from the government's termination for convenience and termination settlement proposals that have reached an impasse, [*James M. Ellett Constr. Co. v. United States,* 93 F.3d 1537, 1542-43 (Fed. Cir. 1996)];
- for compensation for additional work not contemplated by the contract but demanded by the government, *Scan-Tech Sec., L.P. v. United States*, 46 Fed. Cl. 326, 333 (2000);

- for the return of contractor property in the government's possession, *J & E Salvage Co. v. United States*, 37 Fed. Cl. 256, 261 n.4 (1997), *aff'd*, 152 F.3d 945 (1998); and

- for damages stemming from the government's breach of contract or cardinal change to the contract, *Ky. Bridge & Dam, Inc. v. United States*, 42 Fed. Cl. 501, 518-19 (1998).

677 F.3d at 1170-71 (bullets and paragraph breaks added).

This Court's cases after *Parsons* are consistent. In *Zafer Construction Co. v. United States*, the contractor could immediately assert a claim because the "government increased the cost of the project by causing delays and modifying the contract." 40 F.4th 1365, 1366 (Fed. Cir. 2022).

Similarly, in *Electric Boat Corporation v. Secretary of Navy*, the contractor was injured by the Government's "enactment of [an] OSHA Regulation, the compliance with which Electric Boat contends directly increased its costs of performance by more than $125,000 per submarine." 958 F.3d 1372, 1376 (Fed. Cir. 2020); *see id.* at 1376-77 ("Electric Boat's injury under Clause H-30 of the contract was the enactment of the OSHA Regulation, not the Navy's refusal to adjust the price.").[6]

[6] Electric Boat waived any argument that its injury did not occur until the Navy refused to adjust costs because of the regulations. *See id.* at 1377 n.3 ("Electric Boat waived any argument of timeliness under common law breach of contract principles by failing to argue before the Board that its injury arose from the Navy's alleged breach of contract on May 2, 2011.").

Unexpected government action that injures a contractor is not merely "a common thread among a few examples," as the Court of Federal Claims described it. Appx23. It is **the common thread** among **every example** this Court has provided (and every decision that this Court has issued) of circumstances in which a contractor could assert an immediate claim.

### 2. The Court of Federal Claims erred by failing to apply these rules.

The Court of Federal Claims failed to apply the principles discussed above, instead declaring that its "touchstone" would be "the degree to which a request for payment is similar to a 'voucher or invoice.'" Appx20.

The only correct touchstone is whether a request for payment seeks to recover for a contractor's injury from unexpected government action or (like an invoice) does not. The Court of Federal Claims misread this Court's cases as supporting a contrary rule, in which **any** unforeseen circumstances (even when there is no government action and no injury) give rise to an immediate claim.

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In contrast, Textron's complaint alleges claims for breach of contract arising from the government's failure to pay its request for pension adjustment costs. *See* Appx47 (noting that Textron submitted a claim "demanding payment in the amount of $19,407,515 owed by the Government to TA Defense as a result of the Government's breach of contract for failure to timely pay following the CAS 413 Submission"); Appx316 & n.1 (distinguishing Textron's claims from Electric Boat's). Textron has fully preserved—and now raises—precisely the argument that Electric Boat did not.

**a. This portion of the decision below fails to consider *KBR* and adopts the position this Court rejected.**

The six-and-a-half pages of the opinion discussing whether Textron's request for payment is routine or non-routine, Appx17-23, fail to address this Court's decision in *KBR*, which speaks to whether a non-routine request must arise from government action.

The Court of Federal Claims erroneously held that "the critical question" is "whether the payment request seeks compensation because of unforeseen or unintended circumstances," Appx22 (internal quotation marks omitted), apparently regardless of whether the Government was involved in those circumstances. This holding conflicts with *KBR* (and the FAR's definition of claim accrual).

In *KBR*, this Court rejected the Government's argument that any unexpected or unforeseen circumstance—even a circumstance not involving government action—would give rise to a non-routine entitlement to payment (which could be asserted immediately as a claim). In that case, while performing a cost-plus-award-fee contract with the Army, KBR terminated a subcontractor for "failure to bring conditions to full contract performance." 823 F.3d at 624. After nearly nine years of negotiation and litigation, KBR agreed to pay the subcontractor more than $10 million and then filed a certified claim with the Army for this amount. *Id.* at 625.

In its briefing to this Court, the Government argued that **any** unforeseen or unintended circumstances—whether or not the Government was involved—allowed immediate assertion of a claim in the form of a non-routine request for payment:

> KBR argues that a non-routine request for payment can arise only due to the government's misdeeds. KBR is incorrect; this Court has no such requirement. A payment request is non-routine simply if it seeks compensation because of unforeseen or unintended circumstances.

*Brief of Appellee* at 11, *KBR,* 823 F.3d 622 (Fed. Cir. 2016) (No. 2015-1148), 2015 WL 1383035. This is precisely the rule adopted in the decision below. *See* Appx22 (holding that a request is non-routine if it "seeks compensation because of unforeseen or unintended circumstances").

But in *KBR*, this Court rejected the Government's position, making clear that only "unexpected or unforeseen **government action**" allows a contractor to submit an immediate claim. 823 F.3d at 627 (emphasis added); *see also id.* ("Termination of a subcontractor by the prime contractor is not a per se 'unexpected or unforeseen government action' that permits and requires an immediate claim by the prime contractor."). KBR's costs "did not arise from unexpected government action, but from subcontractor inadequacy in performance of its obligations under the subcontract." *Id.*

Similarly, here, Textron's request for pension adjustment costs "did not arise from unexpected government action."

**b. The Court of Federal Claims misread *Reflectone* and omitted key portions of a quote in its analysis.**

This Court's en banc decision in *Reflectone* also makes clear that the "unforeseen or unintended circumstances" must involve government action. The facts of *Reflectone* involved unexpected government action that injured the contractor by "caus[ing] an increase in contract performance costs." 60 F.3d at 1577; *see also id.* at 1574 ("Reflectone submitted an REA [request for equitable adjustment] to the CO demanding $266,840 for costs related to government-caused delay with respect to twenty-one enumerated items.").

The decision below misread *Reflectone* as supporting the rule that **any** unforeseen circumstances give rise to an immediate claim:

> The Federal Circuit concluded, however, that "an REA is anything but a 'routine request for payment'" because "[i]t is a remedy payable only when **unforeseen or unintended circumstances** . . . cause an increase in contract performance costs." 60 F.3d at 1577 (emphasis added) (holding that "[a] demand for compensation for unforeseen or unintended circumstances cannot be characterized as 'routine'").

Appx19.

The ellipses in the quote omit a list of examples, which clarify that these "unforeseen or unintended circumstances" all involve unexpected **government action** that injures the contractor:

> [A]n REA is anything but a 'routine request for payment.' It is a remedy payable only when unforeseen or unintended circumstances, such as government modification of the contract, differing site

> conditions, defective or late-delivered government property or issuance of a stop work order, cause an increase in contract performance costs.

*Reflectone*, 60 F.3d at 1577 (formatting modified). These examples—left out of the quote in the decision below—show that the "unforeseen or unintended circumstances . . . caus[ing] an increase in contract performance costs" must result from government action. In *Parsons*, this Court described a "common thread" of these examples—like every other example that this Court has ever given—is "unexpected or unforeseen **action on the government's part** that ties it to the demanded costs." 677 F.3d at 1171 (emphasis added).

#### c. The Court of Federal Claims relied on *James M. Ellett* to reject an argument not raised by Textron.

This Court's decision in *James M. Ellett*, 93 F.3d at 1537, also involved a contractor injured by unexpected government action.

In *James M. Ellett*, the Government terminated the contract for its convenience. 93 F.3d at 1542. This Court recognized that this unexpected government action gave rise to a claim, regardless of the fact that the contract allowed the Government to injure the contractor in this manner:

> [I]n concluding that a request for an equitable adjustment is not routine in *Reflectone*, we pointed to Supreme Court precedent equating a request for an equitable adjustment with an assertion of a breach of contract. That analogue is even more appropriate here, where, but for the convenience termination clause, the government's action would be a breach of contract[.]

*Id.* Terminating the contract, albeit allowed by the contract, was analogous to a breach of contract. *Id.* The Government's unexpected and unforeseen action injured the contractor, and the contractor could immediately submit a claim for its damages.[7]

The Court of Federal Claims incorrectly characterized Textron as raising the argument—rejected by this Court in *James M. Ellett*—that a payment request is routine if it "can be tied in some manner to a contract provision." Appx22.

To be clear, this is not Textron's argument. *Reflectone* and *James M. Ellett* both recognize that one unusual aspect of government contracts is that the Government is often permitted to take actions that are, in essence, breaches of contract. *See Reflectone*, 60 F.3d at 1577 (equating a request for equitable adjustment "with assertion of a breach of contract"); *James M. Ellett*, 93 F.3d at 1542 (same for termination for convenience).[8] These acts—but for the unusual clauses found within government contracts—"would be a breach of contract."

[7] Although *James M. Ellett* refers to a "demand for compensation for unforeseen or unintended circumstances," 93 F.3d at 1542, it does so while quoting *Reflectone* and in the context of unexpected government action that was, in effect, a breach of contract that injured the contractor. In *KBR*, this Court recognized *James M. Ellett* as supporting the rule that non-routine requests "permit a contractor that has been injured by some unexpected or unforeseen action on the government's part that ties it to the demanded costs, . . . to seek immediate payment of any damages flowing from the government's action." 823 F.3d at 627 (crediting *James M. Ellett* with this explanation of "'non-routine' requests"; internal quotation marks omitted).

[8] *See also Crown Coat Front Co. v. United States*, 386 U.S. 503, 511 (1967) ("With respect to claims arising under the typical government contract, the contractor has agreed in effect to convert what otherwise might be claims for breach of contract into claims for equitable adjustment.").

*James M. Ellett*, 93 F.3d at 1542. These government actions, although tied to the contract, give rise to an immediate claim.

Textron does not—and did not—argue that any payment request is routine if it is "tied in some manner to a contract provision." Appx22. To the contrary, *Reflectone* and *James M. Ellett* confirm that even when linked to a contractual provision, a payment request is non-routine when the Government has injured the contractor through unexpected action (analogous to a breach of contract).

Here, when the pension plans were terminated and curtailed, the Government did not take any action (nor was it required to). The Government did not breach the contract, did not take any action resembling a breach of contract, and did not injure Textron through any unexpected action. Textron was not injured (and the contract not breached) until the Government refused to pay Textron's routine request. Textron could not have asserted a breach of contract claim until that time. FAR 33.201; FAR 2.101.

* * *

This Court's cases set forth a consistent principle that follows from the plain text of the regulations. A contractor that has "been injured by some unexpected or unforeseen action on the government's part" seeks recovery "outside" the contract and may submit a claim immediately. *KBR*, 823 F.3d at 627; *Reflectone*, 60 F.3d at 1577; FAR 33.201. A contractor that seeks recovery "under the contract's terms"

has not been injured, must file a routine request for payment, and may assert a claim only if the Government refuses to pay the routine request (and thus breaches the contract). *Parsons*, 677 F.3d at 1170; *Reflectone*, 60 F.3d at 1578; FAR 2.101.

### B. Textron Submitted a Routine Request for Payment Under the Contract's Terms.

Applying these principles to this case is straightforward. Textron was not "injured by some unexpected or unforeseen action on the government's part." *KBR*, 823 F.3d at 627. When Textron's predecessor terminated two pension plans and curtailed another at the time it was emerging from bankruptcy proceedings (Appx5), the Government did not injure Textron by breaching the contract or by taking any action analogous to a breach (such as altering or terminating the contract). To the contrary, the Government took no action; nor did the contract require it to act.

Under the language of its CAS-covered contracts, this occurrence only made the Government's full share of the pension adjustment allocable to the contract. FAR 52.230-2; CAS 413-50(c)(12); *see also* Appx419 ("Contract No. FA8617-07-D-6151 contains Federal Acquisition Regulation § 52.230-2."). These costs, now allocable under CAS 413-50(c)(12) and made allowable under FAR 31.205-6(j), could be the subject of a proper invoice issued to the Government for the payment of allowable costs. *See Teledyne, Inc. v. United States*, 50 Fed. Cl. 155, 182 (2001)*, aff'd sub nom. Allegheny Teledyne Inc. v. United States*, 316 F.3d 1366 (Fed. Cir. 2003).

The entitlement to money arose from the contractor's actions under the contract, not the Government's actions. When Textron requested pension recovery costs from the Government, it sought to recover under the contract's terms.

Textron's request for pension adjustment costs was, in essence, nothing more than an invoice for previously underpaid labor costs. *See* CAS 413-50(c)(12) (explaining that this amount "represents an adjustment of previously-determined pension costs"). The existence of a pension surplus establishes "that when the Government paid its share of the pension costs [in the past]. . . , it had overpaid." *Raytheon*, 584 F.3d at 1068. Conversely, the existence of a pension deficit establishes that the Government underpaid its share of pension costs in the past. Textron, in effect, invoiced the Government for the amounts it underpaid.

Textron's April 2018 payment request was thus a routine request for payment. In the only material respect—that Textron did not seek payment based on unexpected government action—the request was the same as an invoice. Textron had not suffered an injury and could not properly have asserted a claim until the Government disputed the request as to liability or amount or refused to act upon it in a reasonable time. FAR 33.201; FAR 2.101. This dispute occurred, at the earliest, in February 2020. At that time, the Government breached the contract, and Textron's claim for breach of contract accrued. Textron's submission of a certified claim later that year was well within the six-year limitations period.

* * *

The rule from this Court's precedent is straightforward, predictable, workable, and consistent with the regulations. A contractor's claim accrues only after the contractor suffers an injury. FAR 33.201. When a contractor "has been injured by unexpected or unforeseen action on the government's part," it may submit a claim "to seek immediate payment of any damages flowing from the government's action." *KBR*, 823 F.3d at 627. Otherwise, a contractor owed money by the government suffers an injury—and can assert a claim—only after the Government disputes a routine request for payment. FAR 33.201; FAR 2.101.

Because Textron's claims for breach of contract did not accrue until after the Government refused to pay its request, its certified claim was filed within the limitations period. The Court of Federal Claims erred by dismissing the Complaint, and this Court should reverse the judgment in favor of the Government and render partial summary judgment in favor of Textron on limitations.

## II. Even If Textron's Claim Accrued Before a Dispute, the Court of Federal Claims Erred in Granting Judgment on Limitations.

Even if Textron could have submitted a claim before the Government disputed its request for payment, the Court of Federal Claims erred in resolving limitations in favor of the Government as a matter of law.

For a claim to accrue, an injury is necessary but not sufficient:

> *Accrual of a claim* means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred.

FAR 33.201. Even if a contractor has been injured and liability has been fixed, a claim accrues only when the contractor knows or should have known the facts necessary to "permit assertion of the claim." *Id.*

To assert a claim, a contractor must file a written demand "seeking, as a matter of right, the payment of money in a **sum certain**." FAR 2.101 (emphasis added). Without knowledge of the "sum certain" due, no claim can be asserted. *See also KBR*, 823 F.3d at 627 ("[A] 'claim' for 'the payment of money' does not 'accrue' until the amount of the claim, 'a sum certain,' FAR § 2.101, is 'known or should have been known,' *id*. § 33.201.").

In addition, the contractor must certify "that the claim is made in good faith; that the supporting data are accurate and complete to the best of [its] knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable." FAR 33.207(c).

The Court of Federal Claims did not distinguish between dismissal and summary judgment. *See* Appx10 (holding that on these facts, "nothing of significance turns on the distinction between a ruling on the pleadings and summary judgment" (quoting *Easter v. United States*, 575 F.3d 1332, 1336 (Fed. Cir. 2009)). Under either standard, the Court of Federal Claims erred.

### A. The Court of Federal Claims Erred in Dismissing the Complaint Based on Limitations.

This case falls squarely within the general rule that '[d]ismissal at the pleading stage on statute-of-limitations grounds ordinarily is improper unless it is apparent from the face of the complaint that the claim is time-barred." *ABB Turbo Sys. AG v. Turbousa, Inc.*, 774 F.3d 979, 985 (Fed. Cir. 2014) (internal quotation marks omitted).

Nothing on the face of the Complaint demonstrates when Textron knew or should have known the information necessary to submit a claim. FAR 33.201. The Court of Federal Claims appeared to recognize this fact. In concluding Textron "knew or should have known all of the information necessary to file a CDA claim at least as early as December 31, 2012, and certainly no later than February 15, 2013," the Court of Federal Claims relied exclusively on materials extrinsic to the Complaint. *See* Appx11-12 (citing Textron's counsel's statements at a hearing).

Because the decision below was not based on the face of the Complaint, it cannot be affirmed as dismissal for failing to state a claim on which relief could be granted.

### B. The Court of Appeals Erred in Granting Summary Judgment Based on Limitations.

The Government bears the burden of proof on its limitations affirmative defense. *Shell Oil Co. v. United States*, 751 F.3d 1282, 1297 (Fed. Cir. 2014).

Summary judgment is rarely appropriate in favor of the party with the burden of proof. *See United States v. Donovan*, 661 F.3d 174, 185 (3d Cir. 2011) ("[I]t is inappropriate to grant summary judgment in favor of a moving party who bears the burden of proof at trial unless a reasonable juror would be compelled to find its way on the facts needed to rule in its favor on the law." (quoting *El v. Se. Pa. Transp. Auth*., 479 F.3d 232, 238 (3d Cir. 2007))). This case is no exception.

The Government did not meet its burden to show that Textron knew or should have known the information necessary to assert a claim before July 2014 (six years before Textron submitted its certified claim).

**1. There is no evidence that Textron knew the information necessary to assert a claim, and what Textron should have known was inappropriate for summary judgment.**

The Court of Federal Claims did not expressly distinguish between the "known" or "should have been known" prongs of FAR 33.201, but its analysis necessarily rests on what "should have been known." *See also* Appx12-13 (relying on citations about what Textron should have known). There is no evidence that Textron actually knew the sum certain owed by the Government before July 2014.

Inferences about what a party should have known are generally inappropriate for resolution on summary judgment. *See Raytheon Co. v. Indigo Sys. Corp.*, 688 F.3d 1311, 1318-19 (Fed. Cir. 2012) ("It was for the jury and not for the district court to determine when Raytheon should have first discovered the facts supporting its

cause of action."); *see also FTC. v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1139 (9th Cir. 2010) ("Questions involving a person's state of mind, e.g., whether a party knew or should have known of a particular condition, are generally factual issues inappropriate for resolution by summary judgment."); *O'Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1150 (9th Cir. 2002) ("Review of the record does not lead inexorably to a single inference [about what a plaintiff should have known.]"); *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1387 (10th Cir. 1985) ("[W]hen a plaintiff knew or with reasonable diligence should have known of a cause of action is a question of fact for the jury.").

The Court of Federal Claims erred by equating undisputed facts with resolving an issue as a matter of law. *See* Appx10 (citing *Easter*, 575 F.3d at 1336). When a case involves inferences—such as inferences about what a party should have known—undisputed facts do not mandate summary judgment: "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment." *Dean-Mitchell v. Reese*, 837 F.3d 1107, 1111-12 (11th Cir. 2016).

**2. The statements of Textron's counsel do not provide a basis for the grant of summary judgment.**

As the only support for the conclusion that "Textron AD knew or should have known all of the information necessary to file CDA claim at least as early as

December 31, 2012," the Court of Federal Claims relied on the statements of Textron's counsel at hearing. *See* Appx11-12.

There are two errors in analysis. First, the Court of Federal Claims conflated two concepts: whether Textron "could have" performed calculations and whether Textron "should have" performed those calculations. The statements of Textron's counsel concern what might have been physically possible, without regard to resources. But showing that Textron—had it been able (and willing) to invest unlimited resources—**could have** learned information necessary to assert a claim hardly demonstrates that a reasonable contractor in Textron's position **should have** learned that information.

Second, the Court of Federal Claims misread the statements on which it relied, apparently treating pension adjustment cost calculations as instantaneous. Textron's counsel discussed when calculations could have been "run," but the court interpreted this statement as when calculations could have been completed. For example, the Court of Federal Claims relied on this exchange with Textron's counsel:

> [TEXTRON]: The -- well, the -- under the circumstances here, I think it's arguable the contractor could have run the numbers, but, you know, the facts here go back to 1955. I mean, it would have involved a huge amount of effort.
>
> THE COURT: I understand. Hard, costly, difficult --
>
> [TEXTRON]: Yes.
>
> THE COURT: -- but not impossible.
>
> [TEXTRON]: No, not impossible.

Appx447 (cited by Appx12). The Court of Federal Claims incorrectly characterized this exchange as conceding "that it was 'not impossible' for Textron AD's predecessor-in-interest to have calculated, as of December 31, 2012, the sums the government allegedly owes." Appx12.[9]

At most, Textron's counsel acknowledged that Textron could have begun its calculations, which would have "involved a huge amount of effort," in December 2012. There was no concession—and no evidence—as to how much time those calculations should have taken a reasonable contractor to complete.

To the contrary, Textron repeatedly explained "that it took a lot of time . . . to perform the calculation." Appx276; *see also id.* ("[T]hese calculations are extraordinarily complex. They in this case involve 70 -- 60 years of data going back into the 1950s, having to pull hard-copy documents[.]"); Appx405 (explaining that "the records related to the plans dated back to 1955 and had to be analyzed by various experts").

For example, Textron could not locate certain historical information regarding pension costs and revenue data, so it used other data as a proxy. Appx107. The Court of Federal Claims has permitted similar approximations but only "where a reasonable search for historical data was performed" and "actual pension cost data

[9] This is the only statement interpreted by the Court of Federal Claims as conceding that calculations could have been completed by a particular date. Appx11-12.

could not be located." *Raytheon Co. v. United States*, 105 Fed. Cl. 236, 285 (2012), *aff'd*, 747 F.3d 1341 (Fed. Cir. 2014). Part of Textron's "calculations" required performing this "reasonable search for historical data."

Nor could Textron simply rely on the value placed on the plan assets during the bankruptcy (which measured their value on a composite basis). Appx105. CAS 413 instead required Textron to revalue "the assets of each plan at fair market value as of termination." Appx105 (citing 48 C.F.R. § 9904.413-50(c)(12)(ii)).

The summary judgment record shows an absence of evidence regarding how much time these complex calculations (including the search for the historical data and review by experts) should have taken or even how long the calculations actually took. Textron's counsel did not concede that these calculations could (much less should) have been completed in December 2012. The Government bears the burden of proof on this issue, and it failed to satisfy that burden with evidence at summary judgment. *See* Appx185-186 (arguing that the Government "cannot meet its burden of proof").

**3. The Court of Federal Claims failed to grapple with the certification requirement.**

The error in the Court of Federal Claims' analysis is underscored by the requirement that submitting a claim requires a contractor to certify, in good faith, the amount that it is owed by the Government. FAR 33.207. "[T]he statutory mandate that all claims over $50,000 must be certified is one of the most significant

provisions of the CDA. . . . [C]ertification is not a mere technicality to be disregarded at the whim of the contractor, but is an unequivocal prerequisite for a post-CDA claim being considered under the statute." *Fid. Constr. Co. v. United States*, 700 F.2d 1379, 1384 (Fed. Cir. 1983).

A false certification exposes a contractor to significant liability. "[T]he 'purpose of the certification requirement is to trigge[r] a contractor's potential liability for a fraudulent claim under section 604 of the [Contract Disputes] Act.'" *Daewoo Eng'g & Constr. Co. v. United States*, 557 F.3d 1332, 1340 (Fed. Cir. 2009) (quoting *Fischbach & Moore Int'l Corp. v. Christopher*, 987 F.2d 759, 763 (Fed. Cir. 1993)). And contractors can also face liability under the False Claims Act, 31 U.S.C. §§ 3729-3733. *Id.*

Particularly given this potential liability, contractors cannot provide these certifications casually or lightly. It is not enough, then, that Textron might have been able to perform calculations estimating some amount of money that might be owed by the government. Textron could submit a claim only if it could certify—in good faith and at risk of significant civil (and potentially even criminal) liability—that it was owed a sum certain by the government.

The Court of Federal Claims discussed (incorrectly, as noted above) when Textron might have been able to calculate the amount it was owed. Appx11-12. But it failed to analyze when Textron knew—or should have known—enough

information to certify in good faith that it was owed a particular sum certain. Without such knowledge, the claim could not have been asserted, and no claim accrued. FAR 33.201.

In considering when Textron "knew or should have known all of the information necessary to file CDA claim," Appx11-12, the Court of Federal Claims should have considered both the extensive time required for these calculations and the certainty necessary for Textron to satisfy the certification requirement. It erred by failing to do so.

* * *

Even if Textron could have submitted a claim before the Government disputed Textron's request for payment, the Court of Federal Claims should not have resolved limitations against Textron as a matter of law, either by dismissing the claims or by granting summary judgment in favor of the Government. If this Court does not render judgment in favor of Textron on limitations, it should remand for the issue to be resolved as one of fact.

## CONCLUSION & PRAYER FOR RELIEF

This Court should vacate the judgment in favor of the Government and either render partial summary judgment in favor of Textron on limitations or, in the alternative, remand for further consideration of the issue.

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Respectfully submitted,

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