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

REPLY BRIEF OF APPELLANT

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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: May 8, 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. ☑ 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
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).
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

TABLE OF CONTENTS

Page

Certificate of Interest i

Table of Authorities v

Argument in Reply 1

I. Textron's Claim Accrued When the Government Refused to Pay Its Routine Request. 4

A. A claim accrues only when events "permit assertion of the claim." 4

B. The Court routinely recognizes the difference between routine and non-routine requests for payments as substantive, not a matter of "format." 6

1. The Government offers scant support for its "format" argument, and its only case citation—*Reflectone*—supports Textron. 7

2. The Government ignores this Court's other decisions discussing "routine" and "non-routine" requests. 9

3. The Government misreads *Electric Boat*. 11

C. The Government itself has previously recognized that routine and non-routine requests are distinguished by why the costs arose. 15

D. The Government's alternative arguments are incorrect. 17

II. The Court of Federal Claims Erred in Granting Judgment on Limitations. 20

A. The Government does not defend the conclusion that Textron knew or should have known the information necessary to submit a claim by December 2012. 21

TABLE OF CONTENTS
(continued)

Page

B. The Government's "waiver" argument is meritless. 22

Conclusion & Prayer for Relief 26

Certificate of Compliance with Rule 32(a) 28

TABLE OF AUTHORITIES

Page(s)

CASES

Cars USA, Inc. v. United States,
434 F.3d 1359 (Fed. Cir. 2006) 23

CENTECH GRP., Inc. v. United States,
162 Fed. Cl. 698 (2022) 14

DeMarco Durzo Dev. Co. v. United States,
73 Fed. Cl. 731 (2006) 14

Elec. Boat Corp. v. Sec'y of Navy,
958 F.3d 1372 (Fed. Cir. 2020) 11, 12, 13

Hamer v. Neighborhood Hous. Servs. of Chi.,
138 S. Ct. 13 (2017) 22

Hoel-Steffen Const. Co. v. United States,
456 F.2d 760 (Ct. Cl. 1972) 14

In re Hosack,
282 F. App'x 309 (5th Cir. May 2, 2008) 24

James M. Ellett Const. Co., Inc. v. United States,
93 F.3d 1537 (Fed. Cir. 1996) 9, 10, 17

Kellogg Brown & Root Servs., Inc. v. Murphy,
823 F.3d 622 (Fed. Cir. 2016) ....*passim*

Lake Charles XXV, LLC v. United States,
118 Fed. Cl. 717 (2014) 14

Mega Const. Co., Inc. v. United States,
29 Fed. Cl. 396 (1993) 14

Parsons Glob. Servs., Inc. v. McHugh,
677 F.3d 1166 (Fed. Cir. 2012) ....*passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

Reflectone, Inc. v. Dalton,
60 F.3d 1572 (Fed. Cir. 1995) .... *passim*

Summit Multi-Family Hous. Corp. v. United States,
124 Fed. Cl. 562 (2015) 14

Triax-Pac. v. Stone,
958 F.2d 351 (Fed. Cir. 1992) 14

STATUTES

41 U.S.C. § 7103(a)(4)(A) 4

REGULATIONS

48 C.F.R. (FAR)
§ 2.101 .... *passim*
§ 33.201 .... *passim*
§ 33.207(c) 21

OTHER AUTHORITIES

James Wm. Moore et al., Moore's Federal Practice ¶ 56.13[1] (3d ed. 2005) ..23, 24

ARGUMENT IN REPLY

Both parties agree that the Court of Federal Claims erred. Although the Government defends the outcome, its brief abandons the opinion's reasoning and urges this Court to adopt a radical reinterpretation of the FAR, treating the difference between "routine" and "non-routine" requests for payment as one of "format." Gov't Br. 12. Based on this view, the Government contends that "[a] contractor may elect to submit a non-routine claim letter whenever it wishes—for any type of claim," Gov't Br. 17, and thus that claims always accrue before a dispute. Gov't Br. 6. The Government's position conflicts with the text of the regulations, this Court's precedent, and the Government's previous briefing on the topic.

The decision below correctly recognizes a substantive distinction between routine and non-routine requests for payment. The error was in applying the wrong test, asking whether the request "seeks compensation because of unforeseen or unintended circumstances," Appx22, rather than whether the request seeks compensation because the contractor has "been injured by 'some unexpected or unforeseen action on the government's part.'" *Kellogg Brown & Root Servs., Inc. v. Murphy*, 823 F.3d 622, 627 (Fed. Cir. 2016) ("*KBR*") (quoting *Parsons Glob. Servs., Inc. v. McHugh*, 677 F.3d 1166, 1171 (Fed. Cir. 2012)). The Government has no answer to the numerous decisions of this Court recognizing this distinction between routine and non-routine requests.

Under the standard from these decisions, as Textron demonstrated in its opening brief, Textron Br. 27-29, Textron's request for pension adjustment costs was a routine request for payment, which could be asserted as a claim (and thus accrued) only after it was disputed by the Government.

Amici National Association of Manufacturers, Chamber of Commerce, and The Aerospace Industries Association confirm the importance of this issue and the need for this Court to uphold the "efficient, collaborative, and nonlitigious framework" established by the FAR and this Court's precedent. Amicus Br. 2. Allowing the decision below to stand would result in "more confusion regarding the appropriate claim accrual standard and an unpredictable and inconsistent framework." Amicus Br. 30-31. For these reasons, this Court should reverse and render partial summary judgment in favor of Textron on limitations.

In addition, even if the Court of Federal Claims applied the correct test for accrual, summary judgment was improper. In its cursory briefing in response to this argument, Gov't Br. 27-30, the Government relies almost entirely on "waiver" (it means "forfeiture"), despite eventually conceding that Textron disputed whether the Government carried its burden. Gov't Br. 28 n.18. When a party seeks summary judgment on an issue on which it bears the burden of proof, preservation requires nothing more. The Government's theory that it could shift the burden to Textron or somehow receive summary judgment by default is incorrect.

When it briefly addresses the merits of this argument, Gov't Br. 29-30, the Government again abandons the reasoning of the decision below. Judge Solomson correctly framed the inquiry as when "Textron AD knew or should have known all of the information necessary to file a CDA claim," including the pension adjustment amounts. Appx12. The decision below erred in applying this standard to the summary judgment record of this case.

With little explanation, the Government again rejects the standard applied by the Court of Federal Claims, asserting (without argument or citation) that the only relevant events are the "terminating and curtailing [of the] pension plans." Gov't Br. 29-30. But the Government makes no attempt to harmonize this position with the rule that a claim accrues only when the contractor knows (or should have known) enough to "permit assertion of the claim." FAR 33.201. Nor does the Government suggest that Textron could have asserted a claim without knowledge of the pension adjustment amount.

On this summary judgment record, the Government failed to carry its burden to show that a reasonable factfinder would be compelled to find in favor of the Government on limitations. Textron Br. 31-32.

On either or both of these grounds, this Court should reverse the summary judgment in favor of the Government and remand.

I. Textron's Claim Accrued When the Government Refused to Pay Its Routine Request.

A. A claim accrues only when events "permit assertion of the claim."

The Government misreads the FAR when it argues that the definition of "claim" in FAR 2.101 is irrelevant to limitations. A contractor's claim "shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4)(A). FAR 33.201 defines "accrual of a claim": For a claim to accrue, "some injury must have occurred" and all events must have occurred that "permit assertion of the claim." FAR 33.201.

To assert a claim, a party must file a written demand that satisfies FAR 2.101's definition of "claim." Until a party can submit a "claim" (*i.e.*, the necessary "written demand" for payment) as defined in FAR 2.101, no claim accrues under FAR 33.201.[1] In combination, FAR 33.201 and FAR 2.101 establish that a claim does not accrue until a party can request "the payment of money in a sum certain" (or other relief) and submit either (i) a non-routine request for payment; or (ii) a routine request for payment that "is disputed either as to liability or amount or is not acted upon in a reasonable time."

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[1] The Government is correct that FAR 2.101 and 33.201 use "claim" in slightly different senses so that "claim document" cannot be directly substituted for "claim" in FAR 33.201. But submitting a "claim document" as defined in FAR 2.101 is a prerequisite for asserting a claim (and thus for accrual) under FAR 33.201.

To be clear, this does not mean that "a claim only accrues when presented," as the Government mischaracterizes Textron's position. Gov't Br. 16. The requirement for accrual is that events must "permit assertion" of the claim, FAR 33.201, not that the contractor must actually have asserted it.

This Court has already held that the definition of "claim" in FAR 2.101 affects accrual of a claim under FAR 33.201: "[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." *KBR*, 823 F.3d at 627. The Government's position conflicts squarely with *KBR*, which binds this panel. *See, e.g.*, *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 (Fed. Cir. 1995) (en banc) (noting that "prior panel decisions on an issue are controlling until overruled *in banc*").

As Textron explained in its opening brief (at 17-18), the requirement that a routine request for payment be disputed before it can be asserted as a claim tracks the "injury" requirement for claim accrual under FAR 33.201. A contractor suffers an injury (and thus can assert a claim) either:

- when the contractor has "been injured by 'some unexpected or unforeseen action on the government's part,'" *KBR*, 823 F.3d at 627 (quoting *Parsons*, 677 F.3d at 1171), and may thus file a non-routine request for payment; or
- when the contractor submits a routine request for payment that the Government refuses to pay, either because the Government "dispute[s] [it] either as to liability or amount" or does not "ac[t] upon [it] in a reasonable time." FAR 33.201

Adopting the Government's position—and holding that the distinction between a routine request and non-routine request for payment is irrelevant to claim accrual—would require holding that a contractor suffers an "injury" (under FAR 33.201) every time the Government owes money during the ordinary course of contract progression. No authority supports such a holding, and it is facially absurd.

The "injury" requirement shows the correctness of Textron's position and the error in the Government's. For the Government to be correct (and Textron's claim barred by limitations), Textron must have been "injured" at the time of the pension adjustment in 2013. Gov't Br. 10-11. But the Government is unwilling to make this argument: although its brief denies that Textron's injury occurred after that time, the Government never plainly asserts when it contends that Textron suffered an "injury."

Textron's position, in contrast, is sensible and correct: Textron was injured by the Government (and thus could assert a claim) when—and only when—the Government refused to pay the money Textron requested under CAS 413.

B. The Court routinely recognizes the difference between routine and non-routine requests for payments as substantive, not a matter of "format."

The premise of the Government's argument is that "[t]he distinction between a routine or non-routine request for payment refers to the format of the contractor's submission." Gov't Br. 12; *see also* Gov't Br. 6, 13. This key contention goes virtually unsupported by the Government and conflicts with this Court's cases.

1. The Government offers scant support for its "format" argument, and its only case citation—*Reflectone*—supports Textron.

For such a crucial proposition, the Government's brief offers surprisingly little argument or authority in support. The only argument we have identified is a single sentence with two citations:

> The distinction between a routine versus non-routine request for payment refers to the format of a written submission, not the substance of the underlying claim asserted therein. *See* FAR 2.101 ("A voucher, invoice, or other routine request for payment . . . ."); *Reflectone*, 60 F.3d at 1576 ("when the claim is in the form of a non-routine demand").

Gov't Br. 13.

The citation to FAR 2.101 simply begs the question. The Government (apparently) assumes that vouchers and invoices are "routine request[s] for payment" because of their format. But as Textron explained, vouchers and invoices are routine requests because they do not seek payment for compensation as a result of unexpected government action. Textron Br. 28. The Government's bare quotation of the regulations, without argument, does nothing to support its argument or undermine Textron's.

Nor does this Court's decision in *Reflectone* support the Government. As the Government notes, *Reflectone* refers to a "claim . . . in the form of a non-routine demand as of right," 60 F.3d at 1576, but the Government ignores *why* this Court held that the request for equitable adjustment constituted a non-routine request: "A

routine request for payment . . . is made under the contract," and a non-routine request is made "outside it." *Id.* at 1577. This Court did not discuss the request's "format" but instead focused on the fact that the request for equitable adjustment sought recovery because the contractor was injured by unexpected government action akin to a breach of contract:

> [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. A demand for compensation for unforeseen or unintended circumstances cannot be characterized as "routine." The Supreme Court has confirmed the non-routine nature of an REA by equating it with assertion of a breach of contract. Thus, an REA provides an example of a written demand for payment as a matter of right which is not "a routine request for payment[.]"

Id. at 1577 (internal citations omitted). An REA is non-routine because it is "[a] demand for compensation for unforeseen or unintended circumstances" caused by the Government, *id.*, not because of its "format."

The Government misreads *Reflectone* as "establish[ing] that no pre-existing dispute is [ever] necessary for a contractor to submit a claim under the CDA." Gov't Br. 12. In truth, *Reflectone* eliminated the dispute requirement for non-routine requests but retained it for routine requests: "Routine requests are a subset of all written demands for payment. Special requirements apply to the subset, but not to the rest of the set." 60 F.3d at 1578.

2. The Government ignores this Court's other decisions discussing "routine" and "non-routine" requests.

Reflectone does not stand alone. This Court's decisions have followed *Reflectone* and held that the difference between routine and non-routine requests for payment turns on the reason for the request. *See* Textron Br. 18-24.

Parsons makes this plain: "The distinction between a routine and non-routine request for payment . . . depend[s] on the circumstances in which the requested costs arose." 677 F.3d at 1170. The "common thread" among non-routine requests "is the presence of some unexpected or unforeseen action on the government's part that ties it to the demanded costs." *Id.* at 1171.

Similarly, *KBR* explained that a non-routine request arises from "'unexpected or unforeseen government action' that permits and requires an immediate claim." 823 F.3d at 627; *see also James M. Ellett Const. Co., Inc. v. United States*, 93 F.3d 1537, 1542 (Fed. Cir. 1996) (recognizing that the reason for the request determines whether a request is routine or non-routine). Where, as here, there had been no "unexpected or unforeseen government action" prior to a contractor's request for payment, the request is routine and therefore accrues only after it is disputed.

The Government contends that any contractor—including a contractor seeking payment for work done in accordance with the expected or scheduled progress of contractual performance—always has the option of submitting a claim

in the "format" of a non-routine request. *See* Gov't Br. 17 ("A contractor may elect to submit a non-routine claim letter whenever it wishes—for any type of claim[.]").

This Court has repeatedly held the opposite. When a contractor seeks payment "under the contract," such as "for work done or equipment delivered by the contractor in accordance with the expected or scheduled progression of contract performance," the contractor's request is "routine." *Reflectone*, 60 F.3d at 1577; *accord James M. Ellett*, 93 F.3d at 1542; *Parsons*, 677 F.3d at 1170; *KBR*, 823 F.3d at 627. No case supports the Government's position.

Because the Government has no answer to these cases, it ignores them. Its brief discusses the facts of *Parsons*, Gov't Br, 20-21, which involved a request for payment that was routine because of its "substance." 677 F.3d at 1171 ("[T]he government notes that the costs are not a result of any unforeseen circumstances but rather Odell's own billing error, and as such, the demand is closer in substance to a routine demand."). The Government does not address *Parson*'s discussion of the distinction between routine and non-routine requests.

Similarly, the Government buries *KBR* in a footnote, implying that the case only concerned "mandatory pre-claim" procedures. Gov't Br. 22 n.13 ("In [*KBR*], this Court held that KBR needed to complete 'mandatory pre-claim procedures' before the claim at issue in that case accrued."). But that suggestion is wrong: *KBR* also discussed the distinction between routine and non-routine claims, holding 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; *see also id.* (finding that the claim at issue did not arise from "'unexpected or unforeseen government action' that permits and requires an immediate claim").

This portion of the decision speaks directly to the issue before this Court in this appeal, and Textron discussed it at length in the opening brief. Textron Br. 21-22. The Government cannot answer this holding by pretending as though it does not exist.

This Court has repeatedly held that "[t]he distinction between a routine and non-routine request for payment . . . depend[s] on the circumstances in which the requested costs arose." *Parsons*, 677 F.3d at 1170. The Government does not even attempt to answer this Court's holdings on this point. In light of this Court's post-*Reflectone* decisions, the Government's position in this appeal cannot be correct.

3. The Government misreads *Electric Boat.*

The Government also relies on this Court's decision in *Electric Boat Corp. v. Secretary of Navy*, 958 F.3d 1372 (Fed. Cir. 2020), arguing that this Court "rejected a nearly identical argument." Gov't Br. 24.

But the Government ignores the key differences between this case and *Electric Boat*. Unlike Textron, Electric Boat was injured by unexpected government action that increased its costs of performance: "Electric Boat's injury . . . was the enactment of the 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 at 1376; *see also 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.").

As the Government recognizes, Textron's entitlement to a pension adjustment "resulted from [Textron's] own actions in terminating and curtailing its pension plans." Gov't Br. 29. Textron's termination and curtailment of its pension plans merely allowed Textron to seek the Government's share of the adjustment amount.[2] Textron Br. 4-5; Amicus Br. 13. Textron's injury, the event which gave rise to its claim, occurred only when the Government refused to pay the amount the Government owed.

In its discussion of *Electric Boat*, the Government purports to dispute when Textron was injured. *See* Gov't Br. 24 (Heading: "The Government's Refusal To Pay Was Not Textron's Injury"). Given that heading, one would naturally expect

[2] As Amici explain, the process for seeking these costs closely resembles seeking payment for a voucher. Amicus Br. 11-14.

the Government to state expressly what it believes Textron's injury to be and when it contends that injury occurred, but the Government never does so. The closest it comes is reasserting—without explanation—its belief that "liability for the adjustment that Textron claims in this case was fixed by February 15, 2013." Gov't Br. 26. But the Government never meaningfully addresses the "injury" requirement: "For liability to be fixed, some injury must have occurred." FAR 33.201.

Unlike in *Electric Boat*, where the contractor was injured by unexpected government action (*i.e.*, the OSHA Regulation that increased its costs of performance), Textron was injured by the Government only when the Government refused to pay the pension adjustment costs. Textron's claim did not accrue until that event.

Textron does not, as the Government contends, seek to "avoid the timeliness bar that befell Electric Boat simply by characterizing its claim as a breach-of-contract claim." Gov't Br. 26. Textron instead explains that *Electric Boat* cannot control this appeal because, in addition to the factual differences discussed above, Textron has preserved arguments (such as "under common law breach of contract principles") that Electric Boat did not. Textron Br. 19 n.6 (quoting 958 F.3d at 1377 n.3).

The Government also overreads the cases it cites regarding contractors and breach of contract claims. Gov't Br. 26. Two of its cases involved suspension

clauses that limited contractors' ability to recover. *See Triax-Pac. v. Stone*, 958 F.2d 351, 354 (Fed. Cir. 1992) ("The Suspension clause prevents recovery by Triax because the cause of the delay was due to its own performance, albeit performance on a previous contract."); *Hoel-Steffen Const. Co. v. United States*, 456 F.2d 760, 768 (Ct. Cl. 1972) ("[T]he suspension clause grants the necessary remedy under the contract[.]"). And in the third, the plaintiff sought "common law damages outside of the scope of . . . the Disputes clause of the contract." *Mega Const. Co., Inc. v. United States*, 29 Fed. Cl. 396, 414 (1993). The Government does not contend that Textron seeks relief unavailable under the contract, and the Court of Federal Claims regularly adjudicates breach of contract claims pursuant to the Contract Disputes Act. *E.g.*, *CENTECH GROUP, Inc. v. United States*, 162 Fed. Cl. 698, 700 (2022) ("[A] government contractor . . . brings this suit against the United States seeking payment for breach of contract under the Contract Disputes Act[.]").[3] Textron properly asserted a claim for breach of contract.

[3] *See also, e.g.*, *Summit Multi-Family Hous. Corp. v. United States*, 124 Fed. Cl. 562, 568 (2015) ("[B]reach of contract claims are subject to the Contract Disputes Act[.]"); *Lake Charles XXV, LLC v. United States*, 118 Fed. Cl. 717, 718 (2014) ("This is a breach of contract case brought pursuant to the Contract Disputes Act[.]"); *DeMarco Durzo Dev. Co. v. United States*, 73 Fed. Cl. 731, 733 (2006) ("Pursuant to the Contract Disputes Act, the United States Court of Federal Claims has jurisdiction to adjudicate a breach of contract claim[.]").

C. The Government itself has previously recognized that routine and non-routine requests are distinguished by why the costs arose.

Not only is the Government's current position inconsistent with this Court's previous decisions, but its position conflicts with its own briefing in earlier cases. For example, the Government's *KBR* brief recognized that whether a request was routine or non-routine depended on what the request "arose out of":

> Although *Reflectone* dispensed with the dispute requirement for non-routine submissions to the contracting officer, *Reflectone* emphasized that the FAR distinguished routine demands for payment from non-routine demands. "A routine request for payment," the *Reflectone* Court explained, "is made under the contract, not outside it." Following *Reflectone*, this Court further explained that a non-routine request for payment seeks "compensation because of unforeseen or unintended circumstances[.]"
>
> . . . [T]hat [KBR's] request **arose out of** a termination for default, rather than typical contract performance, indicates that KBR's claim is a request "seeking compensation because of unforeseen or unintended circumstances." . . . KCPC/Morris' failure to perform in accordance with its subcontract constitutes "unforeseen or unintended circumstances."
>
> 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 (emphasis added; internal citations omitted).[4]

[4] To be clear, this Court rejected the standard proposed by the Government in *KBR* (which the Court of Federal Claims erroneously adopted in the decision below) and instead agreed with KBR's position. Textron Br. 21-22. But it is significant that the Government correctly recognized in *KBR* that what matters is what a "request arose out of," not the request's "format."

Indeed, the Government's brief in *Parsons* accused the contractor of "elevat[ing] form over substance." Brief of Appellee at 17, *Parsons*, 677 F.3d 1166 (Fed. Cir. 2012) (No. 2011-1201), 2011 WL 3101850. There, the Government recognized the significance of government action to whether claims are routine:

> Parsons does not and cannot argue that the Government caused Odell's injury. It remains undisputed that Odell's injury resulted from mistakes in Odell's billing practices, not any action upon the Government's part. Indeed, Parsons has not cited a single case that holds that a demand for payment to correct an error, that occurred solely due to the fault of the contractor and its subcontractor, constitutes the type of unforeseen or intended circumstances described in *Reflectone*.

Id. at 16-17.[5]

Nor does the Government make any attempt to harmonize its policy arguments (at 23 & n.14) with its position in *Reflectone*, where the Government argued that **every** claim must "be preceded by a dispute over entitlement to and the amount of a demand for payment." 60 F.3d at 1575; *see also id.* at 1576 ("The government argues . . . that a 'claim' always requires a pre-existing dispute."); *id.* at 1577 ("The government next asserts . . . every 'claim' must involve a pre-existing dispute."). Given its *Reflectone* position, the Government can hardly argue that it is harmed by adhering to the rule that some claims require a pre-existing dispute.

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[5] Unlike in *KBR*, the Government prevailed in *Parsons*, where this Court agreed with the Government that Parson's claim was "closer in substance to a routine demand." 677 F.3d at 1171. This Court also emphasized that a routine request "must be in dispute" before a party can "submit . . . a claim over which the Board has jurisdiction." *Id.* at 1172.

The Government's position in this appeal—contending, contrary to numerous previous decisions of this Court, that the difference between routine and non-routine requests is merely one of "format"— contradicts its previous arguments, without any explanation for or acknowledgement of the inconsistency.

D. The Government's alternative arguments are incorrect.

The Government also argues, in the alternative, that even if a contractor cannot assert a claim until its routine request for payment is disputed (or not acted upon in a reasonable period of time), FAR 2.101, Textron's claim was still untimely. Gov't Br. 21-24. The Government's arguments are incorrect.

The Government first asserts that "there is nothing routine about a CAS 413 submission or Textron Inc.'s submission in this case." Gov't Br. 22. But as Textron explained at length in its opening brief, whether a request is "routine" depends on whether it seeks relief "under the contract" or "outside the contract" because of unexpected government action (essentially akin to a breach of contract). *See* Textron Br. 18-27. This Court has already rejected the Government's plain-language arguments about the meaning of "routine." *James M. Ellett*, 93 F.3d at 1543 (finding a request non-routine despite the Government's argument that "the procedures used to determine a contractor's recovery could be perceived as routine, in the sense that the same ones are followed each time").

The Government's second "alternative" argument simply repeats its earlier theory that whether a contractor can submit a claim (as defined in FAR 2.101) is irrelevant to claim accrual. Gov't Br. 23. As noted above, the Government misreads the FAR, and this Court has already rejected this argument. *See KBR*, 823 F.3d at 627 ("[B]y FAR definition, 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."); *id.* at 628 ("Accrual in accordance with FAR § 33.201 does not occur until [the contractor] requests, or reasonably could have requested, a sum certain from the government."). Nor does the Government's argument address the "injury" requirement of FAR 33.201.

Finally, the Government again misstates Textron's position when it contends that "if it were true that Textron needed to make some routine submission before it could present its certified claim, it failed to make that routine submission" because Textron Inc.—not Textron—sent the April 2018 letter. Gov't Br. 24. As an initial matter, Textron Inc. sent the letter on Textron's behalf. *See* Appx76 n.2 ("The April 4, 2018 CAS 413 Submission was submitted by Textron, Inc. on behalf of [Textron Aviation Inc.] and [Textron]."); Appx235 ("on behalf of [Textron]").

Moreover, the Government misunderstands Textron's position. The FAR explains that a routine request is not a claim if it is "not in dispute when submitted." FAR 2.101. Submitting a routine request is not a "condition precedent," Gov't Br.

21, to filing a claim. But a routine request that is not in dispute when submitted is not a claim—and cannot be converted into one—until it "is disputed either as to liability or amount or is not acted upon in a reasonable time." FAR 2.101.

Here, by the time that Textron submitted its certified claim with the contracting officer in July 2020, Appx75-95, the Government had already made clear that it disputed both the liability and the amount. Appx46. Even though Textron Inc. sent the April 2018 payment request, the Government's refusal disputed the liability and the amount owed to anyone (including Textron, Textron Aviation, Inc., and Textron Inc.[6]), thus permitting Textron to assert a claim.

* * *

In its brief, the Government abandons the reasoning of the Court of Federal Claims, arguing instead for a reinterpretation of the FAR in which the only difference between routine and non-routine requests for payment is their "format" and in which "[a] contractor may elect to submit a non-routine claim letter whenever it wishes—for any type of claim." Gov't Br. 17.

Not only does the Government offer virtually no support (or even argument) for its novel position, but its position conflicts with the FAR, with this Court's

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[6] Textron's certified claim explained that it is "wholly owned by [Textron Aviation Inc.] and intends to recover only the total amount of the adjustment to which [Textron Aviation Inc.] and [Textron] are both jointly or severally entitled." Appx75 n.1.

precedent, and with the Government's own briefing in earlier cases. This Court should adhere to its previous holdings: a contractor may file a non-routine request for payment (and thus an immediate claim) only when 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.'" *KBR*, 823 F.3d at 627 (quoting *Parsons*, 677 F.3d at 1171). Under that standard, Textron's claim was timely because its claim accrued only when the Government disputed its routine request.

II. The Court of Federal Claims Erred in Granting Judgment on Limitations.

Independently, as Textron explained, even if the Court of Federal Claims applied the correct test for accrual, dismissal and summary judgment were improper. Textron Br. 29-38.

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); *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."). The contractor must also 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). Until a contractor can satisfy these requirements, no claim can be asserted and thus no claim accrues. FAR 33.201.

A. The Government does not defend the conclusion that Textron knew or should have known the information necessary to submit a claim by December 2012.

The decision below acknowledged these principles, correctly framing the inquiry as when "Textron AD knew or should have known all of the information necessary to file a CDA claim," Appx11-12, including knowing the amount owed by the Government because of the pension adjustments.

But as Textron explained, the Court of Federal Claims erred when considering the facts of this case. Dismissal was improper because nothing on the face of the Complaint demonstrated when Textron knew or should have known the information necessary to submit a claim. Textron Br. 31.

Similarly, summary judgment based on the statements of Textron's counsel at a hearing was erroneous because the Court of Federal Claims misinterpreted the statements and conflated whether Textron "could have" performed calculations with whether Textron "should have" performed calculations. Textron Br. 33-36.

The Government does not deny these facts or defend the analysis of the Court of Federal Claims. The Government instead argues, in effect, that it was irrelevant when "Textron AD knew or should have known all of the information necessary to

file a CDA claim." Appx11-12. According to the Government, the only relevant events were Textron "terminating and curtailing its pension plans." Gov't Br. 29.

The Government is wrong, and the Court of Federal Claims was correct on this point (albeit not its ultimate conclusion). A claim does not accrue until the contractor knows (or should have known) the information necessary to file a claim. FAR 33.201; *see also KBR*, 823 F.3d at 627 (holding that a claim "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).

Here, Textron's claim for pension adjustment costs did not accrue until Textron knew—or should have known—its amount. As the Court of Federal Claims recognized, calculating this amount required complex calculations. Nothing in the summary judgment record demonstrates that Textron knew or should have known this amount owed before July 2014, Textron Br. 31-36, and the Government does not argue otherwise. Summary judgment was improper.

B. The Government's "waiver" argument is meritless.

The Government's primary argument is that Textron "waived"[7] its opposition to summary judgment. Without explanation or citation to authority, the Government

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[7] The Government means to argue that Textron "forfeited" the argument. *See Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 n.1 (2017) ("The terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous. Forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right.").

suggests that Textron bore some burden to oppose its motion (and thus that the Government was entitled to summary judgment by default): "[A]s result of the text of our motion, Textron was unquestionably on notice that if it 'believe[d] there [were] facts not included in its complaint that b[ore] on the timeliness of its claim, it [was obligated to] present those facts [and] any evidence supporting them' in response to our motion." Govt' Br. 27-28 (quoting Appx68, Motion for Summary Judgment).

This assertion is surprising. Textron is unaware of any rule of procedure—the Government cites none—that allows a party (even the Government) to impose a burden of proof on the opposing party simply by announcing it.

The Government does not deny that it bears the burden of proof on the limitations issue. As Textron explained in its opening brief (at 31-33), a movant with the burden of proof bears a particularly high burden at the summary judgment stage: "[I]f the [summary judgment] motion is brought by a party with the ultimate burden of proof, the movant must still satisfy its burden by showing that it is entitled to judgment as a matter of law even in the absence of an adequate response by the nonmovant." *Cars USA, Inc. v. United States*, 434 F.3d 1359, 1368 (Fed. Cir. 2006) (quoting James Wm. Moore et al., Moore's Federal Practice ¶ 56.13[1] (3d ed. 2005)). "If, for example, the movant bears the burden and its motion fails to satisfy

that burden, the non-movant is not required to come forward with opposing evidence." *Id.* (internal quotation marks omitted).

Here, as the Government acknowledges, Textron argued to the Court of Federal Claims that "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." Appx185; *see also* Appx184 ("[T]he Government's Motion must prove that TA Defense's Claim accrued more than six years before it was submitted to the government. The Government's Motion fails to, and cannot, carry its burden." (internal citation omitted)).[8]

The Court of Federal Claims correctly recognized the timing of the calculations as a key issue in dispute. *See, e.g.*, Appx260 (Court: "When was the earliest that this calculation could have been done?"); Appx275 (Court: "[Y]ou're not disputing that the calculation could not have been done at the bankruptcy period." Textron: "Your Honor, I am."); Appx290 (Court: "They cannot file their CDA claim unless they knew or should have known about the sum-certain. . . . [I]t seems to me that a company could say, well, we didn't know, like we quite literally

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[8] As the Fifth Circuit has explained, only minimal objections are necessary to preserve arguments against summary judgment in favor of the party with the burden of proof. *In re Hosack*, 282 F. App'x 309, 316 (5th Cir. May 2, 2008) ("We find his general assertions sufficient to preserve the argument for appeal in light of the fact that the IRS, as the party seeking an exception to discharge, bears the burden of proof as to nondischargeability.").

could not put a number in there, and then should have known gets into how easy the calculation is."); Appx294 (Court: "[I]t's not just the fact of the injury. It's when the sum-certain is known or should have been known."). And the Court of Federal Claims' opinion addressed the issue, although it erred in evaluating the evidence. *See* Appx15 (analyzing whether "such a calculation could have been performed as of December 31, 2012").

Nothing more was required for Textron to preserve the argument it now presses on appeal: the Government failed to carry its burden on summary judgment.

* * *

As a party seeking summary judgment on an issue on which it bore the burden of proof at trial, the Government was required to meet a high standard to receive summary judgment. Textron's claim did not accrue until Textron knew or should have known the information necessary to submit a claim, FAR 33.201, including the sum certain that the Government owed. Particularly in light of the certainty required by the certification requirement (Textron Br. 36-38), the Government failed to demonstrate the absence of a genuine issue of material fact regarding when Textron should have completed its calculations. Textron Br. 33-36.

Even if the Court of Federal Claims did not err in treating Textron's request for pension adjustment costs as a non-routine request, summary judgment (and dismissal) was nonetheless improper.

CONCLUSION & PRAYER FOR RELIEF

The issues presented in this appeal are, as Amici confirm, critically important to government contractors, who need predictability and consistency in their dealings with the Government under the FAR. This Court should reaffirm the rule that follows from its cases and the regulatory text: non-routine requests for payment, which may be asserted as a claim immediately, arise from an injury caused by unexpected government action.

Applying that standard, 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.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,246 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 in Times New Roman 14-point font.

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