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

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AEROSPACE INDUSTRIES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2023-1042

Short Case Caption Textron Aviation Defense LLC v. US

Filing Party/Entity National Association of Manufacturers; Chamber of Commerce of the United States of America; The Aerospace Industries Association

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

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

Date: 02/21/2023

Signature: /s/ Stephen J. McBrady

Name: Stephen J. McBrady

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
National Association of Manufacturers		
Chamber of Commerce of the United States of America		
The Aerospace Industries Association		

☐ Additional pages attached

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

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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).

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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).

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STATEMENT OF *AMICI CURIAE*

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the U.S., representing small and large manufacturers in every industrial sector and in all 50 states.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, industry sector, and region of the country.

The Aerospace Industries Association ("AIA") is a not-for-profit trade association representing the interests of the aerospace and defense industry in the United States. Founded in 1913, AIA represents more than 300 of the nation's major aerospace and defense manufacturers and suppliers, producers of products ranging from commercial aircraft, engines, and avionics, to manned and unmanned defense systems and space and satellite communication systems.

The NAM, the Chamber, and AIA file amicus briefs in appeals important to manufacturers and the business community. Our memberships include Government contractors subject to the Contract Disputes Act ("CDA") statute of limitations, and therefore this case is of particular interest to them.

As detailed herein, the trial court erred in interpreting and applying the relevant plain language of the CDA, Federal Acquisition Regulation[1] ("FAR") 2.101 ("claim" definition), FAR 33.201 ("accrual" definition), and Cost Accounting Standard ("CAS") 413.[2] A ruling in favor of Appellant reversing the court would be consistent with the plain language and this Court's precedent, and would also support efficient and non-litigious resolution of routine CAS 413 administrative adjustments between contracting partners. An efficient, collaborative, and non-litigious framework has value to industry and accords with the purpose of the CDA. If the court's decision is allowed to stand, the unfortunate result would be more confusion regarding the appropriate claim accrual standard under CAS 413, and an unpredictable and inconsistent framework that would inevitably lead to more litigation.

Pursuant to the Court's rules, *Amici* represent that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person other than *amici curiae*, their members, or their counsel contributed money that was

[1] FAR provisions are in 48 C.F.R. §§ 1-53.

[2] The relevant CAS rules are in 48 C.F.R. §§ 9903-9904. As used herein, "CAS xyz-ab" corresponds to 48 C.F.R. § 9904.xyz-ab. CAS 413 establishes the rules for the adjustment and allocation of pension cost.

intended to fund preparing or submitting this brief. All parties have consented to the filing of this amicus brief.

ARGUMENT

Amici submit this brief to amplify two dispositive points: (1) a CAS 413 calculation is "not a claim" because it is "a routine submission" that is "not in dispute when submitted" (FAR 2.101) and is not "against the Federal Government" (41 U.S.C. § 7103(a)(4)(A)); and (2) even if it were a claim, such claim would not "accrue" until all FAR 33.201 elements were met. For the reasons discussed below, the trial court misapplied the "claim" test and neglected to apply the "accrual" test. Reversal is required.

First, a CAS 413 calculation is "not a claim" under the plain language of the CDA, FAR 2.101, or CAS 413 because it is a "routine request for payment that is not in dispute when submitted[.]" FAR 2.101. CAS 413 only requires the contractor to "determine the difference" between actuarial valuations. CAS 413-50(c)(12). "Determine" means "calculate."[3] A mere calculation is not a "claim" under the statutory plain language because it is not "against the Federal Government" at the time of calculation, as required by 41 U.S.C. § 7103(a)(4)(A). In addition to being

[3] "Determine" means to calculate, *i.e.*, "to find out . . . by investigation, reasoning, or calculation." *Determine*, MERRIAM-WEBSTER DICT., https://www.merriam-webster.com/dictionary/determine.

"routine" under this Court's construction of that term, *see* App. Br. at 34-36, CAS 413 calculations in the ordinary sense are routine for actuaries, industry, and the Government Administrative Contracting Officers, FAR 42.302(a), with cognizance over CAS 413 administration. Other than a command to "determine the difference," the remaining CAS 413 instructions are either for the Government or for both parties jointly, such as the Government's obligation to modify open contracts or pay via any other suitable technique. *See* CAS 413-50(c)(12)(vi)-(vii); FAR 42.302(a).

CAS 413 thus reflects *routine* administration that is similar to routine cost vouchers under an analogous provision, FAR 52.216-7(a) and (d). For vouchered *direct* costs, the Government is entitled to an open-ended period to audit, seek substantiation, and question costs before reimbursing them. FAR 52.216-7(a). The contractor must take an affirmative step to "convert[]" a voucher into a claim, after delay or disagreement. FAR 2.101. For vouchered *indirect* costs, the Government audits and the parties negotiate for years; a claim cannot arise until the parties reach disagreement. FAR 52.216-7(d)(4). The CAS 413 adjustment process is analogous to both aspects of vouchered costs. The Government should be entitled to the same reasonable time to administratively review the proposed CAS 413 calculation and pay/adjust, or dispute, before a "claim" should arise. CAS 413-50(c)(12)(vi)-(vii). Like a voucher, a CAS 413 calculation should be understood as "routine" and "not a claim." FAR 2.101. Moreover, like any routine submission, the contractor has

discretion to later "convert[]" the routine non-claim into a claim, by the extra step of formal written submission (and certification), if the CAS 413 calculation "is disputed either as to liability or amount or is not acted upon in a reasonable time." FAR 2.101.

That CAS 413 is "routine" administration is also supported by this Court's precedent. A CAS 413 calculation is "not seeking an equitable adjustment"[4] because the contractor has an "existing contractual obligation to calculate[.]"[5] Unlike the Government, a contractor's CAS 413 claim is not compensable under FAR 52.230-2(a), the remedy-granting clause for Government-imposed CAS changes and CAS noncompliance.[6] A contractor is not entitled to receive "credits" under the plain language of FAR 31.201-5 or FAR 52.216-7(h)(2), which the *Government* is entitled to.[7] CAS 413 contains no remedy-granting language to indicate when, or if, a

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[4] *Id*. (CAS 413 is not an REA because the contractor "has an existing contractual obligation to calculate segment closing adjustments pursuant to CAS 413–50(c)(12). 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.'").

[5] *Raytheon Co. v. United States*, 747 F.3d 1341, 1352 (Fed. Cir. 2014).

[6] *See* FAR 52.230-2(a) (contractor's recovery limited to the event of Government-required CAS changes); *see also Raytheon Co*., 747 F.3d at 1352 (rejecting Government's "dubious argument that Raytheon is instead alleging CAS noncompliance by the Government.").

[7] *Allegheny Teledyne Inc. v. United States*, 316 F.3d 1366, 1370 n.3 (Fed. Cir. 2003) (FAR 31.201-5 and FAR 52.216-7(h)(2) entitled *Government* to "credits" which may include CAS 413 amounts (under pre-1995 CAS 413 text)). After 1995, new adjustment was expanded to fixed-price "contract prices" or "any other suitable technique," such as direct payment. *See Raytheon Co.*, 747 F.3d at 1353-54 ("CAS

contractor has a dispute/claim within the meaning of the "Disputes Clause" (FAR 52.233-1).

Second, even assuming CAS 413 calculations were non-routine, this Court should still reverse the trial court due to its misapplication of the FAR 33.201 standard for claim accrual. The trial court, in finding Textron's claim time-barred, failed to analyze the elements within the plain language of FAR 33.201. All elements of the FAR 33.201 test must be satisfied for a claim to accrue. The court's ruling was inconsistent with each FAR 33.201 element, discussed in Section II.B, providing alternative grounds for reversal.

I. THE STANDARD FOR CLAIM ACCRUAL UNDER THE CDA

In 1995, Congress amended the CDA to include a statute of limitations period for submitting certified claims. The CDA requires that "[e]ach claim by a contractor against the Federal Government . . . shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4)(A).

Because Congress did not define the terms "accrual" or "claim," this Court looks to "the FAR, the conditions of [a] contract, and the facts of [a] particular case" to determine when certified claims accrue. *Kellogg Brown & Root Servs., Inc. v. Murphy ("KBR")*, 823 F.3d 622, 626 (Fed. Cir. 2016) (citing *Parsons Global Servs.*

Board revised CAS 413 to allow recovery under both cost-type contracts and fixed-price contracts."). Fixed-price contracts lack FAR 52.216-7 (cost-type) but are eligible for CAS 413 adjustment.

v. McHugh, 677 F.3d 1166, 1170 (Fed. Cir. 2012)). FAR 33.201 defines "[a]ccrual of a claim" as:

> 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.

FAR 33.201 (emphasis added). Although this Court has yet to fully articulate the accrual standard applicable to a CAS 413 claim, the plain language and precedent make clear that four separate elements must be present to start claim accrual:

1. **"Claim":** There must be a cognizable "claim" within the meaning of FAR 2.101. FAR 33.201; *see KBR*, 823 F.3d at 626 ("Fixing the date of accrual of a claim requires first that there is a 'claim' as defined in the [CDA] and associated Regulations.").
2. **"Injury":** A claimant must actually suffer a cognizable harm. FAR 33.201; *see Elec. Boat Corp. v. Navy*, 958 F.3d 1372, 1375-76 (Fed. Cir. 2020) (Contractor injured by February 2005 when it began complying with OSHA rule, but this did not start accrual).[8]
3. **"Know[ledge]":** A claimant must possess knowledge of "all events" that fix liability—knowledge of a potential future claim depending on certain events

[8] "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." *Elec. Boat*, 958 F.3d at 1376 (emphasis added).

does not satisfy FAR 33.201. *See Elec. Boat*, 958 F.3d at 1375-76 (OSHA rule, effective December 2004, required compliance within 90 days (by February 2005), but knowledge of future injury did not start accrual).

4. **"Permit Assertion":** A claim does not accrue until the other party becomes legally liable for those injuries that permit assertion of the claim, including mandatory pre-claim procedures. FAR 33.201; *see Elec. Boat*, 958 F.3d at 1375-76 ("[T]he 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.")[9]; *KBR*, 823 F.3d at 626 (mandatory pre-claim procedures); *Triple Canopy, Inc. v. Sec'y of Air Force*, 14 F.4th 1332, 1339 (Fed. Cir. 2021) (same).

While the presence of each element depends on the particular facts of each contract and case, a claim does not accrue until all four elements are present. *See Elec. Boat*, 958 F.3d at 1375-76; *KBR*, 823 F.3d at 626.

II. THE TRIAL COURT MISAPPLIED THE CLAIM ACCRUAL STANDARD

The trial court erroneously held that Textron's CAS 413 claim began to accrue at either plan curtailment/termination ("as early as December 31, 2012") or "no later

[9] *Id.* at 1375 ("The Board further held that Electric Boat 'suffered some injury not later than August 15, 2005, the date two years after the effective date of the [C]ontract when [the Change-of-Law Clause] would first provide the right to a price adjustment.'").

than February 15, 2013." *Textron Aviation Def. LLC v. United States*, 161 Fed. Cl. 256, 266, 276 (2022).

The trial court erroneously held that a CAS 413 calculation was a "claim" by misinterpreting the plain language of the CDA, FAR 2.101, CAS 413, and precedent. The court further misapplied the necessary elements of claim accrual under FAR 33.201. Affirming the trial court's erroneous interpretation would distort the elements of claim accrual, and in the specific instance of CAS 413 would prejudice industry.[10]

A. "Claim" Element: The Trial Court Erred in Holding That CAS 413 Calculations Are Non-Routine CDA "Claims" Against the Government

For a claim to accrue, there must be an underlying "claim" within the meaning of FAR 2.101. *See KBR 2016*, 823 F.3d at 626. FAR 2.101 clarifies that a "routine request for payment that is not in dispute when submitted is not a claim."

Textron correctly describes the applicable legal standard regarding why a CAS 413 calculation is a "routine request for payment that is not in dispute when submitted" and, hence, "is not a claim." FAR 2.101. *Amici* encourage this Court to reaffirm the "common thread" of precedent that it "is the presence of some unexpected or unforeseen action on the government's part that ties it to the

[10] A Government CAS 413 claim arises (if at all) from a pension surplus. *See Gates v. Raytheon Co.*, 584 F.3d 1062 (Fed. Cir. 2009).

demanded costs" that makes a request for payment nonroutine. *Parsons*, 677 F.3d at 1170-71.

Amici make two additional points. First, under FAR 2.101, CAS 413 contains an administrative audit and adjustment that is materially indistinguishable from vouchers under FAR 52.216-7, which are not claims. Second, under the CDA, a CAS 413 calculation is not a claim because it is not "against the Federal Government."

1. Under FAR 2.101, a CAS 413 Calculation Is a "Routine Request" That Is "Not in Dispute When Submitted"

First, a CAS 413 calculation is analogous to a cost "voucher,"[11] which is listed in FAR 2.101's *non-exhaustive* list of "routine request[s] for payment" that are not claims. Second, the trial court improperly narrowed the plain language of FAR 2.101 by compressing the non-exhaustive list of "other routine request[s]" into a litmus test using the singular definition of "invoice" (and voucher, in passing). Third, the court improperly analogized a CAS 413 submission to a Request for Equitable Adjustment ("REA"), *Textron*, 161 Fed. Cl. at 271, a proposition that this Court has squarely rejected, *Raytheon Co.*, 747 F.3d 1341, 1352 (Fed. Cir. 2014).

[11] FAR 52.216-7; *see* FAR 53.301-1034 (voucher form).

a. A CAS 413 Calculation Is Analogous to a "Voucher" and Certainly a "Routine Request" under FAR 2.101

A "voucher" seeks reimbursement for allowable direct and provisional *indirect* costs incurred. *See* FAR 52.216-7(a)-(b), (d); FAR 53.301-1034 (form). The face of the voucher states the Government's liability for the incurred costs. Notwithstanding the contractor's ability to calculate the Government's provisional liability at the time of voucher submission, FAR 2.101 makes clear that a "voucher . . . is not a claim." FAR 2.101.

For vouchered *indirect* costs, the parties engage in a lengthy audit, negotiation, and retroactive cost adjustment process, informally referred to as "true-up." *See* FAR 52.216-7(d). The complexity of this true-up process means payment can come *years* after the vouchers were submitted. Claim accrual starts when there is *disagreement* over the calculations. FAR 52.216-7(d)(4).

For vouchered *direct* costs, the FAR grants the Government an open-ended period to audit and demand cost substantiation. FAR 52.216-7(a) ("In the event that the Government requires an audit or other review of a specific payment request . . . the designated payment office is not compelled to make payment by the specified due date."). Claim accrual starts when the contractor formally "convert[s]" the voucher into a claim. FAR 2.101.

A CAS 413 calculation is analogous to the "voucher" process under FAR 52.216-7 in all material ways and, if anything, is even *less* like a claim under FAR

2.101. Both vouchers and CAS 413 require calculation of liability. Both include indirect costs unrelated to direct contract performance/deliverables. Both involve a complex "true-up" process involving previously over- or under-reimbursed indirect costs. Both provide for the Government's participation and administrative review to verify the proper indirect cost amount. *See* FAR 52.216-7(d); CAS 413-50(c)(12)(vi)-(vii).

And, making CAS 413 even less claim-like, a voucher demands reimbursement for costs already *incurred*—either directly, or using provisional estimates for the indirect costs—*before* voucher submission. FAR 52.216-7(a). Despite the contractor having already suffered the inchoate harm (incurred costs), a voucher "is not a claim" under FAR 2.101 because the Government has the opportunity to administratively review and pay the voucher. FAR 52.216-7(a), (d).

It is the subsequent incurrence of costs and inchoate harm that makes a CAS 413 calculation even less of a demand for payment than a voucher, and, hence, even less cognizable as a claim. A CAS 413 calculation does *not* represent a demand for any costs already incurred in the past. *Gates v. Raytheon Co*., 584 F.3d 1062, 1068-69 (Fed. Cir. 2009) ("CAS 413 is unusual"). In *Gates*, this Court explained that a party does not suffer an injury for the *historical* funding of prior-period pension costs paid in the past. *Id.* at 1068. This is because the CAS 413 owed amount is only "allocable" to current-period contracts that remain open—*i.e.*, contracts open both

after and "during the cost accounting period in which the event occurred." CAS 413-50(c)(12)(vii); *see Gates*, 584 F.3d at 1068-69.

Properly understood, the CAS 413 calculation is a *proposal* for the *prospective* adjustment of open contracts ("or other suitable technique"[12]). The inchoate liability is calculated following a prescribed regulatory formula (based on actuarial valuation and historical contract information), but the harm to a party does not attach (if at all) until a *future* moment. *See Gates*, 584 F.3d. at 1066-69 (construing CAS 413-50(c)(12)(vii)); *infra* Section II.B.1 ("Injury"). The Government may either adopt or recalculate the contractor's CAS 413 proposal; it has time to review. *See* CAS 413-50(c)(12)(vi)-(vii).

This Government administrative review embedded in CAS 413-50(c)(12)(vi)-(vii) makes this process similar to the routine cost voucher process under FAR 52.216-7(a), (d). For vouchered *indirect* costs to ripen into a "claim," the parties must complete a complex audit and adjustment process; if they cannot agree on the calculation, then their *disagreement* starts the claim. FAR 52.216-7(d)(4). For vouchered *direct* costs to ripen into a "claim" after the Government's open-ended audit period (FAR 52.216-7(a)), the contractor must take an additional, affirmative step to formally "convert[]" its routine voucher request into a "claim" (if the

[12] The Government can make direct payment, or pay from the Judgment Fund, 31 U.S.C. § 1304(a)(3), after "settlement."

Government fails to pay "in a reasonable time" or manifests a "dispute[]" as to either "liability or amount"). FAR 2.101.

A CAS 413 proposal for the prospective adjustment to open contracts is materially indistinguishable from this voucher process under FAR 52.216-7. Under CAS 413, if the Government—as part of its routine contract administration—agrees with the CAS 413 calculation and pays (or accepts payment), then no CAS 413 "claim" could be said to have occurred under FAR 2.101. Rather, the contractor's proposal for the Government to adopt its calculation for prospective adjustment would reflect routine contract administration or, at most, inchoate liability that was "not in dispute when submitted[.]" FAR 2.101. Similar to the voucher process, if the Government fails to pay "in a reasonable time" or manifests a "dispute[]" as to either "liability or amount[,]" then *at that later time* the contractor could choose to take the additional step of formally "convert[ing]" its routine CAS 413 request for payment into a "claim." FAR 2.101. Or, following the express remedy-granting clause of FAR 52.216-7(d)(4), the manifestation of disagreement over the CAS 413 calculation could signal the right to submit a claim. But *not* before the occurrence of that future event, which is why a CAS 413 calculation, like a voucher, is "not a claim." FAR 2.101.

b. The Trial Court Erred by Improperly Narrowing the Plain Language of FAR 2.101

The trial court violated the plain meaning rule by narrowing the broad, non-exhaustive list of "other routine request[s]" contained in FAR 2.101 to a new, exhaustive list, primarily limited to the regulatory *example* of an "invoice." FAR 2.101; *see Textron*, 161 Fed. Cl. at 270-71, 275.

The court repeatedly focused on an irrelevant definition of "invoice[,]" a billing instrument used for *price*-based *direct* performance, and viewed it as noteworthy that the "invoice" did not align with CAS 413. *Textron*, 161 Fed. Cl. at 270, 275 ("Indeed, the FAR defines an 'invoice' as . . . ."). The court concluded that a CAS 413 calculation must necessarily be a non-routine "claim" because CAS 413 "is not remotely like an invoice," *id*. at 270, and "bears no resemblance to an 'invoice' as that term is separately and expressly defined in the FAR[,]" *id*. at 275.

The comparison was specious, and it is legally immaterial because "invoice" is just one *example* of a "routine request" in FAR 2.101. The finding that a CAS 413 submission "is not remotely like an invoice" was never a plain language requirement, and it is not dispositive on whether CAS 413 could fit within FAR 2.101's much broader scope of "other routine request[s]."

The trial court also looked to irrelevant indicia for invoices/vouchers in past cases involving *direct* performance billings. *Id*. at 271, 275. The court thought that CAS 413 must be a non-routine claim "for the simple reason that the alleged amount

owed to Textron AD has no connection whatsoever to the 'expected or scheduled progression of contract performance[.]'" *Id*. at 271; *see id*. at 275.

Notwithstanding that a CAS 413 submission *is* similar to a voucher (*see supra* Section II.A.1.a), the plain language of FAR 2.101 is not limited to invoices/vouchers nor to direct performance "scheduled progression." The plain language more broadly includes any "other routine request for payment[,]" which CAS 413 satisfies. The court therefore erred by narrowing the language in FAR 2.101.

c. The Court Erred by Conflating a CAS 413 Calculation With a "Request for Equitable Adjustment"

Lastly, the trial court erred by conflating or analogizing Textron's CAS 413 submission to an "REA" in order to hold that CAS 413 was a non-routine "claim." *Id*. at 271. The court referenced—twice—why CAS 413 was dissimilar from a voucher/invoice because it allegedly was more similar to a non-routine "REA." *Id.*

The court's conflation of CAS 413 with an "REA" is inconsistent with precedent. This Court previously rejected that analogy when it held that a CAS 413 submission "is not seeking an equitable adjustment." *Raytheon Co.*, 747 F.3d at 1352 (CAS 413 is not an REA because the contractor "has an existing contractual obligation to calculate segment closing adjustments pursuant to CAS 413–50(c)(12). 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.'").

The court's conflation of a CAS 413 submission with an REA conflicts with controlling precedent and should not be affirmed.

2. Under the CDA, Following the CAS 413 Formula Is Not "Against the Federal Government" When Calculated and Thus Not a "Claim"

In addition to misapplying the plain language of FAR 2.101, the court's decision loses sight of the CDA's requirement that all contractor claims be "*against* the Federal Government." 41 U.S.C. § 7103(a)(1), (a)(4)(A). Until and unless the government disputes the CAS 413 calculation, the government and the contractor are not adverse to one another, and the contractor has taken no action "against" the government.

Neither the statute nor the regulation defines "against." But given its ordinary meaning, "against" means "in opposition to," *i.e.*, not aligned with the interests of the other party. *Borden v. United States*, 141 S. Ct. 1817, 1826 (2021) (dictionaries indicate against can mean "in opposition to"); CONCISE OXFORD ENGLISH DICT. 24 (10th ed. 2002) ("in opposition to"); MERRIAM-WEBSTER'S COLLEGIATE DICT. 23 (11th ed. 2012) ("in opposition . . . to").

A contractor's mere mathematical calculation of an amount, following the prescribed CAS 413 formula, for the parties to implement by administrative

adjustment pursuant to CAS 413, does not possess any indicia of "adversity" or non-alignment of interest at the moment it is calculated. At that moment, there is no indication that the Government would do anything other than administratively make the CAS 413 adjustment. It is not until one party fails, or refuses, to pay the amount, that any sort of "adversity" arises. *See Gates*, 584 F.3d at 1066-67 (first injury under CAS 413 is when a party fails to make timely payment).

Specifically, CAS 413-50(c)(12) merely calls for an adjustment of estimated pension prices/costs. *See* CAS 413-50(c)(12). The contractor is tasked to "determine the difference" and report the results of that calculation to the government for an adjustment. *Id*. The lack of adversity is particularly evident in this case in the government's behavior prior to its assertion of a statute of limitations defense. Upon receiving Textron's calculation that the Government's portion of pension costs had been underestimated, the matter was delegated to auditors for verification. The Government "appears to owe (or perhaps even admits to owing)" most of the calculated amount. *Textron*, 161 Fed. Cl. at 275.

In no sense could this series of regulatory-prescribed administrative calculations, interactions, and eventual agreement be construed as "adverse," "opposed to," or "against" while ongoing. Thus, Textron's submission of a calculation in support of a contract adjustment was not "against the Federal Government" at the time of calculation. Therefore it was not a CDA-cognizable

"claim . . . against the Federal Government" under the statutory plain language. 41 U.S.C. § 7103(a)(1) or (a)(4)(A).

Without a "claim," no claim began to accrue. FAR 33.201; *see KBR*, 823 F.3d at 626. The court erred in its holding that Textron's claim accrued by February 15, 2013, long before the Government manifested any "opposition" or "adversity" to paying the prescribed CAS 413 formulaic amount.

B. Under FAR 33.201, the Court Erred in Applying the Other Three Claim Accrual Elements *Even If* CAS 413 Is Non-Routine

As described above, this Court should hold that Textron's CAS 413 submission was "routine" and thus "not a claim." FAR 2.101. Such a ruling would be dispositive, and render unnecessary the Court's analysis of the other three elements of FAR 33.201, because if there is no "claim" then there can be no "claim accrual." *See KBR*, 823 F.3d at 626.

Even assuming there was a non-routine claim, this Court should still reverse the trial court due to its failure to apply (or misapplication of) the FAR 33.201 standard for claim accrual. Each of the FAR 33.201 elements of "injury," "permit assertion," and "know[ledge]" is required for a claim to accrue—each is discussed in turn below. FAR 33.201.

1. "Injury" Element: CAS 413-50(c)(12)(vii) Makes Clear that a Party's *Failure to Timely Make Payment* Is the Cognizable CAS 413 "Injury" under FAR 33.201

The trial court's decision, in a footnote, mentions "injury" without analysis. *Textron*, 161 Fed. Cl. at 266 n.15. Instead of applying the FAR 33.201 standard, the court appears to have erroneously presumed (*sub silentio*) that the Government's *prior* over-funding of pension costs on *historical* contracts was a sufficient, cognizable injury for a claim to accrue. *See id*. at 266. The court's presumption violates the plain language of the CAS and FAR and is inconsistent with this Court's precedent.

"For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred." FAR 33.201.

CAS 413-50(c)(12)(vii) states that "[t]he full amount of the Government's share of an adjustment is allocable, without limit, as a credit or charge during the cost accounting period in which the event occurred and contract prices/costs will be adjusted accordingly."

This Court, construing CAS 413 (albeit not in the context of claim accrual), explained that the *injury* under CAS 413 is *not* the historical over-funding or under-funding of prior pension costs overpaid (or underpaid) in the past. *Gates*, 584 F.3d at 1068. This is because the "full amount" of the CAS 413 owed amount is only "allocable" to *open* contracts—*i.e.*, contracts that were open "during the cost

accounting period in which the event occurred." CAS 413-50(c)(12)(vii); *see Gates*, 584 F.3d at 1068-69.

In *Gates*, this Court explained "[b]ecause CAS 413-50(c)(12) contemplates adjustment to any or all contracts that are open during the period of the segment closing, it is on these *open contracts* that the *Government has paid increased costs*." *Gates*, 584 F.3d at 1069. The injury to the Government in *Gates* was the "increased costs" overpaid on the *open* flexibly-priced contracts at the *end* of the accounting period of the segment closing. *Id*. ("[T]he relevant contract payments are those made in the period of the segment closing—and those were clearly 'increased' by the failure to credit the segment closing adjustment in the period required by CAS 413.").

Expanding *Gates* to all CAS 413 claims, a straightforward rule is that the CAS 413 injury (if any) can only materialize from a party's *failure to timely pay*. *See id*.[13] The CAS 413 injury does *not* arise from the mere fact *of* a segment closing. *See id*. Mere knowledge that a segment closing might give rise to the need for a future CAS 413 administrative adjustment is not the same as an extant injury. *See id*.

[13] For potential injury to the Government, that injury cannot attach until the end of the cost accounting period in which the event occurred. The injury to the contractor from Government untimely payment attaches differently, discussed herein.

Here, the trial court's tacit presumption that a contractor's injury could attach at the moment of segment closing cannot be squared with the plain language of CAS 413-50(c)(12)(vii) or *Gates*, 584 F.3d at 1069.

The court's error leaves unresolved *when* Textron's "injury" did attach, which we address. Importantly, unlike Government CAS 413 claims, a contractor's injury cannot attach by the mere fact of Government nonpayment at the end of the accounting period because then a contractor, by delaying its CAS 413 submission, could unilaterally place the Government in a violation of CAS 413-50(c)(12)(vii). That would be inconsistent with the administrative adjustment process of CAS 413, which implicitly grants the Government a reasonable time to audit and implement the adjustment before nonpayment (injury) could attach. *See* CAS 413-50(c)(12)(vi)-(vii); FAR 33.201.

The plain language of CAS 413, setting forth the administrative adjustment process, is dispositive for determining *when* the Government first *fails to make timely payment* of the CAS 413 owed amount, *i.e.*, when the contractor first suffers "injury" under CAS 413-50(c)(12)(vii) and *Gates*. CAS 413 only requires that a contractor perform an actuarial calculation by "determin[ing] the difference

between" actuarial valuations. CAS 413-50(c)(12).[14] "[D]etermine" means to calculate.[15] The remaining CAS 413 requirements either fall upon the Government or both parties by mutual agreement. *See* CAS 413-50(c)(12)(vi)-(vii). CAS 413 instructs both parties to negotiate an "amortization plan," if desired. CAS 413-50(c)(12)(vii). If there is no amortization plan, CAS 413-50(c)(12)(vi) and FAR 42.302(a) authorize the cognizant Administrative Contracting Officer to implement the CAS 413 "adjustment" by any "suitable technique," such as modifying one or more "contract prices" (*i.e.*, to fixed-priced contracts open in the accounting year of curtailment/termination), or modifying "contract . . . cost allowance" (*i.e.*, to flexibly-priced contracts open in the accounting year of curtailment/termination), or any other suitable technique, such as direct payment or Judgment Fund payment. CAS 413-50(c)(12)(vi); *see* FAR 42.302(a).

The Government could not be said to have *failed to timely pay* the contractor until the Government is afforded a reasonable amount of time to perform its administrative/auditing duties and make the administrative adjustment/payment because: (1) the Government has contract administration responsibilities to confirm

[14] There appears to be an implicit, albeit unstated, duty for the contractor to inform the Government of the curtailment/termination and the amount of the actuarial "difference" the contractor "determin[ed]." CAS 413-50(c)(12).

[15] *Determine*, MERRIAM-WEBSTER DICT., https://www.merriam-webster.com/dictionary/determine ("to find out . . . by investigation, reasoning, or calculation.").

the CAS 413 calculation before paying the "Government's share" of the CAS 413 actuarial deficit to the contractor; and (2) the contractor's CAS 413 calculation is *not* a request for "equitable adjustment," *Raytheon Co.*, 747 F.3d at 1352.

Thus, the time before the *end* of that reasonable period (during which the Government performs its administrative audit/payment functions) is only the contractor's possibility of a potential future injury, not an extant injury—just like the *Government's* potential future injury at the date of segment closing does not become a "fixed" injury until the *end* of the current period when the contractor's payment, or noncompliance, can be ascertained. FAR 33.201.

In sum, the contractor does not suffer a cognizable "injury" until the Government's "liability" *for timely nonpayment* becomes "fixed." FAR 33.201; *see Gates*, 584 F.3d at 1067-69. A workable rule for when CAS 413 payment to the contractor is timely must be consistent with: (1) the plain language of FAR 33.201 and CAS 413; (2) precedent regarding CAS 413 injury to open contracts in the current period[16]; (3) precedent holding that the CAS 413 calculation is not a request for "equitable adjustment"[17]; and (4) the Government's CAS/FAR need to discharge its administrative/audit functions to confirm the CAS 413 calculation.

[16] *Gates*, 584 F.3d at 1068-69.

[17] *Raytheon Co.*, 747 F.3d at 1352.

Consistent with the above, a workable rule is that the contractor is not "injured" until the *earlier* of two nonpayment events: (1) manifestation of a "dispute[] either as to liability or amount" (FAR 2.101); *or* (2) the date after the request "is not acted upon in a reasonable time" (FAR 2.101) for the Government to perform its administrative review, validation, and payment functions.[18] By the earlier of these two events, the contractor is "injured" for purposes of FAR 33.201 accrual.

Because CAS 413 is "routine" (Section II.A), at the moment of "injury" the contractor could take the simple, affirmative step of "convert[ing]" the CAS 413 into "a claim, by written notice to the contracting officer" (FAR 2.101). Even if CAS 413 were *non*-routine, then either untimely payment or the "[f]ailure by the parties to agree" (FAR 52.216-7(d)(4)) should permit assertion of the claim. Either way requires reversal in this case.[19]

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[18] These administrative functions include validating the actuarial calculation (CAS 413-50(c)(12)), auditing the "Government share" calculation (CAS 413-50(c)(12)(vi)), and paying/adjusting what is owed (*id*.)

[19] *Even if* this Court were to disagree with Amici's and Textron's proposed tests for accrual of a contractor's CAS 413 claim, this Court should still reverse the trial court's misinterpretation of CAS 413 and *Gates*. While the end of the accounting period in which the segment closing occurred is *not* the contractor's "injury," *see supra*, under no interpretation of CAS 413-50(c)(12)(vii) and FAR 33.201 could a party have "injury" before the *end* of that accounting period. *See Gates*, 584 F.3d at 1068-69.

2. "Permit Assertion" Element: The Court Erred Because Certain Mandatory Pre-Claim Steps May Not Permit Assertion of a Claim by Feb. 15, 2013

A claim does accrue until the other party becomes legally liable for the injuries that "permit assertion" of the claim, even where injury and knowledge have attached. FAR 33.201. The contractor must be legally able to assert a claim for the statute of limitations period to begin to run. *Elec. Boat*, 958 F.3d at 1375–76.

For example, "mandatory pre-claim procedures" prevent accrual. *KBR*, 823 F.3d 622, 626 (Fed. Cir. 2016) (Government's directions regarding additional steps sufficient to prevent accrual); *Triple Canopy, Inc. v. Sec'y of Air Force*, 14 F.4th 1332, 1339 (Fed. Cir. 2021) (no accrual until exhaustion of administrative steps in FAR tax clause).

A second scenario is where a clause specifies dates or events that are required to permit assertion of the claim, but it does not require a party to affirmatively take or exhaust additional steps. *See Elec. Boat*, 958 F.3d at 1375-76 ("August 15, 2005, when Clause H-30 first provides a right to a price adjustment.").

Here, the trial court analyzed and rejected Textron's allegation of mandatory pre-claim procedures, holding that it "identifies no language in CAS 413, or in any statute, regulation, or case law, to support the notion that there is some specific documentation that must be provided to the government for review prior to a

contractor's submission of a CDA claim seeking CAS 413 pension costs." *Textron*, 161 Fed. Cl. at 267.

But the fatal flaw is that the trial court simply presumed that the mere event of a segment closing (termination/curtailment) was sufficient to permit the assertion of the claim and trigger accrual. That presumption was incorrect because it was inconsistent with the plain language of CAS 413-50(c)(12)(vii) and *Gates*, for all of the reasons detailed above in Section II.B.1.

Once the court's presumption is set aside, the mandatory pre-claim procedures of CAS 413 come into clearer focus for all of the reasons detailed extensively above in Section II.A.1.a (similarity to FAR 52.216-7 "voucher" administrative audit/payment process) and Section II.B.1.a-b (listing Government or bilateral administrative steps required cognizable injury). The CAS 413 calculation of current-period liability based on actuarial valuations and historical information is extraordinarily complex. The plain language of CAS 413 necessitates the Government's participation in this administrative calculation and payment process. CAS 413, like FAR 52.216-7(d), is properly construed as affording the Government a reasonable opportunity to perform and discharge its administrative audit and payment functions.

Under FAR 33.201, these CAS 413 pre-claim administrative procedures are materially indistinguishable from the steps involved in reviewing vouchered costs

under FAR 52.216-7. CAS 413 is similar to the *indirect* cost "true-up" pre-claim procedures under FAR 52.216-7(d) because both necessitate Government involvement with lengthy and complex indirect calculations. Under 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. CAS 413 is precisely the same, except that the CAS Board has no jurisdiction to create statutory CDA "claim" rights or to infringe on the FAR Disputes clause (FAR 52.233-1), so CAS 413 is jurisdictionally silent. But this Court should give effect to the similar mandatory pre-claim steps found in CAS 413 because CAS 413 is the basis for the contractor's claim.[20]

In addition, the CAS 413 pre-claim procedures are also similar to administrative *direct* cost procedures under FAR 52.216-7(a), where the Government has an open-ended right to audit vouchered costs, validate calculations, and decide to pay. CAS 413, similarly, lacks a stated deadline for the Government to conclude its administrative payment/adjustment functions. *See* CAS 413-50(c)(12)(vi)-(vi). As such, the same FAR 33.201 standard applicable to the

[20] CAS 413 is not recoverable by a FAR REA because contractors have "an existing contractual obligation to calculate segment closing adjustments pursuant to CAS 413–50(c)(12). *Raytheon Co.*, 747 F.3d at 1352. The plain language of FAR 52.230-2(a) makes it inapplicable to CAS 413 recovery. Even *if* it were applicable, FAR 52.230-2(a)(4)(ii) mandates pre-claim procedures to "Negotiate with the Contracting Officer . . . ."

Government's pre-claim review procedures of vouchered direct costs could apply to a CAS 413 cost submission. If the contractor believes that the vouchered direct costs (or CAS 413 calculation) were "disputed either as to liability or amount or is not acted upon in a reasonable time[,]" then the contractor could take an additional step of formally "convert[ing]" the voucher (or CAS 413 submission) into a "claim" by written notice. FAR 2.101. It is indisputable a contractor would not have a "claim" until it took this formal "conver[sion]" step. FAR 2.101. It is likewise indisputable that this cost voucher claim would not *accrue* until this conversion step (FAR 33.201), and neither should a CAS 413 submission.

3. "Know[ledge]" Element: The Court Failed to Analyze the FAR 33.201 Standard and Violated CAS 413-50(c)(12)(i) in Determining When "All Events" Could Have Been "Known"

The FAR 33.201 knowledge standard is not satisfied until "*all events*, that fix the alleged liability . . . and permit assertion of the claim" should be "known." FAR 33.201.

The trial court neglected to analyze or apply this knowledge standard. *See Textron*, 161 Fed. Cl. at 266-276. Knowledge of a potential future claim at the time of segment closing is not "know[ledge]" of "*all* events, that fix the alleged liability" under FAR 33.201. Textron's brief correctly identifies the court's failure to perform necessary fact-finding regarding when the knowledge standard was satisfied. *See* App. Br. at 38-47.

One example of the court's misapplication of the knowledge standard is evident in the court's holding that all three pension plan claims accrued "as early as December 31, 2012." *Textron*, 161 Fed. Cl. at 266, 276. For the two terminated plans ("Salaried Plan" and "Base Plan"), a necessary "event[]" before knowledge could be "fix[ed]" under FAR 33.201 is the February 13, 2013 transfer of terminated plans to the Pension Benefit Guarantee Corporation ("PBGC"). Under the plain language of CAS 413-50(c)(12)(i), when pension plans are terminated and assets/liabilities transferred to the PBGC, the "measurement" of "actuarial accrued liability" becomes fixed "as the amount . . . paid to the [PBGC]."[21] The PBGC transfer price was thus one (*of many*) necessary "events" that must all be "fixed" to satisfy FAR 33.201 "know[ledge]." This PBGC event was not knowable until the February 13, 2013 transfer, revealing that the court misapplied the FAR 33.201 knowledge standard in holding the claims accrued "as early as December 31, 2012." *Textron*, 161 Fed. Cl. at 266, 276. Textron's brief identifies additional examples of errors. Reversal or remand is warranted.

CONCLUSION

For the reasons above, this Court should reverse. If the court's decision is allowed to stand, the unfortunate result would be more confusion regarding the

[21] "Actuarial accrued liability" is one of the two inputs needed for the contractor's actuaries to "determine the difference" under CAS 413-50(c)(12).

appropriate claim accrual standard and an unpredictable and inconsistent framework that would inevitably lead to more litigation.

Dated: February 21, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Stephen J. McBrady
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FOR THE FEDERAL CIRCUIT

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