2023-1042

IN THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

TEXTRON AVIATION DEFENSE LLC,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims
in No. 1:20-cv-01903-MHS, Judge Matthew H. Solomson

BRIEF OF APPELLEE, THE UNITED STATES

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, appellee's counsel states that he is not aware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. The Court's decision in this case will directly affect one other case that is currently stayed in the Court of Federal Claims: *Textron Aviation Inc. v. United States*, No. 20-1883C (Fed. Cl.). That case involves an identical claim asserted by a different subsidiary of Textron Inc.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1295(a)(3) to review the August 12, 2022 judgment of the United States Court of Federal Claims. The trial court had jurisdiction under the Contract Disputes Act of 1978 (CDA), codified as amended at 41 U.S.C. §§ 7101-7109. 41 U.S.C. § 7104(b). *See* Appx75 (July 22, 2020 certified claim letter); Appx172 (September 8, 2020 contracting officer's final decision denying claim); Appx32 (December 18, 2020 court complaint).

STATEMENT OF THE ISSUE

Whether the Court of Federal Claims correctly determined that the contract claim presented by plaintiff-appellant, Textron Aviation Defense LLC (Textron or Textron Aviation Defense),[1] to the Government on July 22, 2020, accrued more than six years earlier and is therefore barred by the statute of limitations at 41 U.S.C. § 7103(a)(4)(A).

STATEMENT OF THE CASE

I. Nature Of The Case

On July 22, 2020, Textron submitted a certified claim letter for purposes of the CDA. Appx75. The claim letter demanded a payment of $19,407,515 based

[1] The trial court and our briefs below referred to appellant, Textron Aviation Defense, as "Textron AD" to avoid confusion with (1) Textron Aviation Inc., the immediate parent of appellant, and (2) Textron Inc., the top-level parent of both Textron Aviation Inc. and appellant. In this brief, we refer to these two other entities by their full names and to appellant as either Textron or Textron Aviation Defense.

on events that occurred during a Textron predecessor's bankruptcy proceedings, which had been completed more than seven years earlier. Appx75. The Government denied Textron's claim. Appx172. Textron brought suit in the Court of Federal Claims, which held that Textron's claim is barred by the CDA's six-year statute of limitations for claim presentment, 41 U.S.C. § 7103(a)(4)(A). Appx1-26 (*Textron Aviation Def. LLC v. United States*, 161 Fed. Cl. 256 (2022)).

II. Statement Of Facts And Procedural History

A. Beechcraft's Bankruptcy

On May 3, 2012, Hawker Beechcraft, Inc. (Beechcraft) petitioned for bankruptcy. Appx37; Appx124. In the course of its bankruptcy proceedings, Beechcraft terminated two pension plans and curtailed a third. Appx37. Under a settlement agreement executed by Beechcraft and the Pension Benefit Guaranty Corporation (PBGC) on December 21, 2012, the plan terminations and curtailment were all effective December 31, 2012. Appx37-38; Appx124-141. The December 21, 2012 agreement called for Beechcraft to make an $11 million cash payment to the PBGC, and for the PBGC to assume responsibility for the terminated pension plans. Appx37-38.

On February 13, 2013, the United States Bankruptcy Court for the Southern District of New York issued an order approving Beechcraft's December 21, 2012 settlement agreement with the PBGC. Appx118-122. On February 14, 2013,

Beechcraft and the PBGC signed agreements appointing the PBGC as trustee of the terminated pension plans. Appx162-170. As of February 15, 2013, Beechcraft's bankruptcy process was complete. Appx41.

B. Acquisition And Claim By Textron

On March 14, 2014, Textron Inc. acquired Beechcraft. Appx41-42. Textron Inc. formed an entity named Textron Aviation Inc. "as the corporate parent" of what was previously Beechcraft. Appx42. The appellant in this case, Textron Aviation Defense, is a subsidiary of Textron Aviation Inc., which is a subsidiary of Textron Inc. *Id.*

On April 4, 2018, more than five years after the plan terminations and curtailment, Textron Inc. sent a letter to the Defense Contract Management Agency (DCMA). Appx99. In that letter, Textron Inc. identified itself as "the successor-in-interest to Beechcraft's government contract rights and obligations by merger," and requested that the Government pay Textron Inc. $18.9 million under Cost Accounting Standard (CAS) 413-50(c)(12), 48 C.F.R. § 9904.413-50(c)(12), as a result of Beechcraft's pension plan terminations and curtailment. Appx99.[2]

[2] CAS 413-50(c)(12) provides that when a pension plan is terminated or curtailed, "the contractor shall determine the difference between [1] the actuarial accrued liability for the segment and [2] the market value of the assets allocated to the segment." 48 C.F.R. § 9904.413-50(c)(12). The Government's share of the difference is "allocable, without limit, as a credit or charge during the cost accounting period in which the event occurred." 48 C.F.R. § 9904.413-50(c)(12)(vii); *see Gates v. Raytheon Co.*, 584 F.3d 1062, 1065 (Fed. Cir. 2009).

DCMA requested an audit from the Defense Contract Audit Agency (DCAA), which was completed on February 27, 2020. Appx218. DCAA concluded that Textron Inc.'s calculations with respect to the two terminated pension plans did not comply with CAS 413, although it did not take issue with the calculation relating to the curtailed plan. Appx220-222.

On April 6, 2020, more than seven years after the conclusion of Beechcraft's bankruptcy proceedings, Textron Aviation Inc. submitted a certified claim letter to DCMA asserting entitlement to $19,407,515. Appx34. On June 1, 2020, DCMA issued a contracting officer's final decision denying Textron Aviation Inc.'s claim. *Id.* One of the reasons for the denial was that the claim letter had relied on a contract that was between the Government and Textron Aviation Defense, not Textron Aviation Inc., which submitted the claim letter. *Id.*

On July 22, 2020, Textron Aviation Defense, the appellant in this case, submitted a certified claim letter, which was nearly identical to the April 6, 2020 letter of Textron Aviation Inc. Appx34-35; Appx75-96; Appx115. On September 8, 2020, DCMA issued a contracting officer's final decision denying Textron Aviation Defense's claim. Appx172. The contracting officer denied the claim in its entirety based on the statute of limitations. Appx172-173.[3]

[3] The contracting officer also stated that, even absent the timeliness bar, she would have denied the "portion claimed that exceeds the amount that would be calculated on the basis that the $11 million actually paid to the PBGC is the

C. Proceedings Below

In December 2020, Textron Aviation Defense and Textron Aviation Inc. each filed a complaint in the Court of Federal Claims. Appx28; Appx32; Appx57; Appx62-63. The case filed by Textron Aviation Inc. was stayed by the trial court. We moved to dismiss or, alternatively, for summary judgment on the complaint filed by Textron Aviation Defense, asserting that the claim presented in that complaint is barred by the CDA's six-year statute of limitations for claim presentment. 41 U.S.C. § 7103(a)(4)(A). Textron cross-moved for summary judgment that its claim was timely presented. The Court of Federal Claims granted our motion, and Textron filed this appeal.

SUMMARY OF ARGUMENT

The claim asserted in Textron's July 22, 2020 certified claim letter accrued, at the latest, on February 15, 2013, more than seven years before Textron's July 2020 letter. Accordingly, the claim is barred by the CDA's six-year statute of limitations for claim presentment. 41 U.S.C. § 7103(a)(4)(A).

Contrary to Textron's arguments, nothing prevented its predecessor from submitting the claim at issue in this case on February 15, 2013, if not before. By

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contractor's maximum actuarial accrued liability, pursuant to CAS 413-50(c)(12)(i)." Appx173; *see also* Appx220-228; 48 C.F.R. § 9904.413-50(c)(12)(i) ("If there is a pension plan termination, the actuarial accrued liability shall be measured as the amount paid to irrevocably settle all benefit obligations or paid to the Pension Benefit Guarantee Corporation."); Br. of the Nat'l Assoc. of Mfrs. et al. (Amici Br.) 30.

that date, all of the events that fixed the alleged liability—the company's termination of two pension plans and curtailment of a third—had already occurred. And the company was necessarily aware of these events because it was directly involved in them.

Textron's argument that it could not have submitted its claim without a pre-existing dispute with the Government is contradicted by this Court's decision in *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (en banc). Neither the contractor's decision as to whether to request payment in a routine or non-routine format, nor the timing of when it elects to submit such requests, has any effect on when a claim accrues. *See Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1320 (Fed. Cir. 2014) ("A claim accrues as of '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.'" (quoting Federal Acquisition Regulation (FAR) 33.201)).[4]

Textron's contention that it was not injured until the Government refused payment is also incorrect. *See Elec. Boat Corp. v. Secretary of the Navy*, 958 F.3d 1372, 1376-77 (Fed. Cir. 2020) ("Electric Boat's injury . . . was . . . not the Navy's refusal to adjust the price."). Under Textron's claim, it would have been entitled to receive CAS 413 adjustments upon the terminations and curtailment of its three

[4] The FAR is codified in Chapter 1 of Title 48 of the Code of Federal Regulations.

pension plans. Therefore, its alleged injury occurred at the time CAS 413 was triggered and the adjustments were allegedly owed to it. Textron cannot avoid the statute of limitations by mischaracterizing its claim as one for breach of contract. *See, e.g.*, *Hoel-Steffen Constr. Co. v. United States*, 456 F.2d 760, 768 (Ct. Cl. 1972) ("contractor cannot maintain a breach claim for which . . . contractual relief is available").

If Textron's arguments were accepted, contractors could pick any claim accrual date they like. Under Textron's reasoning, it could have waited 100 years before asking the Government for a CAS 413 adjustment, and its claim would only accrue at some indefinite point thereafter. Claim accrual does not wait for a dispute between the parties. Textron's arguments are antithetical to the idea of a statute of limitations. This Court should reject them and affirm the judgment of the Court of Federal Claims.

ARGUMENT

I. Standard Of Review

This Court reviews a dismissal under Rule 12(b)(6) of the Rules of the Court of Federal Claims (RCFC), as well as a grant of summary judgment, de novo. *See Frankel v. United States*, 842 F.3d 1246, 1249 (Fed. Cir. 2016). Dismissal under RCFC 12(b)(6) is appropriate when the facts alleged in the complaint fail to state a plausible basis for entitlement to relief. *See id.* Summary judgment is appropriate

if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (quoting RCFC 56(a). In this case, the trial court's determination that Textron's claim had accrued by February 15, 2013, at the latest, was based on undisputed facts that were presented in Textron's complaint. *See* Appx10. Hence, the distinction between a motion to dismiss and a summary judgment motion was not of any consequence in the trial court's opinion. Appx10.

II. Textron's Claim Is Time-Barred Under 41 U.SC. § 7103(a)(4)(A) Because It Accrued More Than Six Years Before Textron's July 22, 2020 Submission

The CDA requires that "[e]ach claim by a contractor against the Federal 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). Failure to comply with this six-year statute of limitations bars recovery on a claim. *See, e.g.*, *Elec. Boat Corp.*, 958 F.3d at 1376.

"A claim accrues as of '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. However, monetary damages need not have been incurred.'" *Sikorsky Aircraft Corp.*, 773 F.3d at 1320 (quoting FAR 33.201).

Textron submitted its certified claim on July 22, 2020. Appx47; Appx75. Thus, the claim is time-barred unless it accrued on or after July 22, 2014. All of the events that fix the liability alleged in Textron's July 2020 claim letter had occurred, and were known or should have been known to Textron's predecessor, by February 15, 2013, at the latest.

Textron asserts that the Government owes roughly $19 million under CAS 413-50(c)(12), as a result of Beechcraft's termination or curtailment of three pension plans, effective December 31, 2012. Appx37-38; *see* Appellant Br. 5 ("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).").

That provision of the CAS provides that when a pension plan is terminated or curtailed, "the contractor shall determine the difference between [1] the actuarial accrued liability for the segment and [2] the market value of the assets allocated to the segment." 48 C.F.R. § 9904.413-50(c)(12). The Government's share of the difference is "allocable, without limit, as a credit or charge during the cost accounting period in which the event occurred." 48 C.F.R. § 9904.413-50(c)(12)(vii); *see Gates v. Raytheon Co.*, 584 F.3d 1062, 1065 (Fed. Cir. 2009).

As of December 31, 2012, the effective date for the terminations and curtailment at issue, Textron's predecessor could have calculated the pension-cost

adjustments for which it now alleges that the Government is liable. The two elements of the CAS 413 calculation—the plans' accrued liabilities and the value of the plans' assets—were readily determinable, if not actually known, by Textron's predecessor as of December 31, 2012. *See* Appx12 (citing Appx276; Appx405; Appx446-447).

To the extent Textron's predecessor needed to obtain bankruptcy court approval before it could have asserted the claim at issue in this case, that occurred by February 2013. On February 13, 2013, the bankruptcy court approved Textron's predecessor's settlement agreement with the PBGC. Appx122. The same day, Textron's predecessor transferred the assets and liabilities, along with its $11 million cash payment to the PBGC. Appx5; Appx38. By February 15, 2013, Textron's predecessor's bankruptcy proceedings were complete. Appx41 (Compl. ¶ 41: "On February 15, 2013, Beechcraft's bankruptcy process was complete . . . .").

Thus, by February 15, 2013, all events on which Textron alleges that the Government is liable for CAS 413 adjustments in this case had occurred and were known or should have been known to Textron's predecessor.[5] The claim therefore

[5] Textron's July 2020 certified claim letter reinforces the absence of any relevant events after February 15, 2013. The letter includes a section identifying the facts on which Textron alleged government liability. Appx77 ("the government's obligation to pay TA Defense under CAS § 413-50(c)(12) resulted from the following facts"). The claim letter then proceeds to identify a series of

accrued no later than February 15, 2013.[6] Because the claim was not presented to the Government in accordance with 41 U.S.C. § 7103(a)(1) until July 22, 2020, Appx75, it is barred by the six-year statute of limitations at 41 U.S.C. § 7103(a)(4)(A).[7]

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events culminating with Beechcraft's February 15, 2013 emergence from bankruptcy. Appx81. The fact section of the claim letter concludes with one further paragraph discussing subsequent corporate reorganizations and acquisitions, *id.*, but Textron has never attempted to, nor could it, argue that corporate reorganizations and acquisitions are "events that fix the alleged liability . . . and permit assertion of the claim." *Sikorsky Aircraft Corp.*, 773 F.3d at 1320 (comma omitted).

[6] There is no need in this case to determine whether the claim accrued at some time before February 15, 2013. Even if the claim did not accrue until then, Textron's July 22, 2020 claim submission was still untimely by more than a year.

[7] Textron has never argued that the April 4, 2018 letter, Appx99, submitted by its top-level parent, Textron Inc., satisfied the claim presentment requirement of 41 U.S.C. § 7103(a)(1). Accordingly, any such argument has now been waived, both for failure to raise it in this Court and for failure to raise it in the trial court. *See Pavo Sols. LLC v. Kingston Tech. Co., Inc.*, 35 F.4th 1367, 1380 (Fed. Cir. 2022) ("a position not presented in the tribunal under review will not be considered on appeal in the absence of exceptional circumstances"); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) ("arguments not raised in the opening brief are waived"). Regardless, an argument that the April 4, 2018 letter constituted the necessary certified claim under the CDA could not have succeeded as it lacks, among other things, any attempt to provide the required certification. *See* Appx111-113; *Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426, 1428 (Fed. Cir. 1989); *W.M. Schlosser Co. v. United States*, 705 F.2d 1336, 1340 (Fed. Cir. 1983); *see also Hamza v. United States*, 31 Fed. Cl. 315, 324 (1994).

III. Claim Accrual Does Not Depend On Whether There Is A Dispute

Textron argues that it was not allowed to submit its certified claim letter until there was a disagreement between it and the Government over the payment that Textron requests. This Court's en banc decision in *Reflectone* contradicts Textron's position. *Reflectone* established that no pre-existing dispute is necessary for a contractor to submit a claim under the CDA, provided the claim is presented in a non-routine format. 60 F.3d at 1576 ("holding . . . that the FAR requires a 'claim' to be a written demand seeking a sum certain (or other contract relief) as a matter of right, but not necessarily in dispute").

Textron argues that it could not have submitted a non-routine claim letter until the Government refused payment because a CAS 413 payment is a routine request. Appellant Br. 17. The trial court correctly rejected Textron's contention that a request for payment under CAS 413 constitutes a routine request, Appx17-24, but the court ought to have rejected the premise that a pre-existing dispute is ever required before a contractor is allowed to submit a non-routine claim letter. The distinction between a routine or non-routine request for payment refers to the format of the contractor's submission and goes to the question of whether the contractor has satisfied the claim presentment requirement of 41 U.S.C. § 7103(a)(1). That has no bearing on when the underlying claim accrued. *See* FAR 33.201.

A. The Distinction Between Routine And Non-Routine Payment Requests Has No Effect On The Timing Of Claim Accrual

As discussed above, a claim accrues 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 (emphasis added). Textron incorrectly argues that it was not permitted to assert its claim until the Government disputed its payment request because its request for payment under CAS 413 is a routine claim, not a non-routine claim. *E.g.*, Appellant Br. 28.

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").

Textron conflates different usages of the word "claim," which has more than one meaning. For example, Black's Law Dictionary provides several different definitions of "claim," including: "1. A statement that something yet to be proved is true . . . . 2. The assertion of an existing right; any right to payment or to an equitable remedy . . . . 3. A demand for money, property, or a legal remedy to which one asserts a right . . . ." Claim, Black's Law Dictionary (11th ed. 2019). In CDA practice, "claim" is used not only in these general senses but also as a term of

art referring to a particular document; namely, a document that satisfies the claim presentment requirement of 41 U.S.C. § 7103(a)(1).

That is the sense of the word "claim" that is defined in FAR 2.101, which addresses the characteristics necessary for a particular document to satisfy the CDA's claim presentment requirement:

> 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. However, a written demand or written assertion by the contractor seeking the payment of money exceeding $100,000 is not a claim under 41 U.S.C. chapter 71, Contract Disputes, until certified as required by the statute. 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. Consistent with this definition, "claim" is frequently used in the context of CDA litigation to refer to a specific letter submitted by the contractor to the Government's contracting officer.

However, that is not the usage of "claim" in 41 U.S.C. § 7103(a)(4)(A), the CDA provision specifying a six-year statute of limitations for claim presentment. 41 U.S.C. § 7103(a)(4)(A) ("Each claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government

against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim."). If "claim" were understood to refer to a particular document in this statute-of-limitations provision, the end of the sentence would become incomprehensible: ". . . shall be submitted within 6 years after the accrual of the [document]." *Id.*

Similarly, the claim accrual provision at FAR 33.201 would not make sense if its references to "claim" were understood to refer to a particular document. That provision provides, in part: "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." FAR 33.201. If "document" were substituted for "claim" in that sentence, the provision would be incomprehensible: "Accrual of a [document] means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the [document], were known or should have been known." *Id.*

The arguments of Textron and the amici curiae fail to distinguish between different usages of "claim." *E.g.*, Amici Br. 19 ("Without a 'claim," no claim began to accrue.").[8] Their arguments conflate adequate presentment of a claim for purposes of 41 U.S.C. § 7103(a)(1) with accrual of a claim for purposes of the

[8] *See also* Amici Br. 11 ("Claim accrual starts when the contractor formally 'convert[s]' the voucher into a claim."); *id.* at 7; *id.* at 9 ("For a claim to accrue, there must be an underlying 'claim' within the meaning of FAR 2.101."); *id.* at 19 ("if there is no 'claim' then there can be no 'claim accrual'").

timeliness requirement of 41 U.S.C. § 7103(a)(4)(A), such that a claim only accrues when presented. That interpretation is an unreasonable reading of both the statute and the regulations. As discussed above, the plain language of the CDA's six-year statute of limitations provision, 41 U.S.C. § 7103(a)(4)(A), and the FAR's claim accrual standard, FAR 33.201, cannot be read to tie claim accrual to the submission or adequacy of a particular document. Moreover, such an interpretation would make the statute of limitations at 41 U.S.C. § 7103(a)(4)(A) superfluous. If the trigger for accrual were presentment, no claim would ever be untimely presented. And as a matter of logic, the submission of a satisfactory claim document cannot be the event that triggers claim accrual, as one could not appropriately submit a demand if the claim underlying it has not already accrued.

The argument of Textron and the amici regarding whether Textron's claim was routine or non-routine confuses unrelated concepts. The statement in FAR 2.101 that a "voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim," does not have anything to do with claim accrual. Rather, that statement expounds on which documents will be understood to request a contracting officer's final decision, thereby satisfying the claim presentment requirement of 41 U.S.C. § 7103(a)(1). *See M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (to satisfy the CDA's claim presentment requirement, a claim submission must "indicate to the

contracting officer that the contractor is requesting a final decision"). FAR 2.101 merely reflects that the Government's contracting officers will not treat invoices and similar documents as requests for a contracting officer's final decision.

Accordingly, if a contractor wishes to convert a previously-submitted routine request for payment into a request for a contracting officer's final decision, so as to satisfy the CDA's claim presentment requirement, the contractor must take further action. *See* FAR 2.101 ("The submission [of a voucher, invoice, or other routine request for payment] 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."). Contrary to the arguments of Textron and the amici, the obligation to take action to convert a routine request for payment into a claim submission, if the contractor so desires, does not mean that the contractor is not allowed to submit some types of claims until the Government refuses to pay them. A contractor may elect to submit a non-routine claim letter whenever it wishes—for any type of claim, as *Reflectone* established.[9]

[9] If a contractor submits a claim letter demanding a payment for which the contractor has not yet invoiced, but the parties agreed in their contract that the Government would not have a payment obligation until after the contractor submits an invoice, the Government may have a merits defense on that basis, but the merit, or lack thereof, of the claim has no effect on the contractor's ability to present it in accordance with 41 U.S.C. § 7103(a)(1), which the contractor can do whenever it wishes.

B. Under *Reflectone*, Claim Presentment Does Not Require Any Pre-Existing Dispute

In *Reflectone*, the issue was whether a submission styled as a request for an equitable adjustment (REA) satisfied the CDA's claim presentment requirement, such that the Armed Services Board of Contract Appeals (ASBCA) had jurisdiction over Reflectone's appeal to the board. 60 F.3d at 1574. Relying on *Dawco Construction, Inc. v. United States*, 930 F.2d 872, 878 (Fed. Cir. 1991), the ASBCA concluded that Reflectone's REA did not satisfy the CDA's claim presentment requirement. *Reflectone, Inc.*, 60 F.3d at 1574.

In *Dawco*, this Court had stated that "[t]he [CDA] and its implementing regulation require that a 'claim' arise from a request for payment that is 'in dispute.'" 930 F.2d at 878. Interpreting *Dawco* as holding that no demand for payment could satisfy the CDA's claim presentment requirements unless the matter was already in dispute between the contractor and the Government, the ASBCA dismissed Reflectone's appeal for lack of jurisdiction. *Reflectone, Inc.*, 60 F.3d at 1574. A divided panel of this Court affirmed, but the full Court reversed, overruling *Dawco*. *Id.*

In its en banc *Reflectone* opinion, this Court explained:

> In order to explore whether a CDA "claim" requires a dispute which pre-dates the submission to the CO, we requested that the following question be addressed by the *in banc* briefs.

> Did *Dawco* . . . properly conclude that a [CDA] "claim" as defined in FAR 33.201 [now FAR 2.101] requires a pre-existing dispute between a contractor and the government when the claim is in the form of a "written assertion . . . seeking, as a matter of right, the payment of money in a sum certain" or other contract relief per the first sentence of the FAR definition, or does that requirement only apply when the claim initially is in the form of a "routine request for payment"?

> We answer the first half of this question in the negative and the second half in the affirmative. We hold that sentence [1] of [the] FAR [definition of claim] sets forth the only three requirements of a non-routine "claim" for money: that it be (1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain. That sentence simply does not require that entitlement to the amount asserted in the claim or the amount itself already be in dispute when the document is submitted. The subsequent sentence does not add another requirement to a non-routine submission.
>
> . . . . [T]he FAR explicitly excludes from the definition of "claim" those "routine request[s] for payment" that are not in dispute when submitted to the CO. Nevertheless, nothing in the definition suggests that *other* written demands seeking payment of a sum certain as a matter of right, i.e., those demands that are not "routine request[s] for payment," also must be already in dispute to constitute a "claim."

Reflectone, 60 F.3d at 1575-76 (footnotes omitted). This Court held en banc that the CDA's claim presentment requirement was satisfied by Reflectone's REA, which was not a routine submission like an invoice and therefore did not require either a pre-existing dispute or subsequent conversion to a CDA claim before

litigation. *Id.* at 1578; *see also id.* at 1577 ("an REA is anything but a 'routine request for payment'").[10]

Textron and the amici rely on a panel decision in *Parsons Global Services, Inc. ex rel. Odell International, Inc. v. McHugh*, 677 F.3d 1166 (Fed. Cir. 2012) (*Parsons*), but that case cannot properly be interpreted to support their position. In *Parsons*, this Court affirmed an ASBCA decision finding that it lacked jurisdiction because the documents Parsons submitted to the contracting agency did not satisfy the CDA requirement that the contractor present its own administrative claim. 677 F.3d at 1169 ("The Board agreed with the government that Parsons had failed to submit a valid sponsored claim and dismissed Parsons's appeal for lack of jurisdiction."); *id.* at 1173 ("The Board lacked jurisdiction over Parsons's routine request for payment and thus we affirm the Board's dismissal.").[11] In contrast to

[10] The notion that a routine submission could satisfy the CDA's claim presentment requirement because it was already in dispute when submitted may be largely theoretical. The submission would still need to indicate that a final decision is being requested. *See M. Maropakis Carpentry, Inc.*, 609 F.3d at 1327. And if the claim sought more than $100,000, it would have to contain a claim certification, the presence of which is typically a hallmark of a non-routine submission. *See Ball, Ball & Brosamer, Inc.*, 878 F.2d at 1428.

[11] Although neither Textron nor the amici rely on them in their briefs, *Parsons* includes two sentences that, if taken out context, may appear to support their position: "What Parsons cannot do is classify its request as non-routine so it can submit it directly to the PCO as a claim without first pursuing the proper avenues under the prime contract. Because Parsons's request is routine, it must be in dispute before Parsons can submit 'a written demand . . . seeking, as a matter of right, the payment of money in a sum certain' that would constitute a claim over

Parsons, in this case there is no dispute that Textron's July 22, 2020 letter satisfied the CDA's claim presentment requirement. The problem for Textron is not a failure to present a valid claim letter, but rather that the claim presented in its July 2020 letter had accrued more than six years earlier and is therefore time-barred. 41 U.S.C. § 7103(a)(4)(A).[12]

C. Even If Textron's Interpretation Of This Court's Cases Were Correct, The Claim At Issue In This Case Is Still Time-Barred

Although the rejection of Textron's theory ought to end the Court's analysis, even if it were true that presentment of a routine payment request is a condition precedent under the CDA for presenting a claim for purposes of 41 U.S.C.

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which the Board has jurisdiction." 677 F.3d at 1172. However, the context of the case makes clear that the Court's holding was that Parsons did not submit a valid claim letter, not that it would not have been allowed to do so. *See id.* at 1172-73 ("Without a pre-exi[s]ting dispute over its routine request, Parsons has not submitted a valid claim."). After the Government declined to settle directly with Parsons's subcontractor, Parsons presented the Government with its subcontractor's certified claim, not its own, which was insufficient for jurisdiction in the ASBCA. Appx336-337 (purported claim submission stating "Please find attached a Certified Claim for Payment presented under the [CDA] by our subcontractor, Odell International, LLC," and transmitting a document titled, "Certified Claim of Subcontractor Odell International, LLC Under Contract No. W914NS-04-D-0006"); *see also* Appx320-322. Moreover, *Parsons* did not, and could not have, overruled *Reflectone*. *See* 677 F.3d at 1172 (citing *Reflectone*).

[12] In discussing FAR 52.216-7(d)(4)—a provision that is relevant neither to claim accrual nor the facts of this case—the amici inaccurately state that "[u]nder FAR 52.216-7(d)(4), the FAR Drafters expressly stated that a claim does not arise––accrue—until the parties reach disagreement with these audit/calculation negotiations." Amici Br. 28. But FAR 52.216-7(d)(4) states only that "[f]ailure by the parties to agree on a final annual indirect cost rate shall be a dispute within the meaning of the Disputes clause." FAR 52.216-7(d)(4).

§ 7103(a)(1), Textron's claim in this case would still be barred for at least three reasons.

First, as the trial court explained at length, there is nothing routine about a CAS 413 submission or Textron Inc.'s submission in this case. Appx17-24; *see also Raytheon Co. v. United States*, 747 F.3d 1341, 1351 (Fed. Cir. 2014) ("segment closing adjustments are not ordinary pension costs"); *id.* ("CAS 413 treats segment closing adjustments differently than ordinary 'pension costs.'"); *Gates v. Raytheon Co.*, 584 F.3d 1062, 1069 (Fed. Cir. 2009) ("CAS 413 is unusual").[13]

[13] Textron asserts that the trial court relied on *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1543 (Fed. Cir. 1996) "to reject an argument not raised by Textron." Appellant Br. 24 (heading emphasis omitted). Textron insists that it is not arguing "that a payment request is routine if it 'can be tied in some manner to a contract provision.'" Appellant Br. 25 (quoting Appx22). But Textron does argue that its request was routine because it sought recovery under the contract's terms. *E.g.*, Appellant Br. at 26-27. Regardless, if the question of whether Textron's submission was routine is reached, *James M. Ellett Construction Co.* demonstrates that it was not. *See* 93 F.3d at 1543 (observing that "routine" may be "defined as 'habitual; regular,' and '[n]ot special; ordinary'").

Textron also complains that 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*." Appellant Br. 21. In *Kellogg Brown & Root Servs., Inc. v. Murphy*, 823 F.3d 622 (Fed. Cir. 2016) (*KBR*), this Court held that KBR needed to complete "mandatory pre-claim procedures" before the claim at issue in that case accrued. *Id.* at 628. Relying on *KBR*, Textron argued in the trial court (but does not argue in this Court) that CAS 413 contains mandatory pre-claim procedures. Appx186. The trial court correctly rejected that argument, as well as Textron's reliance on *KBR* in support of it. Appx14 ("Textron AD relies upon *KBR*, but neither that case nor its progeny

Second, Textron cannot postpone the running of the statute of limitations through its own inaction. *See, e.g.*, *United States v. Commodities Exp. Co.*, 972 F.2d 1266, 1271 (Fed. Cir. 1992) ("This court cannot, however, permit a single party to postpone unilaterally and indefinitely the running of the statute of limitations."). Thus, even if Textron were correct that it was obligated to present a routine request for payment, wait for a dispute with the Government, and then convert its routine request for payment to a certified claim,[14] Textron would not properly be able delay the six-year time limit for completing the final step through its own inaction. Rather, it would merely establish that Textron had more steps to complete within the same time period. However many steps there may be to the process of presenting a claim under the CDA, there was no reason why Textron's

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support Textron AD's view."). Regardless, the holding of *KBR* does not support any of Textron's arguments, and the subcontractor pass-through claim at issue in *KBR* is not analogous to Textron's claim, the assertion of which has always been entirely within Textron's control.

[14] Textron and the amici seem not to appreciate the consequences of the ruling they request. Adopting their arguments would seemingly require dismissal in any case in which a contractor submitted a non-routine certified claim letter requesting relief "under the contract's terms," Appellant Br. 26, but cannot demonstrate that the Government first disputed or failed to act on some separate routine request that the contractor previously submitted. In other words, Textron and the amici generally seek to re-establish a prerequisite to the jurisdictional prerequisite of a valid claim submission—a requirement that *Reflectone* abolished decades ago. *See* 60 F.3d at 1581 ("Requiring contractors to submit the identical claim twice . . . is a waste of the contractor's time and money.").

predecessor could not have started that process by February 15, 2013, and completed it within the six years allowed by the CDA.[15]

Finally, 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. The April 4, 2018 letter that Textron claims needed to be submitted first was submitted not by the plaintiff-appellant and CDA-claimant in this case, Textron Aviation Defense, but rather by Textron Inc., which is a different entity. *See, e,g, BLH Inc. v. United States*, 13 Cl. Ct. 265, 272 (1987) ("a parent corporation and a subsidiary are in law separate and distinct entities, and under ordinary circumstances a contract in terms and in name with one corporation cannot be treated as that of both").

IV. The Government's Refusal To Pay Was Not Textron's Injury

Textron and the amici also argue that Textron's injury did not occur until the Government refused to make the payment it requested. This Court rejected a nearly identical argument in *Electric Boat Corp.* 958 F.3d at 1376. In that case, this Court affirmed an ASBCA decision denying as untimely Electric Boat's claim for increased costs due to a change in an Occupational Safety and Health

[15] Textron had "an existing contractual obligation to calculate" those adjustments upon terminating and curtailing its pension plans. *Raytheon Co. v. United States*, 747 F.3d 1341, 1352 (Fed. Cir. 2014) ("Raytheon's 'obligation to perform an adjustment on the segment closing [pursuant to CAS 413] was a preexisting contract requirement that arises whenever a segment closes.'"); *see also Gates v. Raytheon Co.*, 584 F.3d 1062, 1065 (Fed. Cir. 2009).

Administration (OSHA) regulation. *Id.* at 1373-74. Electric Boat argued that it was not injured, and therefore its claim did not accrue, until the Navy refused its payment request, but this Court rejected that argument, stating:

> Electric Boat contends that its claim for costs did not accrue until . . . the Navy's Contracting Officer denied its request for a price adjustment. It argues that it was not injured under the Contract until it received notice of the Navy's intent to not adjust the contract price. . . . We do not agree.

Electric Boat Corp., 958 F.3d at 1376.

Rather, Electric Boat's claim accrued on the day when it allegedly had a right to the price adjustment it sought. *Id.* The Court explained:

> Electric Boat's injury under the Contract 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. Because the OSHA Regulation became effective in December 2004, the Navy's liability for a price adjustment became fixed under the Contract on August 15, 2005, when Clause H-30 first provides a right to a price adjustment. The Board correctly determined that the Navy's liability was fixed, and therefore Electric Boat's claim accrued, on August 15, 2005, more than six years before Electric Boat filed its claim.

Id. (internal citations omitted).[16]

[16] *Electric Boat* also rejected an argument that mandatory pre-claim procedures delayed claim accrual. 958 F.3d at 1376. Amici attempt to revive a similar argument with respect to CAS 413, Amici Br. 26, even though Textron abandons that argument. To the extent that this Court does not deem that argument

Like in *Electric Boat*, liability for the adjustment that Textron claims in this case was fixed by February 15, 2013, if not before, and its claim therefore accrued by that date.

Textron attempts to distinguish its case from *Electric Boat* by arguing that Textron preserved a breach of contract theory that Electric Boat waived. Appellant Br. 19-20 n.6. According to Textron, it can avoid the timeliness bar that befell Electric Boat simply by characterizing its claim as a breach-of-contract claim, with the alleged breach being the Government's failure to pay. *Id.* However, it is well-established that a "[p]laintiff cannot give life to [a] breach of contract claim by merely relabeling claims for which relief is available under the contract." *Mega Constr. Co. v. United States*, 29 Fed. Cl. 396, 415 (1993); *see Triax-Pac. v. Stone*, 958 F.2d 351, 354 (Fed. Cir. 1992) ("the Board did not err in deciding that Triax's claim was not remediable under a breach of contract claim"); *Hoel-Steffen Constr. Co.*, 456 F.2d at 768 ("plaintiff's claim for breach of contract . . . must be dismissed. . . . [T]he contractor cannot maintain a breach claim for which . . . contractual relief is available").[17] Thus, the law does not allow Textron to

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to be waived, the trial court correctly explained why CAS 413 does not impose any such procedures. Appx12-17; *see also* Appx200-208.

[17] The presence of the Disputes Clause, FAR 52.233-1, in Government contracts further negates any notion that the Government's refusal to pay a disputed amount under the terms of the contract can properly be characterized as a

manipulate the statute of limitations by choosing to characterize its claim as one for breach of contract.

V. Dismissal Was Appropriate And, Alternatively, The Government Was Entitled To Summary Judgment

Finally, Textron argues on appeal that resolution of this case through dismissal or summary judgment was premature. These arguments have been waived because they were not made in the trial court. *See, e.g.*, *Pavo Sols. LLC*, 35 F.4th 1367, 1380 (Fed. Cir. 2022) ("a position not presented in the tribunal under review will not be considered on appeal in the absence of exceptional circumstances"). Even if they had been raised below, they would not have sufficed to allow the case to continue.

In our initial motion to dismiss or, alternatively, for summary judgment, Appx64, we made clear that Textron's failure to comply with the CDA's six-year statute of limitations for claim presentment was apparent from the facts alleged by Textron in its complaint. Appx68. "Nonetheless, to avoid any risk of our motion being reduced to a debate over the text of the complaint," we alternatively sought summary judgment. *Id.* Thus, under both the trial court's rules and as result of the text of our motion, Textron was unquestionably on notice that if it "believe[d]

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breach of contract. *See Mega Constr. Co.*, 29 Fed. Cl. at 415 n.11. In the Disputes Clause, the parties have agreed how disagreements as to amounts payable under the terms of the contract will be resolved. That procedure does not involve the Government remitting payment as to disputed amounts.

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. *Id.*

In response, Textron did not claim that facts outside of its complaint needed to be considered. It did not assert that resolution of this issue was premature.[18] Nor did it raise any factual dispute. To the contrary, Textron expressly acknowledged its agreement on the facts and cross-moved for summary judgment in its favor. Appx182 ("The relevant facts, as pleaded in [Textron's] Complaint (ECF No. 1) and which the government states, for purposes of the Government's Motion, are not disputed are set forth below. These facts support both [Textron's] opposition to the Government's Motion and [Textron's] cross-motion for partial summary judgment."); *see also* Appx276.[19]

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[18] In briefing below, Textron summarily asserted that we had not met our burden, Appx184-185, but it proceeded to support those contentions with only its legal theories and not by identifying any specific factual issues. *See* Appx176; Appx185-194; *see also* Appx12 n.18; Appx276.

[19] In a footnote within its cross-motion and response brief below, Textron asserted that if the trial court did not rule in its favor, it should permit discovery to determine whether the statute of limitations was equitably tolled. Appx193. In our reply brief, we established that (1) Textron's footnote did not meet the requirements of RCFC 56(d), which requires a non-movant seeking to avoid summary judgment based on a lack of discovery to show, by affidavit or declaration, that essential facts are unavailable to it; (2) if there were any basis to assert equitable tolling, Textron would be aware of the basis for such an argument by then; and (3) such an argument could not succeed even if it had been preserved. Appx214-216. Over the course of several more briefs filed by each party and two

Textron's contention that dismissal was improper because "[n]othing on the face of the Complaint demonstrates when Textron knew or should have known the information necessary to submit a claim" is incorrect. Appellant Br. 31. The relevant events are all identified in Textron's complaint. Appx32-48. And Textron's allegations also establish that it was in possession of all of the necessary information regarding its own pension plans. *See id.*

Regardless, if dismissal was not warranted, summary judgment was. Textron never contested any facts. Rather, it made legal arguments regarding its alleged inability to present its certified claim at an earlier time. Those legal arguments were appropriately rejected via summary judgment, if not dismissal.

On appeal, Textron argues that there was not sufficient evidence before the trial court to determine when Textron knew or should have known of its claims. Appellant Br. 32. Textron's appellate counsel stops short of claiming that Textron lacked contemporaneous knowledge of any relevant event, and for good reason. The adjustments to which Textron claims entitlement resulted from its own actions in terminating and curtailing its pension plans. Appellant Br. 28 ("The entitlement to money arose from the contractor's actions under the contract, not the Government's actions."). Thus, the evidence of the company's contemporaneous knowledge of the relevant events is that they were admittedly undertaken by the

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oral arguments, equitable tolling was never raised again. Nor does Textron mention it in its appellate brief.

company. It is difficult to imagine how a company could lack knowledge of its own actions. Certainly, Textron does not offer this Court any reason believe that that could have been the case. Before the trial court, Textron never argued that it lacked contemporaneous knowledge of any pertinent event. To the contrary, Textron implicitly conceded such knowledge. *See* Appx12; Appx446-447.[20]

Textron's remaining arguments essentially contend that Textron should have been allowed additional time to submit its claim based on how complex its calculations were allegedly. Appellant Br. 34-38.[21] Congress provided one, six-year statute of limitations for the presentment of every CDA claim. 41 U.S.C. § 7103(a)(4)(A). Congress has not authorized this Court to make special rules for Textron or CAS 413 claims.

The claim that Textron presented to the Government on July 22, 2020 had accrued more than six years earlier. The Court of Federal Claims correctly held that it is time-barred.

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[20] The statements of Textron's counsel at oral argument were binding admissions, *see* Appx 12 n.18; *Checo v. Shinseki*, 748 F.3d 1373, 1378 n.5 (Fed. Cir. 2014), but they were not necessary to resolve this case. The allegations in the complaint were sufficient to demonstrate that the claim was time-barred.

[21] *But see* Amici Br. 3 ("CAS 413 only requires the contractor to 'determine the difference' between actuarial valuations."); Appellant Br. 28 (characterizing Textron's payment request as routine and "in essence, nothing more than an invoice").

CONCLUSION

For these reasons, we respectfully request that the Court affirm the judgment of the Court of Federal Claims.

Respectfully submitted,

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FOR THE FEDERAL CIRCUIT

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