

FOREWORD

THE MODERNIZATION OF GOVERNMENT CONTRACT APPEALS AND THE FEDERAL CIRCUIT

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Because appeals from the boards of contract appeals and the Court of Federal Claims involving contract disputes comprise a sliver of the volume of cases heard by the Federal Circuit,¹ any government contract decisions issued are of significant import to the government contracts community. In one area of focus—the evolving requirements of contract claims—the contracting officer’s duty of claim resolution is more challenging than ever. This Foreword examines the historical development of contract

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The views expressed are my own and in no way attributable to the United States Civilian Board of Contract Appeals, my colleagues, or to the United States Federal Government. I thank my law clerk, Matthew Lewis, for assisting me with this Foreword.

1. For example, of the types of appeals heard by the Federal Circuit, the total time devoted to the patent docket has been estimated by one Federal Circuit judge as exceeding 80%. See Timothy B. Dyk, Foreword, *Federal Circuit Jurisdiction: Looking Back and Thinking Forward*, 67 AM. U. L. REV. 971, 973 (2018).

appeals and the role of contracting officers in the dispute process, and highlights recent decisions impacting contracting officers.

GOVERNMENT CONTRACT APPEALS AND THE FEDERAL CIRCUIT

The primary jurisdiction of the boards of contract appeals has been government contract cases under the Contract Disputes Act (CDA).² Various fora resolving these disputes have existed since the founding of our nation. Courts and boards have been created, separated, and combined through a patchwork of legislation and administrative action before finally arriving at the judicial forum we see today. Under current law, CDA claims are first heard by a contracting officer,³ before being appealed to either a board of contract appeals or the Court of Federal Claims (CFC) under a shared jurisdiction. From there, a case may be appealed from either forum to the Federal Circuit and might be heard by certiorari in the Supreme Court.

The role of the contracting officer is unique. Initially, the contracting officer functions as the government's advocate while negotiating for the government. The contracting officer's role changes once he or she is called to render a final decision under the disputes clause. This quasi-judicial duty of the contracting officer is a particularly important nuance to the field of government contracting. It is only after a contractor has submitted a claim to the contracting officer that a case may be brought to either the CFC or a board of contract appeals.⁴ The contracting officer also must make a final decision (or fail to do so within the required period of time) before a claim is appealable. In this decision-making role, a contracting officer has an obligation not only to follow the applicable laws and regulations but also to treat contractors fairly.⁵ This role in making preliminary

2. Pub. L. No. 95-563, 92 Stat. 2383 (1978) (codified as amended at 41 U.S.C. §§ 7101-7109 (2012)).

3. A contracting officer is "a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings." FAR 2.101 (2018) (defining "Contracting Officer").

4. 41 U.S.C. §§ 7103-7105.

5. S. REP. NO. 95-1118, at 1 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5235, 5235 (explaining one of the purposes of the Contract Disputes Act of 1978 as "insur[ing] fair and equitable treatment to contractors"); FAR 33.211 (outlining the steps a contracting officer must follow when making a decision); FAR 1.602-2(b) (describing contracting officers responsibilities to include "[e]nsur[ing] that contractors receive impartial, fair, and equitable treatment"); *see also* Penner Installation Corp. v. United States, 89 F. Supp. 545, 547 (Ct. Cl. 1950) ("[T]he contracting officer must act impartially

decisions serves as a gatekeeper in one sense, alleviating the burden on the fora that would otherwise hear these complaints if the disputes could not be resolved at the contracting officer level. If appealed, the contracting officer's final decision and the underlying administrative record provide the initial evidentiary record, though the boards and CFC allow the record to be supplemented and will hear issues of both law and fact de novo.⁶

I. HISTORY OF CONTRACT APPEALS

A. Early History

Contracts with the federal government (or what would become the government) extend back to the time of the Revolutionary War, preceding formal design for contracting disputes or appeals.⁷ Under the structure of the Articles of Confederacy, the power to pay federal expenses would be decided by the "United States, in Congress assembled."⁸ After the founding of the current United States government, the underlying principle of sovereign immunity (affecting contracting disputes to this day)⁹ limited the ability of courts to resolve contract claims against the United States.¹⁰ Thus, if a federal contractor sought to be reimbursed for a claim, they would take their claims directly to Congress or to the Treasury Department.¹¹

One of the most famous government procurements highlights the early relationship between the United States government and federal contractors. In 1798, fearing a potential war with France, Congress

in settling disputes. He must not act as a representative of one of the contracting parties, but as an impartial, unbiased judge."), *aff'd per curiam*, 340 U.S. 898 (1950).

6. 41 U.S.C. §§ 7104–06.

7. See *Space Gateway Support, LLC*, ASBCA Nos. 55608, 55658, 13-1 BCA ¶ 35,232.

8. Floyd D Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 634 (1985) (citing ARTICLES OF CONFEDERATION OF 1781, art. VIII, para. 1).

9. See, e.g., *PAE-Parsons Glob. Logistics Servs., LLC v. United States*, 145 Fed. Cl. 194, 197–98 (2019) (reviewing the limits of the Tucker Act and sovereign immunity).

10. See Shimomura, *supra* note 8, at 637 (citing 2 W. COWEN, P. NICHOLS & M. BENNETT, *THE UNITED STATES COURT OF CLAIMS* 4 (1978)); Collin D. Swan, *Government Contracts and the Federal Circuit: A History of Judicial Remedies Against the Sovereign*, 8 J. FED. CIR. HIST. SOC'Y, 105, 105–06 (2014).

11. See Shimomura, *supra* note 8, at 644–45 (citing Charles C. Binney, *Origin and Development of Legal Recourse Against the Government in the United States*, 57 U. PA. L. REV. 372, 381 (1909)); Swan, *supra* note 10, at 106.

allocated \$800,000 for purchasing military equipment.¹² Eli Whitney, already well known for inventing the cotton gin, received a contract award to manufacture firearms.¹³ In 1801, seeking additional time to perform his contract, he conducted an in-person demonstration of his work on the contract for John Adams (the active president), Thomas Jefferson (the president-to-be), and other officials.¹⁴ To exhibit his progress, he unloaded standardized firearm components onto a table and proceeded to give one of the first demonstrations of an interchangeable parts system, where he picked up parts at random from the pile (or at least appeared to do so) and showed how any individual part would fit any other part it was intended to mate with.¹⁵

Whitney's contract demonstration, now famous, provides an example of the hands-on approach to contract disputes. It also highlights the inefficiency of the early system. This direct communication with elected officials proved not to be practical going forward. Growth of federal contracts led to an increasing amount of contract disputes that Congress had to hear and vote on . . . or perhaps ignore.¹⁶ From 1838 to 1848, there were 17,574 contract petitions to Congress, with few petitions receiving approval by the House and Senate.¹⁷

To resolve this issue, in 1855, Congress established the Court of Claims to hear disputes from government contractors.¹⁸ However, the original version of this court was less than effective.¹⁹ Congress had not provided the Court of Claims with the authority of final judgment, and Congress would instead review the decisions made by the court. This system left many contractors wanting, as Congress might reject the court's decision or ignore the court's judgments.²⁰ In his 1861 congressional address, President Lincoln alluded to this inefficient system: "It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals. The

12. James V. Joy, Jr., *Eli Whitney's Contracts for Muskets*, 8 PUB. CONT. L.J. 140, 142 (1976).

13. *Id.* at 143.

14. *Id.* at 144.

15. *Id.*

16. See Swan, *supra* note 10, at 106–07 (describing the difficulties faced by Congress in dealing with significant increases in claims).

17. *Id.* at 106 (citing 2 W. COWEN, P. NICHOLS & M. BENNETT, *supra* note 10, at 10).

18. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.

19. Swan, *supra* note 10, at 107.

20. *Id.*; see also Act of March 3, 1863, ch. 9, § 2, 12 Stat. 765 (providing that petitions and bills for private claims be sent to the court "unless otherwise ordered by resolution of the house in which the same are presented or introduced").

investigation and adjudication of claims, in their nature belong to the judicial department”²¹ Accordingly, in 1866, Congress granted the Court of Claims the authority to issue final judgments, thereby securing contractor appeals from both congressional action and inaction.²²

B. *Early Contracting Officials and Disputes Clauses*

While authority over contracting disputes was granted to the Court of Claims, practical barriers prevented the court from actually deciding many disputes. Contract disputes clauses were developed and implemented into government contracts beginning in the nineteenth century.²³ These clauses, different than what is now supplied in contracts pursuant to the CDA, provided an agency official or board with the authority to resolve contract appeals.²⁴ Some clauses might provide that a contracting officer’s decision was the final determination of fact, while others would give contracting officers or agency officials the power to decide both law and fact, limited only by administrative review.²⁵ Thus, while courts had jurisdiction to hear contract disputes, any actual review of contracting officer or administrative action was limited.²⁶

In one early example, *Kihlberg v. United States*,²⁷ the government contracted to transport supplies and goods by railroad. The contract stipulated that reimbursement would be paid based upon the shipping distance determined by the chief quartermaster.²⁸ The quartermaster, however, made a determination inconsistent with the reality of performance, resulting in contract reimbursement that under-recognized the contractor’s monetary entitlement.²⁹ Yet, because both the government

21. CONG. GLOBE, 37th Cong., 2d Sess. app. at 2 (1862); *see also* Swan, *supra* note 10, at 107–08 (describing President Lincoln’s comments regarding the Court of Federal Claims’s limitations during his 1861 inaugural address to Congress).

22. Act of March 17, 1866, ch. 19, 14 Stat. 9.

23. *See* James V. Joy, *The Disputes Clause in Government Contracts: A Survey of Court and Administrative Decisions*, 25 *FORDHAM L. REV.* 11, 13 (1956).

24. Franklin M. Schultz, *Proposed Changes in Government Contract Disputes Settlement: The Legislative Battle over the Wunderlich Case*, 67 *HARV. L. REV.* 217, 217 (1953).

25. *Id.*

26. *See* Comment, *Government Contracts Disputes: An Institutional Approach*, 73 *YALE L.J.* 1408, 1410–11 (1964) (noting that a contractor had little power in the bargaining of disputes clauses); *see also* Arthur V. Wittich, *Contracting with the Federal Government: The Dispute Resolution Process*, 5 *PUB. LAND L. REV.* 128, 129 (1984).

27. 97 U.S. 398 (1878).

28. *Id.* at 401.

29. *Id.*

and the contractor had agreed to be bound by the chief quartermaster's determinations, the court found the chief quartermaster's decision to be binding and not to be overturned on appeal outside of fraud, gross mistake indicating bad faith, or "failure to exercise honest judgment."³⁰

This deference to contract clauses and contracting officer decisions was maintained for many years,³¹ culminating in the unanimous decision in *United States v. Moorman*.³² The Court found that the determination of the "contractually designated agent," here the Secretary of War, was conclusive absent "fraud, or such gross mistake as necessarily implied bad faith," a more limited standard than the early *Kihlberg* decision.³³ The Court also noted the policy of such clauses as enabling more efficient settlement, saving the government from costly litigation.³⁴

Just three years later, however, the Supreme Court would further restrict judicial review of contracting officers and agency decisions in *United States v. Wunderlich*.³⁵ According to the contract, the contracting officer's factual determinations were final, and the contractor could only appeal the officer's determinations to the agency's secretary.³⁶ The Court held that, where a contract contained a disputes clause granting determinative power to government officials, fraud presented the only ground to overturn the decision and must be established by the contractor.³⁷

30. *Id.* at 402; *see also* *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234, 237–40 (1946) (holding that the contractor must exhaust the administrative appeal procedure before pursuing claims in court); *United States v. Blair*, 321 U.S. 730, 734–36 (1944) (stating that even if the contracting officer's conduct was such "as to imply bad faith" the contractor must exhaust his administrative appeals before going to court).

31. *See* *Merrill-Ruckgaber Co. v. United States*, 241 U.S. 387, 393 (1916) (holding that the judgment of a supervising architect was determinative of an appeal when the contract indicated that disputes would be decided by that architect); *Plumley v. United States*, 226 U.S. 545, 547 (1913) (stating that the Secretary's construction determinations were conclusive due to the contract language).

32. 338 U.S. 457 (1950).

33. *Id.* at 461 (citations and quotations omitted).

34. *Id.* at 460.

35. 342 U.S. 98, 100–01 (1951); *see Government Contracts Disputes*, *supra* note 26, at 1430–31.

36. *Wunderlich*, 342 U.S. at 99, 101.

37. *Id.* at 100. Some judges recognized the problems with this holding. *See id.* at 102 (Douglas, J., dissenting) ("We should allow the Court of Claims, the agency close to these disputes, to reverse an official whose conduct is plainly out of bounds whether he is fraudulent, perverse, captious, incompetent, or just palpably wrong."); *see also id.* at 103 (Jackson, J., dissenting) ("Men are more often bribed by their loyalties and

The *Wunderlich* decision was met with widespread criticism, including by government agencies who might benefit from the holding,³⁸ and quickly became an issue before Congress.³⁹ In 1954, Congress passed the Wunderlich Act in response to the case.⁴⁰ The Act provided that, “any such [agency] decision shall be final and conclusive unless the same is fraudulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.”⁴¹ The biggest difference here between the Act and pre-*Wunderlich* precedent being the right to appeal decisions not supported by substantial evidence.

C. Modernization of the Appeals System

In 1969, Congress created a commission to review the federal contracting system and to recommend changes to Congress.⁴² The resulting CDA created the structure that we see today in contractor disputes.⁴³ The CDA incorporated the function of contracting officers in their quasi-judicial capacity, while also subjecting their determinations to review by a structured system of courts and boards.⁴⁴ The CDA also reduced the impact of the administrative record by allowing both the boards and the CFC to supplement the record and make de novo determinations of both law and fact.⁴⁵ Further, Article III appellate judges within the Court of Claims were granted authority

ambitions than by money. I still believe one should be allowed to have a judicial hearing before his business can be destroyed by administrative action . . .”).

38. See Schultz, *supra* note 24, at 233 (noting that criticism was widespread and both the Department of Defense and General Services Administration agreed “to return the disputes clause to its pre-*Wunderlich* meaning by administrative amendment”; see also Swan, *supra* note 10, at 111 (explaining that “[t]he [*Wunderlich*] decision alarmed many in the procurement community”).

39. Schultz, *supra* note 24, at 233 (noting that four remedial bills were introduced in the House of Representatives and two were introduced in the Senate in response to the *Wunderlich* decision).

40. Act of May 11, 1954, ch. 199, §§ 1–2, 68 Stat. 81 (formerly codified at 41 U.S.C. §§ 321–22 (1958)).

41. *Id.*

42. See Pub. L. No. 91-129, 83 Stat. 269 (1969); Clarence Kipps et al., *The Contract Disputes Act: Solid Foundation, Magnificent System*, 28 PUB. CONT. L.J. 585, 588 (1999).

43. See Wittich, *supra* note 26, at 130–31 (noting that the development of the contract remedies system was unplanned and reactionary but culminated with the CDA).

44. See Jeri Kaylene Somers, Foreword, *The Boards of Contract Appeals: A Historical Perspective*, 60 AM. U. L. REV. 745, 752–54 (2011).

45. See, e.g., *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 713 (1963) (noting that the Court of Claims may make de novo determinations of disputed fact).

to hear appeals from either forum, with de novo review of law but a more limited review of factual determinations.⁴⁶

As noted in the introduction, this expanded appeal right requires contractors to submit a claim to the contracting officer as a preliminary requirement for an appeal.⁴⁷ One consequence arising from this right is that, where contractors historically had appeal limitations due to disputes clauses, contractors now may find claim requirements to be a primary remaining jurisdictional barrier for contract appeals. Although a claim under the CDA does not require a certain format, it must include particular information so that a contracting officer is in a position to make a final decision on the claim.⁴⁸ In this way, a claim—a written demand by one of the parties “as a matter of right” for the payment of money, alteration of the contract, or some other type of relief⁴⁹—has similarities to the pleading requirements of a civil case.⁵⁰

The standards for claims as preliminary dispute requirements can be seen in Federal Circuit cases since the implementation of the CDA. For example, in *Reflectone, Inc. v. Dalton*,⁵¹ the Federal Circuit considered whether a contractor’s communications to the contracting officer could constitute a claim when there was no dispute between the parties

46. Wittich, *supra* note 26, at 144. The trial division of the Court of Claims was later separated to create the Claims Court, and the appellate division was split off to create the new Court of Appeals for the Federal Circuit. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 127, 96 Stat. 25, 37–38. The Claims Court would be renamed as the Court of Federal Claims with the Federal Courts Administration Act of 1992. Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516; *see also* Pensive Poser, *What’s in A Name? Or Does A Court by Any Other Name Smell As Sweet?*, 48 *PROCUREMENT LAW*. 16 (2013) (tracing the history of the Court of Federal Claims name changes).

47. *See* 41 U.S.C. § 7103 (2012); FAR 2.101 (2018); *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc) (“Under the CDA, a final decision by a [contracting officer] on a ‘claim’ is a prerequisite for Board jurisdiction.”).

48. *See* FAR 52.233-1 (declaring a claim must be in writing with a certification); *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (noting that a valid claim “need not be submitted in any form or use any particular wording” but it must give the contracting officer notice of the basis and amount of the claim and also indicate a request for a final decision).

49. FAR 2.101 (defining “Claim”); *see also Reflectone*, 60 F.3d at 1575 (noting that the CDA does not define a claim, so it is necessary to look to the FAR implementation of the CDA for the definition).

50. *See, e.g.*, FED. R. CIV. P. 8 (requiring a claim for relief contain “a short and plain statement of the grounds for the court’s jurisdiction,” a short and plain statement of the claim, and a demand relief is sought).

51. 60 F.3d 1572 (Fed. Cir. 1995) (en banc).

at the time the written claim documents were submitted.⁵² The court, en banc, determined that where the requirements of a claim were met in a nonroutine request for payment a dispute did not need to yet exist for a contractor to meet the jurisdictional requirements.⁵³

The Federal Circuit also addressed claim requirements in its 2010 *Maropakis* decision.⁵⁴ *Maropakis* considered a claim for a construction contract that was running behind schedule, implicating liquidated damages and time extension issues.⁵⁵ The contractor appealed to the CFC, who found that it had no jurisdiction due to failure to meet claim requirements.⁵⁶ The contractor's claim was based on a letter that it had submitted to the contracting officer requesting a time extension and indicating that it would dispute liquidated damages in the future.⁵⁷ The court found that the contractor's letter was deficient as it lacked adequate notice of the amount and basis for the claim, but it also held that the intent of the contractor in their communications was insufficient.⁵⁸

II. RECENT FEDERAL CIRCUIT DECISIONS

The development of contract appeals and contractor claim requirements bring us to among the most notable government contracting cases of this year by the Federal Circuit, *Hejran Hejrat Co. v. United States Army Corps of Engineers*⁵⁹ and *DAI Global, LLC v. Administrator of the United States Agency for International Development*.⁶⁰

Hejran Hejrat examined the distinction between contractor communications to a contracting officer that constitute a claim, versus those that do not.⁶¹ Citing to prior Federal Circuit decisions in *Reflectone* and *Maropakis*,⁶² the court reiterated that magic words were not required as an element of a CDA claim: “a CDA claim need not be submitted in any particular form or use any particular wording’ so long as it has ‘a clear and unequivocal statement that gives the contracting

52. *Id.* at 1577–78.

53. *Id.*

54. *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1328 (Fed. Cir. 2010).

55. *Id.* at 1325–26.

56. *Id.* at 1326.

57. *Id.*

58. *Id.* at 1328 (finding that “[a] claim cannot be based merely on intent to assert a claim without any communication by the contractor of a desire for a contracting officer decision”).

59. 930 F.3d 1354 (Fed. Cir. 2019).

60. 945 F.3d 1196 (Fed. Cir. 2019).

61. *Hejran Hejrat*, 930 F.3d at 1357.

62. *Id.*

officer adequate notice of the basis and amount of the claim.”⁶³ Accordingly, the court found that the contractor’s communications constituted a claim even where the contractor had not requested a final decision and where the contractor had previously communicated that it was not pursuing a claim.⁶⁴ In reaching this holding, the court magnified the final decision difficulties of a contracting officer. A contracting officer should no longer rely on the contractor’s characterization of its communications when determining if they should issue a final decision.

In *DAI Global*, the Federal Circuit considered the line between when a claim certification did not meet the minimum certification requirements versus when the certification was merely defective, thereby allowing the contractor to correct the claim and preserve contract appeal jurisdiction.⁶⁵ In the case, the contractor was apprehensive about assuming responsibility for claims sought by its subcontractor but was required to certify the subcontractor’s claim for the subcontractor to pursue reimbursement.⁶⁶ In order to meet claim requirements, the contractor phrased its certification in a way that limited its stated accountability for improper subcontractor claims.⁶⁷ The contracting officer, however, was late to notify the contractor that it had issued a defective certification.⁶⁸ Therefore, the Federal Circuit determined that the claim was deemed denied and that the contractor’s certification phrasing was sufficient to constitute a defective and correctable certification under the statute.⁶⁹ The Federal Circuit’s decision underscores the importance of contracting officer timeliness and indicates that contractors may have more leeway when phrasing their certifications going forward.

63. *Id.* (quoting *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (2010) (citation and quotations omitted)).

64. *Id.*

65. *See DAI Global*, 945 F.3d at 1198; *see also* 41 U.S.C. § 7103(b) (2012) (requiring contractors to submit a claim to contracting officer with certification as a preliminary requirement for an appeal); FAR 33.201 (2018) (defining defective certification).

66. *See Dev. Alternatives, Inc. v. Agency for Int’l Dev.*, CBCA 5942, 18-1 BCA ¶ 37,147, *rev’d*, *DAI Global*, 945 F.3d 1196 (Fed. Cir. 2019).

67. *DAI Global*, 945 F.3d at 1197.

68. *Id.* at 1197–98.

69. *Id.* at 1200; *see* 41 U.S.C. § 7103(b)(3) (requiring, to excuse obligation to render a final decision, the contracting officer to notify within sixty days of reasons why a certification was defective).

OUTLOOK

Hejran Hejrat and *DAI Global* also highlight two historical developments in federal procurement: the long-term expansion of contractor appeal rights and the role of the contracting officer as a preliminary judge of contractor claims. By allowing imprecise communications to be the basis of a CDA claim—and therefore an appealable issue—the Federal Circuit follows the historical trend of allowing more appeals to be heard and resolved on the merits rather than barring or restricting appeal rights to agency determinations or procedural requirements.⁷⁰ However, the decisions also allowed the contractor to bypass the preliminary review and decision making of a contracting officer, in contrast with the traditional role of the contracting officer as the preliminary decision-maker in contract claims. Additionally, *Hejran Hejrat* and *DAI Global* make a contracting officer's administrative role more difficult, as a contracting officer can no longer necessarily rely on their understanding of a contractor's communications when deciding whether to issue a final decision. The holdings in both cases perhaps suggest that a contracting officer should issue a final decision on any questionable reimbursement communications as a safeguard.⁷¹

Contract appeals, whether from the contracting officer's final decision or from a judicial decision to the Federal Circuit, are a distinct aspect of government contracting law that underlies much of the federal procurement system. The structure has seen significant change over the years but remains an important part of the contracting process as seen through the Federal Circuit's recent decisions. These developments make this year's Federal Circuit review—as well as future reviews from this publication—of great interest to the procurement community.

70. See e.g., *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234, 239 (1946) (noting that no court can justify disregarding the letter or spirit of appeal provisions arising under a contract); *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1322 (Fed. Cir. 2014) (finding the CDA statute of limitations to be nonjurisdictional); *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1577 (Fed. Cir. 1995) (en banc) (holding a contractor's communications to the contracting officer could constitute a claim when there was no dispute between the parties at the time the written claim documents were submitted).

71. See Ralph C. Nash, *Postscript V: Requests for Equitable Adjustments vs. Claims*, 33 NASH & CIBINIC REP. ¶ 58 (2019) (opining that contracting officers should now issue a final decision while also asking contractors if they mean to file a claim).