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The End of Days for Litigation Over Contract Disputes Act Jurisdiction

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Readers of this journal are no doubt aware that decades of judicial decisions have left the Contract Disputes Act (CDA) riddled with jurisdictional traps for the uninitiated. A little-noticed February 2021 decision of the U.S. Court of Appeals for the Federal Circuit brings another welcome sign that it is only a matter of time before the procurement community can finally say goodbye to CDA jurisdictional issues. It is increasingly clear that the CDA's requirements for claim submission, certification, and timely appeal are mere procedural rules, not jurisdictional preconditions to maintaining CDA litigation. This is cause for celebration. As I have explained previously, the current practice of dismissing legitimate breach claims for lack of jurisdiction based on perceived noncompliance with procedural formalities is contrary to Supreme Court precedent and congressional intent. These unnecessary impediments to dispute resolution serve to dissuade innovative, nontraditional contractors from entering the public procurement markets where they are most needed.

Introduction

Another "drive-by jurisdictional ruling."[1] Nearly 45 years after Congress enacted the CDA,[2] jurisdictional dismissals of contractor claims are so common that the Federal Circuit's February 2021 decision in *Creative Management Services, LLC v. United States*[3] barely made the trade press. The contractor filed suit more than one year after receiving the contracting officer's final decision, and therefore the U.S. Court of Federal Claims unceremoniously dismissed the case in an unpublished decision for lack of jurisdiction pursuant to Federal Rule of Civil Procedure (FRCP) 12(b)(1).[4] The Federal Circuit's unanimous affirmance could have been issued in a nonprecedential decision, if not Rule 36 summary affirmance—but for one procedural comment that is worth serious discussion.

Federal Circuit Judge Kara Stoll carefully explained that the case "arguably" should have been dismissed for failure to state a claim pursuant to FRCP 12(b)(6) rather than for lack of subject matter jurisdiction, noting that the Federal Circuit had previously questioned whether the 12-month filing deadline for CDA claims is jurisdictional.[5] While the Federal Circuit declined to decide the issue, that the court so openly signaled that the statutory deadline to appeal a contracting officer's final decision is a procedural requirement, rather than a jurisdictional requirement, carries great promise.

As I have previously explained in more detail,[6] under a relatively new but well-established line of Supreme

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Court precedent, most of the traditional procedural hurdles to CDA litigation—claim submission, certification, and timely appeal—are just that: procedural. As procedural requirements, they are, of course, important, but they lack jurisdictional stature.

In the 1970s, Congress touted the CDA as a comprehensive reform designed to create a fair, efficient, and flexible process for resolving procurement contract disputes. It was intended to provide contractors of all sizes and sophistication access to meaningful due process and judicial review. Prior to the CDA, contractor claims encountered potentially inexorable delays while winding their way through agency-specific administrative processes, and access to meaningful judicial review was contingent on arbitrary jurisdictional distinctions between claims for breach of contract and claims "arising under" a contract clause. To remedy this, Congress adopted several recommendations of the Commission on Government Procurement designed to promote efficiency and fairness in U.S. procurement policy, specifically to encourage companies to do business with the government, which, in turn, would increase competition in the procurement markets.[7]

Despite congressional aspirations of fairness and efficiency, decades of judicial and administrative interpretations have left the CDA riddled with unintuitive, subjective, and highly contextual procedural traps. Worse yet, many of these procedural requirements have been labeled as jurisdictional by the Federal Circuit and its predecessor (the U.S. Court of Claims), which allows for extraordinary disruptions to the dispute resolution process.

Consider the following hypothetical. A contractor submits a claim to the contracting officer seeking payment for increased costs incurred during performance. After a brief correspondence, the contracting officer submits a decision allowing the claim in part, but denying some of the requested payment. On appeal at one of the agency Boards of Contract Appeals, agency counsel does not raise any jurisdictional concern. After a full trial, the Board finds in favor of the contractor and directs payment of the full amount claimed. On appeal at the Federal Circuit, for the first time, the Department of Justice moves that the case be dismissed for lack of jurisdiction because the contractor failed to fully comply with one of the technical claim submission formalities—e.g., the contractor failed to request, implicitly or expressly, a decision from the contracting officer. The Department of Justice asserts that the overall tenor of the correspondence between the contractor and contracting officer indicates that the contractor may have desired further negotiation rather than a final decision, and therefore all further proceedings were legally void. The Federal Circuit reflexively recites its maxim that the claim submission requirement is a jurisdictional prerequisite to CDA litigation and accordingly dismisses the case. After years of litigation, the contractor must begin anew by more clearly requesting a contracting officer's final decision on its claim, which at this point may well be time barred. Because jurisdictional objections can be raised at any time and may never be waived or conceded, it is of no matter that (1) the contracting officer did issue a decision, (2) the government never objected to jurisdiction at the Board, or (3) the contracting officer's decision is substantively irrelevant because review at the Board is *de novo*.

Thankfully, this unfortunate state of affairs has begun to correct itself, but the final act is yet to come, and we cannot take the conclusion for granted. For far too long, jurisdictional classification of the CDA's procedural requirements has generated unjust and inefficient outcomes based on procedural technicalities, while obstructing congressionally permitted access to contractual relief and meaningful judicial review. Because the Supreme Court rarely grants *certiorari* in cases that deal with pure issues of procurement law, the Federal Circuit will likely have the last say with respect to the jurisdictional classification of the CDA's requirements. With that in mind, and acknowledging that a legislative fix is unlikely in the near term, this article urges contractors and their counsel to take every opportunity to raise these issues before the Federal Circuit as catalysts to finally break down these wholly unnecessary and unlawful barriers to an efficient and effective CDA dispute resolution process.

Context for the CDA and Distinctions Between Procedural Rules and Jurisdictional Requirements

The Distinction Between Procedural Requirements and Jurisdictional Preconditions

The distinction between a procedural requirement and a jurisdictional rule carries great significance. Courts have an independent obligation to determine whether subject-matter jurisdiction exists, and the issue can never be forfeited or waived, regardless of whether any party raises or concedes the point.[8] In contrast, claim processing rules and substantive elements of a claim can be equitably tolled, conceded, and waived if not timely challenged.[9] Consequently, as illustrated by the introductory hypothetical, classifying a rule as jurisdictional can result in considerable unfairness to claimants and inefficiencies for all parties and institutions involved.[10]

Until relatively recently, courts, including the Supreme Court, have occasionally been careless in characterizing rules as jurisdictional.[11] Beginning with its 2006 decision in *Arbaugh v. Y&H Corporation*, the Supreme Court has repeatedly admonished lower courts to carefully distinguish between jurisdictional and nonjurisdictional rules to avoid so-called jurisdictional drive-by rulings.[12] *Arbaugh* explicitly directs lower courts to accord "no precedential effect" to rulings that purport to dismiss a case for lack of subject-matter jurisdiction when the discovered defect lacks jurisdictional status.[13]

Most importantly, *Arbaugh* provides a "readily

administrable bright line" rule for determining whether a statutory requirement is jurisdictional: If Congress has clearly stated that a statutory requirement is jurisdictional, then the requirement is jurisdictional; if Congress did not clearly rank a statutory limitation as jurisdictional, then the requirement is not jurisdictional.[14] Subsequent Supreme Court decisions provide a useful framework to discern whether this test is satisfied.

First, the primary inquiry rests with the text of the statute at issue; to that end, the Court repeatedly frames the pertinent question as whether the provisions at issue "speak in jurisdictional terms."[15] A requirement is not jurisdictional simply because it is mandatory or emphatic; nor is the word "shall" alone sufficient to limit a court's authority.[16] Instead, a jurisdictional requirement must speak to the court's adjudicative authority, rather than the parties' rights or obligations.[17]

The clearest example of a jurisdictional rule is one that is directly tied by its own terms to a court's jurisdiction over a cause of action, such as the amount in controversy requirement for district court diversity jurisdiction:

Through a series of unfortunate Federal Circuit holdings, the CDA was burdened with five distinct jurisdictional hurdles.

"The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000. . . ."[18] By contrast, the Court has deemed filing deadlines and statutes of limitations as the "quintessential" nonjurisdictional claim processing requirements because they speak to the orderly processing of a claim, not the court's adjudicative power.[19]

Second, the Court will consider the statutory requirement in context, particularly the relationship between the statutory provision that contains the requirement in question and the statutory provision that grants the court jurisdiction over the claimant's cause of action. For example, the amount-in-controversy requirement above is incorporated directly into the same statutory provision that grants district courts jurisdiction in diversity cases. Of the many court holdings that a statutory requirement is nonjurisdictional, most explain that result in part because the statutory requirement at issue is codified in a provision separate and apart from the statutory provision that vests the tribunal with jurisdiction.[20]

Third, the Supreme Court will consider its own prior analysis of the requirement at issue—i.e., *stare decisis*.[21] On this basis, the Court found that the Tucker Act's six-year statute of limitations is jurisdictional.[22] The Supreme Court has declined to extend such treatment to statutory requirements just because they have been classified as jurisdictional by a line of lower court decisions.[23]

Finally, the Court has indicated that it will consider whether jurisdictional treatment of a requirement comports with the statute's overall purpose. For example, in the veterans benefits context, pursuant to the Veterans' Judicial Review Act, veterans must file a notice of appeal with the U.S. Court of Appeals for Veterans Claims within 120 days of receiving an adverse decision from the Board of Veterans' Appeals.[24] In *Henderson v. Shinseki*, the Court explained that the claimant-friendly nature of the veterans' benefits system militates against treating the statute's 120-day filing deadline for appeals as jurisdictional.[25]

The CDA's Jurisdictional Framework

Through a series of unfortunate Federal Circuit holdings, the CDA was burdened with five distinct jurisdictional hurdles: (1) claim submission, (2) certification, (3) issuance of a contracting officer's final decision, (4) timely appeal, and (5) a six-year statute of limitations.

The fifth was the first to fall. Prior to 2014, several precedential Federal Circuit decisions had treated the CDA's statute of limitations as a jurisdictional requirement.[26] But the Federal Circuit reversed that line of precedent in the 2014 decision *Sikorsky Aircraft Corporation v. United States*, finding that the statute of limitations does not speak in jurisdictional terms and therefore cannot pass the *Arbaugh* standard.[27]

While *Sikorsky* was a step in the right direction, it is only the beginning. Of the four remaining CDA provisions assigned jurisdictional status, the requirements that a contracting officer issue a final decision and that a contractor timely appeal therefrom are fairly self-explanatory. However, the Federal Circuit's misclassifications of the claim submission and certification requirements as jurisdictional have proven most problematic, and further context is warranted.

Claim Submission

The Court of Claims gave jurisdictional status to the claim submission requirement in the 1981 decision *Paragon Energy Corporation v. United States*,[28] and, as customary, the Federal Circuit adopted its predecessor's position.[29] The court's reasoning in *Paragon* started with the premise that its own jurisdiction is preconditioned on the issuance of a contracting officer's decision, but then made an unexplained logical leap to assert that the contracting officer lacks any authority to issue a decision until a contractor's claim is properly submitted.[30] Thus, even when a contracting officer's decision is actually issued (as it was in *Paragon*), failure to submit a claim in accordance with the CDA is a jurisdictional defect.[31]

The jurisdictional requirements associated with claim

submission are not limited to the CDA's minimal mandates that contractor claims shall be "in writing" and "submitted to the contracting officer for a final decision."[32] The Court of Claims and the Federal Circuit relied on the Federal Acquisition Regulation (FAR) definition of "claim" to create several subsidiary requirements that must be met to properly submit a claim—each of which is considered an independent jurisdictional prerequisite.[33]

Although the Supreme Court has admonished that jurisdictional tests should be clear and predictable,[34] the subsidiary claim submission requirements are unintuitive, highly contextual, fact-specific, and often subjective. Three examples illustrate well the complexity of these jurisdictional tests.

First, a claim for payment must demand, "as a matter of right," a "sum-certain," which essentially requires the contractor to assert entitlement to the specific amount of money that is in demand, or at least provide enough information that the amount can be easily calculated.[35]

Second, "routine" requests for payment (i.e., requests made under the terms of the contract) must be "in dispute" before they qualify as claims, whereas "non-routine" requests for payment (i.e., requests based on unforeseen or unintended consequences) need not meet the additional "in dispute" requirement.[36] The distinction between "routine" and "non-routine" requests is factual and depends on the overall scheme of the contract and the parties' expectations.[37] It is also eerily similar to the pre-CDA distinction between claims "arising under" the contract and claims for breach of contract.

Third—as alluded in the introductory hypothetical—contractor claims must request a contracting officer's final decision. This is a subjective inquiry. As long as the overall tenor of correspondence indicates that the contractor desires final action by the contracting officer, that prong of the test is satisfied.[38] As such, requests for a final decision can be implicit; no specific wording is required.[39] There is no necessary inconsistency between a request for final decision and an expressed desire to work mutually toward a claim's resolution.[40] But if the overall tenor of correspondence suggests that the contractor's request for payment is actually a request for continued negotiation, then a final decision has not been requested, and jurisdiction is lacking.[41] In that event, the correspondence may "ripen" into a claim once negotiations reach impasse.[42]

Suffice it to say that all but the most seasoned contractors could be excused for having some confusion as to whether they have met the FAR standard for claim submission in any given dispute. And nontraditional contractors and small businesses without specialized procurement counsel may justifiably be surprised and disappointed when their business partner attempts to avoid a legitimate breach of contract claim through a preliminary motion to dismiss for failure to satisfy these amorphous, anachronistic procedural formalities.

The Certification Problem

The Court of Claims gave jurisdictional status to the CDA's certification requirement in the 1981 decision *Paul E. Lehman, Inc. v. United States*,[43] and the Federal Circuit adopted its predecessor's position.[44] The justification given in *Paul E. Lehman* for granting the certification requirement jurisdictional status was based primarily on legislative history. The Court of Claims started from the incorrect proposition that Senator Byrd justified the certification requirement as a response to concerns raised by Admiral Hyman Rickover.[45] The court then concluded that Admiral Rickover viewed certification as a prerequisite to the disputes process, and therefore promoted certification to jurisdictional rank.[46]

Controversial regulations regarding which individuals within a company had authority to certify resulted in a tidal wave of litigation relating to motions to dismiss for lack of jurisdiction due to inadequate certification. Litigation of these fact-specific procedural motions served to undermine the CDA's purpose. As Professors John Cibinic and Ralph Nash remarked in 1990:

> There have been so many defective certification cases over the years that they would make a veritable rogue's gallery of wasted effort. . . . I would guess that this has happened approximately 500 times since the CDA was passed. . . . The result is mighty curious for an Act that was passed to make the disputes process more efficient—and certainly reveals a serious flaw in the CDA.[47]

Similarly, the Honorable Ruth C. Burg, when reflecting on her tenure at the Armed Services Board of Contract Appeals, addressed the impact of certification-related motions:

> This plethora of motions was extremely frustrating since it impacted not only a particular case where, if the certification was invalid, the matter had to start all over, but also the entire docket. I still relive the feeling of futility I felt every time a motion to dismiss for failure to certify was submitted for one of the cases before me.[48]

This inefficiency (and countless unjust outcomes) led Congress to attempt a legislative remedy through the Federal Courts Administration Act of 1992, which (1) clarified who could certify a claim, (2) provided that the contracting officer had no obligation to issue a final decision on a claim that was not properly certified, and (3) affirmed that "[a] defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim."[49] Just before Congress sent the final bill to President Clinton, its sponsor, Senator Heflin, explained that the amendment "will eliminate the confusion and waste of resources that has resulted from the Contract Disputes Act certification being deemed jurisdictional. . . ."[50]

The Federal Circuit has not provided a precedential

holding as to whether failure to certify is still a jurisdictional defect after the 1992 amendments; however, it has suggested in dicta and nonprecedential opinions that failure to certify may not be a jurisdictional issue.[51] Nevertheless, and despite the 1992 amendment's plain language and legislative intent, the Boards of Contract Appeals and several judges of the Court of Federal Claims continue to address certification as a jurisdictional requirement. Often citing FAR provisions and unenacted passages of legislative history, these decisions generally distinguish between "defective certification" and "failure to certify," the latter of which is still treated as a jurisdictional bar.[52]

Neither Claim Submission, Certification, Nor Timely Appeal Are Jurisdictional Prerequisites to CDA Litigation

Applying the *Arbaugh* standard to the CDA requirements that are still afforded jurisdictional status, it is clear that all but one, issuance of a contracting officer's final decision, are nonjurisdictional claim processing rules. To the extent the Federal Circuit or its predecessor courts ever articulated a basis for treating claim submission, certification, or timely appeal as jurisdictional, that prior rationale is now at odds with controlling Supreme Court precedent.

Contracting Officer's Final Decision

When examining the statutory provisions that grant the Boards of Contract Appeals and the Court of Federal Claims jurisdiction over CDA cases, it is clear that those jurisdictional grants are contingent on the issuance or deemed denial of a contracting officer's decision. Nevertheless, just because a decision by the contracting officer is a jurisdictional prerequisite to CDA litigation does not mean that every statutory requirement ancillary to issuance of a contracting officer's decision is also a jurisdictional prerequisite.

The requirement for issuance of a contracting officer's decision satisfies *Arbaugh*'s bright-line test because the need for such a decision is stated in jurisdictional terms that limit the adjudicative authority of the Boards of Contract Appeals and the Court of Federal Claims. Just as the amount in controversy requirement is incorporated directly into the same statutory language that grants district courts' diversity jurisdiction, the need for a contracting officer's decision is likewise tied directly to the same statutory language that grants the Boards of Contract Appeals and the Court of Federal Claims their jurisdiction over CDA cases.

The Boards obtain their jurisdiction through section 7105(e) of the CDA, which provides that each Board "has jurisdiction to decide any appeal from a decision of a contracting officer. . . ."[53] The Court of Federal Claims receives jurisdiction over CDA cases from section 1491(a)(2) of the Tucker Act, which explicitly conditions its grant on the issuance of a contracting officer's decision.

> The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.[54]

Accordingly, like the amount in controversy requirement for district court diversity jurisdiction, the issuance of such a decision is properly categorized as a jurisdictional requirement.

However, just because the Boards' and Court of Federal Claims' jurisdictions over CDA disputes are contingent on issuance of a contracting officer's final decision does not mean that every statutory or regulatory requirement relating to issuance of that contracting officer decision also carries jurisdictional weight. This is supported by several Supreme Court decisions. For example, in *Steel Co. v. Citizens for a Better Environment*, the Court considered a statutory grant of jurisdiction that provided: "The district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement."[55] The Court explained that "[i]t is unreasonable to read this as making all the elements of the cause of action under subsection (a) as jurisdictional, rather than as merely specifying the remedial *powers* of the court, viz., to enforce the violated requirement and to impose civil penalties."[56]

Similarly, in *Gonzalez v. Thaler*, the Court recognized that a circuit court of appeals' jurisdiction to review the final decision of a district court in a federal habeas proceeding was contingent on obtaining a "certificate of appealability" from the district court.[57] However, it held that requirements for when the certificate may be issued and what the certificate must contain were not jurisdictional because those requirements did not speak to jurisdiction and were located in separate statutory provisions from those that did speak to jurisdiction.[58]

As demonstrated in the next two sections, the jurisdictions of the Boards of Contract Appeals and Court of Federal Claims are not conditioned on the submission or certification of a claim. Nor can those requirements be given jurisdictional status just because they may be prerequisites to the issuance of a contracting officer's decision. Instead of being limitations on any tribunal's adjudicative authority, claim submission and certification are mandatory claim-processing rules, albeit important ones.

Claim Submission

The two provisions of the CDA that most clearly articulate a claim submission requirement are those of section 7103(a), which require that contractor claims "shall be in writing" and "shall be submitted to the contracting

officer."[59] Those requirements do not speak to adjudicative authority; they dictate behavior of the parties, and thus are more accurately characterized as nonjurisdictional claim processing rules. Context confirms this, as the rules for claim submission are located in an entirely different statutory section than those that grant the Boards of Contract Appeals and Court of Federal Claims jurisdiction over CDA cases, which make no reference to proper claim submission.

The Federal Circuit's analysis in *Paragon* concluding that claim submission is a jurisdictional requirement because the contracting officer lacks authority to issue a final decision until the contractor submits a claim is unsupported by the CDA's text and legally insufficient. In some circumstances, submission of a claim triggers the contracting officer's statutory *obligation* to issue a final decision within a certain time frame, but nothing in the CDA suggests that submission of a claim triggers the contracting officer's *authority* to issue a decision.[60] And even if submission of a claim is a prerequisite to issuance of a contracting officer's decision, as discussed above, that alone would not automatically make claim submission a jurisdictional requirement.

While the Federal Circuit has treated the claim submission requirement as jurisdictional for several decades, the Supreme Court has repeatedly indicated that it is the Court's own precedent, not any lower court's, that matters in this regard.[61]

Given the text, context, and past Supreme Court interpretation of the claim submission requirement, there is no basis for affording it jurisdictional weight. Because claim submission is not jurisdictional, it follows that neither are any of the judicially and administratively conjured elements of claim submission—e.g., the need to demand a "sum-certain," the need for "routine" requests for payment to be "in dispute," and the need to request a final decision. These elements of claim submission lack any support in the statutory text, much less a clear statement of jurisdictional import. Moreover, the current jurisdictional treatment of the claim submission requirement undermines the very purpose of the CDA. The CDA was the result of comprehensive reform undertaken because the prior system failed to give contractors reliable and efficient access to meaningful judicial review. Only inefficiency and inequity result from allowing agency counsel and the Department of Justice to impede judicial review by having a case dismissed for lack of jurisdiction based on the argument that the contracting officer's decision was invalid because the contractor failed to adequately request it.

This does not mean that the claim submission requirement or its sub-elements are meaningless; to the contrary, they are important, mandatory claim processing rules. Until a claim is submitted, the contracting officer has no obligation to issue a written decision, and interest does not begin to run.[62] A contracting officer should not be forced to choose between issuing a final decision or incurring interest on behalf of the government unless and until the contracting officer has received adequate notice of the contractor's claim and enough information to resolve that claim.[63] In that context, it makes sense that contractors must submit written claims to the contracting officer and request a decision before triggering the contracting officer's obligation to write a decision or the government's obligation to pay interest.

However, nothing in the CDA's legislative history supports the proposition that failure to submit a particular kind of claim in a particular kind of way could create a jurisdictional defect that fatally infects all subsequent proceedings. In the CDA's entire, voluminous legislative history, there is not a single discussion relating to the manner of claim submission that might be sufficient to trigger the CDA's dispute resolution procedures. As noted by Professors Cibinic and Nash, the only discussion about when a contractor submission would constitute a "claim" occurred in the context of determining when interest would begin to run.[64] All reasonable implications suggest that the procedures envisioned by the Commission on Government Procurement and Congress were to be triggered by the issuance of a contracting officer's decision, not the submission of a contractor's claim (or certification).

Certification

The CDA's requirement that a contractor "shall certify" claims for more than $100,000 does not speak in jurisdictional terms. Like the claim submission rules, the certification requirement dictates the parties' behavior, not any tribunal's adjudicative authority, and is thus nonjurisdictional. Context confirms this, as the certification requirement is in an entirely different statutory section than those that grant the Boards of Contract Appeals and Court of Federal Claims with jurisdiction over CDA cases. The Court of Claim's reasoning in *Paul E. Lehman* that certification is jurisdictional because "Admiral Rickover viewed the certification requirement as a necessary prerequisite to the consideration of any claim"[65] carries no weight under the Supreme Court's direction in the *Arbaugh* line of cases.

For the same reasons explained in relation to claim submission, the notion that a contracting officer's decision is invalid unless a properly certified claim is submitted cannot stand.

Although the certification requirement itself does not speak in jurisdictional terms—one sentence of the CDA at section 7103(b)(3), added during the 1992 amendments, states: "A defect in the certification of a claim does not deprive a court or an agency board of jurisdiction over the claim."[66] In light of its plain language and clear legislative history, that sentence should be read as providing further affirmation that the certification requirement is not jurisdictional.

As with the claim submission requirement, there is no

long line of Supreme Court precedent interpreting the certification requirement as jurisdictional, and the Federal Circuit's own line of precedent cannot tip the scale on its own. Thus, based on the certification requirement's text, context, and prior Supreme Court interpretation, it is not jurisdictional. The legislative history supports this. Just before the 1992 amendments were passed by the Senate and sent to the president, Senator Howell Helfin, the bill's sponsor, made no distinctions for technical defects or failures to certify; instead, he stated that the bill would "eliminate the confusion and waste of resources that has resulted from the Contract Disputes Act certification being deemed jurisdictional."[67] As the Federal Circuit recently confirmed, statements made in the House Report attempting to define "technically defective" certifications are irrelevant because that term was removed from the bill before it passed.[68]

Demoting the certification requirement from jurisdictional status does not eliminate its importance or any contractor's incentive to take certification seriously. If a claim is submitted with defective certification, the contracting officer has no obligation to issue a written decision, as long as the contracting officer provides the contractor written notice of the defects.[69] Because the contracting officer can refuse to issue a final decision until proper certification is provided, the contractor cannot obtain any remedy under the contract until it provides proper certification, and the government is never forced to decide an uncertified claim. This addresses Admiral Rickover's concern that contractors will game the disputes system by submitting unsubstantiated claims for unjustifiably high payments only to settle for a reduced amount. Admiral Rickover's additional concerns of foul play are addressed by separate CDA provisions that provide monetary penalties for claims that are unsupportable due to fraud and misrepresentations. But once the contracting officer does issue a decision, only unfairness and inefficiency result from treating the failure to certify as a jurisdictional defect—particularly when the CDA expressly requires that certification must be provided before entry of final judgment.[70]

Timely Appeal

Turning to the CDA deadlines for appealing a contracting officer's decision, as discussed, although the Federal Circuit has yet to definitively address the issue, the court has expressed serious doubt as to whether the filing deadlines are jurisdictional. Like the six-year statute of limitations determined to be nonjurisdictional by the Federal Circuit in *Sikorsky*, the CDA's deadlines for timely appeal are mere claim processing rules, not limits to any tribunal's adjudicative authority. As the Supreme Court has reiterated several times, filing deadlines are the "quintessential claim processing requirements,"[71] regardless of how emphatic and nonconditional they may be.

Following the Federal Circuit's recent comments in *Creative Management* regarding the distinction between dismissal pursuant to FRCP 12(b)(1) and 12(b)(6), the Boards and Court of Federal Claims judges need not strain to read the writing on the wall. There is no justification for treating the CDA's filing deadlines as jurisdictional.

Again, this is not to say that the CDA's filing deadlines are not important or mandatory. Just as the CDA states, a contracting officer's decision is final and nonreviewable unless timely appealed.[72] As with any mandatory claim processing rule, failure to timely appeal from a contracting officer's decision likely warrants dismissal for failure to state a claim. Lack of jurisdictional status only provides two caveats. First, the government must raise its defense of untimely appeal, or the defense will be waived.[73] Second, a tribunal may, in exceptional circumstances, equitably toll a filing deadline.[74]

Conclusion and the Way Forward

For far too long, jurisdictional classification of the CDA's claim submission, certification, and timely appeal requirements has thwarted fair and efficient access to meaningful judicial review for government contractors. To right this wrong, contractors and their counsel should raise the arguments presented herein before the Boards of Contract Appeals, Court of Federal Claims, and Federal Circuit. Congress never envisioned—much less intended to create—the arbitrary, inefficient, and unjust obstacle course that the current jurisdictional classification of the claim submission and certification requirements represents. No defensible policy is served by depriving contractors of fair and efficient access to meaningful judicial review. Nor can the government afford to unnecessarily discourage the nontraditional contractors that drive innovation from the procurement market, particularly when the participation of such companies is critical to maintain the nation's technological and battlefield superiority. PL

Endnotes

1. Arbaugh v. Y&H Corp., 546 U.S. 500, 511 (2006).
2. Contract Disputes Act, Pub. L. No. 95-563, 92 Stat. 2383 (1978).
3. 989 F.3d 955 (Fed. Cir. 2021).
4. Creative Mgmt. Servs., LLC v. United States, No. 18-1864C, 2020 WL 102992 (Jan. 8, 2020).
5. *Creative Mgmt.*, 989 F.3d at 961 (citing Guardian Angels Med. Serv. Dogs, Inc. v. United States, 809 F.3d 1244, 1252 (Fed. Cir. 2016)).
6. Nathaniel E. Castellano, *After* Arbaugh*: Neither Claim Submission, Certification, Nor Timely Appeal Are Jurisdictional Prerequisites to Contract Disputes Act Litigation*, 47 Pub. Cont. L.J. 35 (2017).
7. For additional background, see *id*.
8. Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006).
9. *See id.* at 506–07; Kontrick v. Ryan, 540 U.S. 443, 456 (2004).
10. Henderson v. Shinseki, 562 U.S. 428, 434–35 (2011).
11. *Arbaugh*, 546 U.S. at 511.
12. *Id*.
13. *Id*.
14. *Id.* at 515–16.

15. *Id.* at 515; *Henderson*, 562 U.S. at 438.
16. Gonzalez v. Thaler, 565 U.S. 134, 146 (2012).
17. *See Henderson*, 562 U.S. at 429, 435; United States v. Kwai Fun Wong, 575 U.S. 402, 409 (2015).
18. 28 U.S.C. § 1332(a); *Arbaugh*, 456 U.S. at 513–15.
19. *Kwai Fun Wong*, 575 U.S. at 409; *Henderson*, 562 U.S. at 435.
20. *See Gonzalez*, 565 U.S. at 143–45; Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 164 (2010); *Henderson*, 562 U.S. at 439.
21. *See Henderson*, 562 U.S. at 436.
22. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134–39 (2008).
23. *See Reed Elsevier*, 559 U.S. at 168; *Kwai Fun Wong*, 575 U.S. at 426 (Alito, J., dissenting).
24. 38 U.S.C. § 7266(a).
25. *Henderson*, 562 U.S. at 439–40.
26. *See* Sys. Dev. Corp. v. McHugh, 658 F.3d 1341, 1347 (Fed. Cir. 2011); Arctic Slope Native Assoc., Ltd. v. Sebelius, 583 F.3d 785, 793, 800 (Fed. Cir. 2009); England v. Swanson Grp., Inc., 353 F.3d 1375, 1379 (Fed. Cir. 2004).
27. 773 F.3d 1315, 1320–22 (Fed. Cir. 2014).
28. 645 F.2d 966 (Fed. Cir. 1981).
29. Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc).
30. *Paragon*, 645 F.2d at 971.
31. *Id.*
32. 41 U.S.C. § 7103(a).
33. *Reflectone*, 60 F.3d at 1575.
34. Hertz Corp. v. Friend, 559 U.S. 77, 80 (2010).
35. *See* Alliant Techsystems, Inc. v. United States, 178 F.3d 1260, 1265 (Fed. Cir. 1999).
36. *See Reflectone*, 60 F.3d at 1575.
37. Parsons Global Servs., Inc. v. McHugh, 677 F.3d 1166, 1170–71 (Fed. Cir. 2012).
38. Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1576 (Fed. Cir. 1992), *overruled in part on other grounds by Reflectone*, 60 F.3d 1572.
39. *Reflectone*, 60 F.3d at 1578.
40. *Id.* at 1579.
41. *See* John Cibinic Jr., James F. Nagle & Ralph C. Nash Jr., Administration of Government Contracts 1170–71 (5th ed. 2016).
42. *See* James M. Ellet Constr. Co., Inc. v. United States, 93 F.3d 1537, 1543 (Fed. Cir. 1996); Rex Sys., Inc. v. Cohen, 224 F.3d 1367, 1371 (Fed. Cir. 2000).
43. 673 F.2d 352, 355 (Ct. Cl. 1982).
44. *See* W.M. Schlosser Co. v. United States, 705 F.2d 1336, 1337–39 (Fed. Cir. 1983).
45. *Paul E. Lehman*, 673 F.2d at 354–55.
46. *Id.* at 355.
47. John Cibinic Jr., *The Contract Disputes Act: A Prescription for Wheel Spinning*, 4 Nash & Cibinic Rep. ¶ 29.
48. Ruth C. Burg, *The Role of the Court of Appeals for the Federal Circuit in Government Contract Disputes: A Historic View from the Bench*, 42 Pub. Cont. L.J. 173, 175 (2012).
49. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 907, 106 Stat. 4506, 4518 (codified in scattered sections of 18 and 28 U.S.C.).
50. *See* 138 Cong. Rec. 34,204 (1992).
51. *See* M. Maropakis Carpentry, Inc. v. United States, 609 F.3d 1323, 1329 (Fed. Cir. 2010); J & E Salvage Co. v. United States, No. 97-5066, 1998 WL 133265, at *6 n.4 (Fed. Cir. Mar. 25, 1998); James M. Ellett Constr. Co. v. United States, 93 F.3d 1537, 1545 (Fed. Cir. 1996).
52. *See* Nathaniel E. Castellano, *Year in Review: The Federal Circuit's 2019 Government Contract Law Decisions*, 69 Am. U. L. Rev. 1265, 1274–79 (2020).
53. 41 U.S.C. § 7105(e).
54. 28 U.S.C. § 1491(a)(2).
55. 523 U.S. 83, 90 (1998) (quoting 42 U.S.C. § 11046(c)).
56. *Id.*
57. 565 U.S. 134, 137–42 (2012).
58. *Id.*
59. 41 U.S.C. § 7103(a)(1)–(2).
60. *Id.* § 7103(f)(2).
61. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 167–68 (2010); United States v. Kwai Fun Wong, 575 U.S. 402, 414–17 (2015); Henderson v. Shinseki, 562 U.S. 428, 436 (2011).
62. 41 U.S.C. §§ 7103(f), 7109(a).
63. *See* Castellano, *After* Arbaugh, *supra* note 6, at 50–62, 68.
64. *See* John Cibinic Jr. & Ralph C. Nash Jr., Government Contract Claims 58–59 (1981).
65. Paul E. Lehman, Inc. v. United States, 673 F.2d 352, 355 (Ct. Cl. 1982).
66. 41 U.S.C. § 7103(b)(3).
67. *See* 138 Cong. Rec. 34,204 (1992).
68. *See* DAI Global LLC v. Admin. of the U.S. Agency for Int'l Dev., 945 F.3d 1196, 1189–99 (Fed. Cir. 2019).
69. 41 U.S.C. § 7103(b)(3).
70. *Id.*
71. Henderson v. Shinseki, 562 U.S. 428, 435 (2011).
72. 41 U.S.C. § 7104(g).
73. Kontrick v. Ryan, 540 U.S. 443, 456 (2004); Arbaugh v. Y&H Corp., 546 U.S. 500, 506–07 (2006).
74. *Henderson*, 562 U.S. at 440–42 & n.4.