



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: October 21, 2026

CBCA 8370, 8412

GALLIUM LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Benjamin A. Klopman of The Law Offices of Benjamin A. Klopman, Rockville, MD, counsel for Appellant.

Elizabeth H. Johnson, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **SHERIDAN**, and **NEWSOM**.

LESTER, Board Judge.

Appellant, Gallium LLC (Gallium), filed two appeals in which it seeks costs incurred for overtime heating, ventilation, and air conditioning (HVAC) services at a property that respondent, the General Services Administration (GSA), is leasing from Gallium. After the parties briefed the merits of these appeals, the Board discovered what appeared to be jurisdictional defects affecting the Board's ability to entertain the appeals. Although the parties propose to have the Board dismiss these appeals without prejudice—without resolving the jurisdictional questions—so that Gallium can submit a new claim that satisfies the requirements of section 7103 of the Contract Disputes Act (CDA), 41 U.S.C. § 7103 (2024), and later return to the Board with a new appeal, the parties' proposal would merely postpone,

not eliminate, the need for the Board to consider the current jurisdictional issues. The obvious nature of the jurisdictional defects requires us to dismiss these appeals for lack of jurisdiction.

Background

I. The Lease

On September 7, 2018, GSA entered into a ten-year lease with Eleven Eighteen Limited Partnership (Eleven Eighteen) of 42,240 rentable square feet (RSF), or 35,411 ANSI/BOMA¹ (ABOA) square feet (SF), of space within the building at 1801 L Street, NW, Washington, DC. Appeal File, Exhibit 1 at 1, 5.² The lease specified that “[t]he Lessor is responsible for providing all utilities necessary for base Building and tenant operations as part of the rental consideration,” *id.* at 36, but that this obligation applied only to “normal hours of operations,” which were defined as the hours between 7 a.m. and 6 p.m., Monday through Friday, excepting Federal holidays. *Id.* Beyond those hours, the lessor was not required to provide air conditioning and was only required to provide heating no higher than fifty-five degrees Fahrenheit. *Id.* Use of the HVAC systems outside of normal hours was subject to another clause titled “OVERTIME HVAC USAGE (JUN 2012),” *id.* at 36-37, at an HVAC overtime rate of “\$79.00 per hour per zone.” Exhibit 1 at 7-8.

Portions of the leased space in the office building were built out as Local Area Network (LAN) server rooms that need to be cooled at all times, twenty-four hours a day. To account for that need, section 6.4 of the lease provided an exception to the HVAC overtime requirement that allowed “[u]p to 500 ABOA SF of the Premises” to “receive cooling at all times (24 hrs. a day, 365 days a year) for purposes of cooling the designated server room.” Exhibit 1 at 36. When GSA first leased the space, it was using 550.3 RSF, or 462.5 ABOA SF,³ of the space as LAN server rooms, Exhibit 20 at 1—an amount of space

¹ “ANSI/BOMA” refers to the commercial floor measurement guidelines published by the Building Owners and Management Association and approved by the American National Standards Institute.

² All exhibits are found in the consolidated appeal file, unless otherwise noted.

³ In a memorandum that Gallium submitted in support of judgment in its favor, Gallium represented that, under the lease as originally written, the server room space totaled 550.3 ABOA SF. Memorandum at 2. Exhibit 20 refutes this assertion. That exhibit shows that the three server rooms in use when the lease was first signed totaled 462.5 ABOA SF, a number that was multiplied by a factor of 1.9% to establish the 550.3 RSF figure. It does

with section 6.4's full-time HVAC allowance. Following bilateral lease amendments on May 21, 2021, and August 18, 2023, however, GSA's total leased space expanded to include an additional floor in the building, which, according to Gallium, increased overall GSA server room space needing full-time HVAC from 550.3 RSF to 923.9 RSF, or approximately 771.3 ABOA SF. *See* Exhibit 20 at 1; Joint Statement of Facts ¶¶ 3, 7, 16.⁴

On or about November 21, 2022, Eleven Eighteen transferred ownership of the building at 1801 L Street, NW, to Gallium, Exhibit 4 at 117, and, on December 5, 2022, the GSA contracting officer amended the contract to accept the novation agreement that Eleven Eighteen and Gallium had executed. *Id.* at 114.

II. Gallium's July 2022 Through June 2024 HVAC Overtime Claim

On July 29, 2024, Gallium submitted a certified claim for \$892,068 to the GSA contracting officer for overtime HVAC services in server rooms at the building provided between July 1, 2022, and June 30, 2024. Exhibit 7 at 137-38.⁵ Gallium asserted that, under the terms of its contract, any HVAC that it had provided for server rooms in excess of 500 ABOA constituted HVAC overtime and was subject to the \$79-per-hour outside-of-working-hours fee. *Id.* at 137-38. Gallium certified its claim in accordance with section 7013(b)(1) of the CDA, 41 U.S.C. § 7013(b)(1). *See id.* at 138. Gallium had never previously invoiced GSA for the claimed HVAC overtime.

The GSA contracting officer issued a decision denying that claim on September 24, 2024, citing, among other things, Gallium's failure timely to submit invoices for overtime, which were supposed to be submitted within 120 days after overtime work was performed, and the lack of evidence that the Government had ordered overtime. Exhibit 8 at 152-53. In the decision, the contracting officer notified Gallium of its appeal rights, inclusive of the right to appeal to the Board within ninety days of receipt of the decision. *Id.* at 153-54.

not show a 550.3 ABOA SF figure.

⁴ Although the parties have indicated that the total server room space in use after the amendments to the lease was 923.9 ABOA SF, *see* Joint Statement of Facts ¶ 16; Appellant's Memorandum at 2-3, Exhibit 20 indicates space usage of 771.5 ABOA SF. That figure was multiplied by factors of either 1.19% or 1.21% (depending on which server room was being assessed) to provide a total figure of 923.9 RSF.

⁵ There is no indication in the record that the original lessor or Gallium attempted to bill GSA prior to the July 29, 2024, claim.

On September 30, 2024, Empire Leasing, Inc. (Empire Leasing), which we presume to have been Gallium's management agent,⁶ filed an appeal in its own name by mailing (via certified mail) a notice of appeal to the Board but represented in its notice that it was filing "on behalf of Gallium LLC." Exhibit 9 at 158. On October 7, 2024, the Clerk of the Board docketed the appeal as CBCA 8228, identifying "Empire Leasing, Inc. on behalf of Gallium LLC" as the appellant. *Id.* at 155-57. Subsequently, on December 18, 2024, Empire Leasing filed an unopposed motion to dismiss CBCA 8228 without prejudice, indicating that "[d]ismissal without prejudice as provided in the rules is requested so that the dismissal does not affect any future claims of Gallium that are not the subject of the instant case." Appellant's Unopposed Motion to Dismiss, CBCA 8228, at 1. The motion contained no other explanation as to why Empire Leasing was withdrawing CBCA 8228, but, in subsequent correspondence with the GSA contracting officer, Gallium represented that the appeal was withdrawn because its invoice seeking July 2022 through June 2024 overtime "did not meet the timeframe requirements of the lease." Exhibit 15 at 171. By order dated December 19, 2024, the Board granted Empire Leasing's motion and dismissed CBCA 8228 without prejudice. Exhibit 14 at 169. Gallium's claim for HVAC overtime costs from July 1, 2022, through June 30, 2024, is not before us in these appeals.

III. Gallium's August Through November 2024 HVAC Overtime Request

On November 30, 2024, while CBCA 8228 was pending before the Board, Gallium submitted an invoice to GSA, accompanied by an explanatory letter, seeking payment of \$148,836 for overtime HVAC services for the period between August 1 and November 30, 2024. In the letter, Gallium raised the same arguments in support of entitlement that it had previously raised in support of its claim for overtime for the period from July 1, 2022, through June 30, 2024. Exhibits 11 at 163-64, 12 at 165.

By letter dated December 4, 2024, the GSA contracting officer indicated that, because "there has been no request for these overtime services . . . , no amounts are owed for them." Exhibit 13 at 168. Nevertheless, he indicated that, in light of the then-pending CBCA 8228 litigation, "Lessor's counsel has expressed interest in coming to a more reasonable agreement in how the Government can pay for overtime HVAC services to its server rooms going forward." *Id.* Given that server rooms must be cooled at all times, he suggested two possible options: (1) Gallium could install a submeter in the server room that exceeded 500 ABOA

⁶ We can find nothing in the record that expressly identifies Empire Leasing's relationship to Gallium or right to submit an appeal in its own name on Gallium's behalf. For purposes of this decision, we assume that Empire Leasing served as a management agent for Gallium at the 1801 L Street, NW, property.

SF, after which the Government could “pay its actual usage of electricity to cool this room”; or (2) the parties could negotiate an overtime flat rate specific to cooling server room space that exceeded 500 ABOA SF. *Id.*

In a letter dated January 23, 2025, Gallium responded that “[w]e appreciate your interest in finding a resolution” but “maintain our position that the invoice dated November 26, 2024, is owed in full.” Exhibit 15 at 170. After summarizing its prior explanations of why it believed itself entitled to HVAC overtime, it stated that its November 26, 2024, invoice for \$148,836 was timely submitted and that “[t]he overtime HVAC services provided were in accordance with the terms agreed upon” in the contract “and thus, payment is due.” *Id.* at 171.

Gallium did not expressly request a contracting officer’s final decision in its January 23, 2025, letter or certify its payment request. Nevertheless, on February 13, 2025, the GSA contracting officer issued what he called a contracting officer’s final decision on Gallium’s “claim.” See Exhibit 16 at 174. In the decision, he denied the claim on the grounds that section 6.5 of the lease requires an order by the Government for overtime HVAC services, something which GSA did not issue. *Id.* at 175-76. At the end of the decision, the contracting officer included a notice of Gallium’s appeal rights. *Id.* at 176.

On February 18, 2025, Gallium filed a notice of appeal of the February 13, 2025, decision with the Board, which the Clerk docketed as CBCA 8370.

IV. Gallium’s Invoices for January and February 2025 HVAC Overtime

On February 10, 2025, Gallium submitted an invoice to GSA for \$36,972 covering 468 overtime hours that Gallium employees expended between January 1 through 31, 2025. Exhibit 17 at 177. A month later, on March 10, 2025, Gallium submitted another invoice to GSA, this time seeking payment of \$34,128 for 432 overtime hours between February 1 and 28, 2025. Exhibit 18 at 178. In each invoice, Gallium provided a brief description of the overtime work performed, the number of overtime hours, the unit price of \$79 an hour, and the “Invoice Subtotal,” which was the same dollar figure that was used as the subsequent “Total.” See Exhibits 17 at 177, 18 at 178. The invoices were addressed and directed to the GSA building management office. Neither invoice was accompanied by a cover letter, and neither invoice identified or referenced the GSA contracting officer.

On March 31, 2025, the GSA contracting officer issued what he called a contracting officer’s final decision denying Gallium’s February and March 2025 invoices. Exhibit 19. He represented that he had “determined that in submitting these invoices, the Lessor is requesting a Contracting Officer Final Decision (COFD),” *id.* at 1, and that, through these

invoices, Gallium was seeking payment for providing after-hour HVAC services that are not reimbursable under the terms of the parties' lease agreement. *Id.* at 3. He included at the end of the decision letter a notice of Gallium's appeal rights. *Id.* at 3-4.

On April 11, 2025, Gallium appealed the March 31, 2025, decision to the Board, which the Clerk docketed as CBCA 8412. By order dated April 23, 2025, the Board consolidated CBCA 8370 and 8412.

V. Subsequent Proceedings Before the Board

After GSA filed its answer in these appeals on April 23, 2025, the parties submitted a joint statement representing that they wanted to proceed immediately to a decision on the written record under Board Rule 19 (48 CFR 6101.19 (published in eCFR)), without the need for discovery. The judge then assigned to preside over the appeals directed the parties to file a joint statement of issues and a joint statement of facts, which the parties filed on August 1, 2025. During the next several months, each party filed briefing in support of judgment on the merits in its favor on the written record, concluding with Gallium's submission of a reply brief.

On August 24, 2026, the then-presiding judge issued a show cause order, indicating that, "[w]hen studying the parties' submissions in these appeals, questions arose as to whether the Board has jurisdiction to hear these appeals." Show Cause Order at 1. In the order, the Board indicated that "[r]eviewing the 'claim' upon which the contracting officer based the [first] final decision on appeal, we have been unable to identify any certification in the submissions." *Id.* at 2. It further indicated that "it is unclear whether the submissions, whereby appellant submitted invoices, were the subject of pre-existing disputes between the parties that would allow them to be considered 'claims' and require a contracting officer's final decision." *Id.* The Board in the show cause order directed that each party address whether the Board possessed jurisdiction to entertain these appeals. *Id.*

In a joint response filed September 1, 2026, the parties represented their belief "that under the totality of the circumstances, some of which are likely unknown to the Board, the Board may exercise jurisdiction." Joint Response at 1. "Nevertheless," they indicated, "in the interest of judicial economy, and to avoid any necessity to arrive at a decision on that issue, the Parties propose . . . [t]hat the Board dismiss [these] Appeals without prejudice; . . . [t]hat Appellant thereafter submit a certified claim to the contracting officer which is in all substantial respects identical to those which gave rise to these Appeals;" that the GSA contracting officer swiftly issue a decision; that Gallium file a new appeal; and that the Board decide the new appeal based on the existing briefing. *Id.* at 1-2.

These appeals were reassigned to the current presiding judge on September 8, 2026, who participated in a status conference with the parties on September 9, 2026. During that conference, the parties asked that the Board act on their request for dismissal quickly so that Gallium could submit a new claim that would encompass the payment requests at issue in these appeals. The Board indicated that it would work to resolve the pending issues expeditiously.⁷

Discussion

I. Jurisdiction to Consider the January and February 2025 Costs (CBCA 8412)

The Board's jurisdiction to consider contract disputes derives solely from the CDA—there is no other statutory basis under which the Board can consider contract disputes. *Richter Developments, Ltd. v. General Services Administration*, CBCA 5119, 16-1 BCA ¶ 36,306, at 177,038. Accordingly, unless a matter satisfies the jurisdictional requirements of the CDA, “we cannot proceed to decide a case.” *Monster Government Solutions, Inc. v. Department of Homeland Security*, DOT BCA 4532, 06-2 BCA ¶ 33,312, at 165,155.

In addition, it is the appellant's burden to establish the Board's jurisdiction. *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,970. The parties' representation to the Board that there are facts “likely unknown to the Board” that might establish jurisdiction, Joint Response (Sept. 1, 2026) at 1, does not satisfy, reduce, or eliminate that burden. “When a contractor has a dispute regarding the payment of money from the Government under a contract, the contractor, as a prerequisite to review by the Board, must have submitted a written claim to the relevant agency's contracting officer seeking payment, as a matter of right, of an amount to which it believes itself entitled, stated in a sum certain, and requesting a decision of the contracting officer.” *Duke*

⁷ During the conference, the presiding judge suggested that Gallium might consider submitting its new claim immediately, without awaiting the Board's dismissal, because the rules that divest a contracting officer of authority to act on a matter while it is pending in Federal court and transfer it to the Attorney General, *see Sharman Co. v. United States*, 2 F.3d 1564, 1571-72 (Fed. Cir. 1993) (citing 28 U.S.C. § 516), *overruled in part on other grounds by Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (en banc), do not apply to CDA appeals before the Board, which are typically handled by the responding agency rather than the Department of Justice. *See Primestar Construction v. Department of Homeland Security*, CBCA 5510, 17-1 BCA ¶ 36,612, at 178,331 n.1 (2016). We do not know if Gallium has submitted a new claim to the GSA contracting officer for the overtime costs at issue in these appeals.

University v. Department of Health & Human Services, CBCA 5992, 18-1 BCA ¶ 37,023, at 180,290 (citing *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc), and *Richter Developments*, 16-1 BCA at 177,038); see 41 U.S.C. § 7103(a)(1), (2); 48 CFR 2.101 (Federal Acquisition Regulation (FAR) 2.101). If the requested payment exceeds \$100,000, the contractor must also certify its claim in accordance with the requirements of the CDA. 41 U.S.C. § 7103(b).

The extent to which some of these claim submission requirements are jurisdictional has been the subject of some debate in the last few years. Historically, the Court of Appeals for the Federal Circuit repeatedly maintained that, “[u]nder the CDA, a final decision by the contracting officer on a claim, whether asserted by the contractor or the government, is a ‘jurisdictional prerequisite’ to further legal action thereon.” *Sharman Co.*, 2 F.3d at 1568 (citing cases); see *England v. The Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004) (“We have held, based on the statutory provisions, that the jurisdiction over an appeal of a contracting officer’s decision is lacking unless the contractor’s claim is first presented to the contracting officer and that officer renders a final decision on the claim.”); 138 Cong. Rec. S17799 (daily ed. October 8, 1992) (statement of Senator Howell Heflin that “[a] contracting officer’s final decision under the Contract Disputes Act *will remain a jurisdictional prerequisite* to [judicial] review” after amendments made by Public Law No. 102-572 (emphasis added)). Because a contracting officer cannot issue an enforceable final decision on a contractor’s entitlement to money until the contractor has submitted a “claim” seeking payment of that money, the contractor’s submission of a “claim” satisfying the requirements of the CDA has been viewed as part of the jurisdictional scheme. See, e.g., *Hejran Hejrat Co. v. United States Army Corps of Engineers*, 930 F.3d 1354, 1356 (Fed. Cir. 2019); *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996), *overruled in part on other grounds by Reflectone*, 60 F.3d 1572; *Paragon Energy Corp. v. United States*, 645 F.2d 966, 971 (Ct. Cl. 1981).

That being said, the CDA itself does not contain a comprehensive definition of the term “claim,” see *D.L. Braugher Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997)—only the FAR (at FAR 2.101) does. Until recently, the Federal Circuit accepted the FAR definition as setting forth the mandatory requirements for a “claim,” the satisfaction of which was considered a jurisdictional prerequisite to review by the Court of Federal Claims or a board of contract appeals. See, e.g., *The Swanson Group, Inc.*, 353 F.3d at 1379; *James M. Ellett Construction*, 93 F.3d at 1541-42. Similarly, requirements relating to the timing of the claim submission, such as the need for a contractor to submit its claim to the contracting officer within six years of the accrual of that claim, were also viewed as jurisdictional. See, e.g., *Systems Development Corp. v. McHugh*, 658 F.3d 1341, 1347 (Fed. Cir. 2011).

Recently, though, the Federal Circuit has begun to modify what it views as jurisdictional, citing its interpretation of more recent Supreme Court guidance. For example, the six-year limitations period for submission of a contractor claim that was once viewed as jurisdictional now is not. *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1320-22 (Fed. Cir. 2014). The FAR requirement that a contractor’s monetary claim identify the “sum certain” that the contractor is seeking to recover, although long held to be jurisdictional, no longer is. *ECC International Constructors, LLC v. Secretary of the Army*, 79 F.4th 1364, 1371-79 (Fed. Cir. 2023). In finding the “sum certain” requirement not to be jurisdictional, the Federal Circuit indicated that “Supreme Court precedent and in particular the principles articulated in recent Supreme Court decisions, reflects that rules outside the statutory text are not jurisdictional.” *Id.* at 1373. Because “the CDA itself does not require a claim to state a sum certain,” it held, the FAR “sum certain” requirement can no longer be viewed as jurisdictional. *Id.*

It appears clear, though, that the Federal Circuit still recognizes that at least *some* aspects of the claim submission and decision process—specifically, those (or at least some of those) required by statute as precursors to the filing of an appeal—remain jurisdictional prerequisites to Board review. Section 7105(e)(1) of the CDA grants the boards of contract appeals with “jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency . . .,” 41 U.S.C. § 7105(e)(1)(B), while section 7104(a) provides that “[a] contractor, within 90 days from the date of receipt of a contracting officer’s decision under section 7103 of this title, may appeal the decision to an agency board.” *Id.* § 7104(a). Section 7103 provides that a contracting officer can issue a decision on a contractor’s entitlement to money only after receipt from the contractor of a “submitted claim” or “submitted certified claim.” *Id.* § 7103(f). The Federal Circuit in *ECC International*, in finding that the “sum certain” requirement included in the FAR definition of a “claim” but not in the CDA itself is not jurisdictional, recognized that, “although the [CDA] links the *claim* in § 7103 to the jurisdictional hook of § 7104, there is no statutory language linking the *sum certain* to § 7104.” *ECC International*, 79 F.4th at 1375. From this holding (as supported by a post-*ECC International* appellate court decision), it appears clear that the Federal Circuit still considers the submission by the contractor of a claim to the contracting officer (or a decision by the contracting officer asserting a government claim) to be a jurisdictional prerequisite to appeal. See *BCC-UIProjects-ZAAZTC Team JV v. Secretary of the Army*, No. 2022-2143, 2024 WL 1298745, at *2 (Fed. Cir. Mar. 27, 2024) (in a post-*ECC International* decision, holding that, “[a]s a prerequisite for the Board’s jurisdiction, the CDA requires a contractor to present a valid claim over which the contracting officer has rendered a final decision” (quoting *Parsons Global Services, Inc. ex rel. Odell International, Inc. v. McHugh*, 677 F.3d 1166, 1170 (Fed. Cir. 2012))).

As a result, in considering whether Gallium submitted a “claim” sufficient to establish jurisdiction in CBCA 8412, we will focus on the statutory requirements for a claim set forth in the CDA.

Under the CDA, “[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted *to the contracting officer* for a decision.” 41 U.S.C. § 7103(a)(1) (emphasis added). In seeking HVAC overtime for January and February 2025, Gallium submitted an invoice in February 2025 for the January costs, and it submitted an invoice in March 2025 for the February costs. The invoices were submitted without any accompanying explanation, and neither was directed to the GSA contracting officer, whose name appears nowhere on them. They instead were sent to a GSA business management office, without any request that the invoices be forwarded to the contracting officer. A request for payment that is not directed to the contracting officer cannot constitute a “claim” under the CDA. *See, e.g., J&E Salvage Co. v. United States*, 37 Fed. Cl. 256, 261-62 (1997), *aff’d*, 152 F.3d 945 (Fed. Cir. 1998) (table); *West Coast General Corp. v. United States*, 19 Cl. Ct. 98, 100-01 (1989); *Blanchard’s Contracting LLC v. General Services Administration*, CBCA 8430, 25-1 BCA ¶ 38,905, at 189,386.

Even if they had been directed to the contracting officer, “not all contractor submissions to a [contracting officer] are claims.” *Systems Development*, 658 F.3d at 1346. “[A]n invoice is a classic example of a submission that, standing alone, cannot constitute a CDA claim,” *Parker v. Donley*, 379 F. App’x 980, 982-83 (Fed. Cir. 2010), at least in most circumstances. That is, in part, because, under the FAR, “[a] voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim.” FAR 2.101. In this particular case, we might be able to find that, given the status of the previously submitted overtime pay reimbursement requests (submitted as part of earlier certified and uncertified claims) that were pending with the agency when Gallium submitted the February and March 2025 invoices at issue here, these two invoices were already “in dispute” when Gallium submitted them.

Even if “in dispute,” though, it ultimately would not matter because of another reason, based on the language of the CDA itself, that an invoice generally cannot constitute a “claim”—because the invoice contains no request, either express or implied, for a contracting officer’s final decision. *See Parker*, 379 F. App’x at 982 (noting that the invoice at issue in *Parker* was not a claim because it “did not include an express request for the contracting officer’s final decision under the CDA”). Under the CDA, each claim must “be submitted to the contracting officer *for a decision*.” 41 U.S.C. § 7103(a)(1) (emphasis added). The Court of Appeals for the Federal Circuit has held that, under this statutory provision, a submission “cannot be considered a formal CDA claim [if, in it, the contractor] did not request a final decision of the [contracting officer].” *Bill Strong Enterprises, Inc. v.*

Shannon, 49 F.3d 1541, 1550 (Fed. Cir. 1995), *overruled in part on other grounds by Reflectone*, 60 F.3d 1572. Although the request for issuance of a decision does not have to be express and “can be implied from the context of the submission,” *James M. Ellett Construction*, 93 F.3d at 1543 (quoting *Heyl & Patterson, Inc. v. O’Keefe*, 986 F.2d 480, 483 (Fed. Cir. 1993), *overruled in part on other grounds by Reflectone*, 60 F.3d 1572), the request has to have been made. Neither in nor submitted along with the February and March 2025 invoices was there such a request.

The Federal Circuit has long held that the statutory requirement that a “claim” include a request for a final decision is jurisdictional. *See, e.g., M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1329 (Fed. Cir. 2010); *Heyl & Patterson*, 986 F.2d at 485-86. Although the Federal Circuit, as explained in *ECC International*, no longer views the FAR’s “sum certain” requirement as a jurisdictional prerequisite for a “claim,” 79 F.4th at 1370-79 (citing FAR 2.101 (defining a monetary “claim” as having a sum certain)), the requirement that a valid claim contain a request for a contracting officer’s final decision is imposed not only by the FAR but also by the CDA. *See* 41 U.S.C. § 7103(a)(1). Because the submission of a “claim” remains a jurisdictional prerequisite to an appeal to the Board, and because the CDA defines a “claim” as a submission directed to the contracting officer that includes a request for a contracting officer’s decision, we continue to view that request as a necessary jurisdictional prerequisite.

We understand the contracting officer’s apparent motive for treating these two invoices as “claims” under the CDA: he was trying to move things along. Gallium had already submitted a payment request (which he also treated as a claim) for the same type of overtime costs as Gallium was seeking in these two invoices, albeit for an earlier period of time, and Gallium’s appeal relating to the earlier payment request was already pending with the Board when Gallium sent these two invoices. To speed his ability to reach a final resolution of the HVAC overtime cost issues underlying the invoices, he issued what he called “decisions” on them. But the invoices were not “claims” under the CDA. By choosing to treat them as such, the contracting officer usurped the contractor’s right, established by the CDA, to decide if, and when, to move a contract dispute into the litigation process. Under the CDA, a contractor has six years from the date of the accrual of a claim to submit a claim for costs to the contracting officer for a decision. 41 U.S.C. § 7103(a)(4)(A). It is the contractor who gets to decide if and when it is going to start the process for taking a monetary request into litigation, including when, during that six-year period, to begin that process (through the submission of a claim) and, once the contracting officer issues a final decision, in what forum it will challenge that decision. *See id.* §§ 7103(a)(4)(A), 7104. Absent language in the contract to which the parties agreed, *see Brittani Wattiker v. General Services Administration*, CBCA 8362, 26-1 BCA ¶ 39,027, at 190,060-61 (discussing how parties can agree in a contract to reduce the time for the

contractor to challenge agency action), the contracting officer has no right to usurp the contractor's decision-making time. By choosing to treat the contractor's invoices as "claims" when they were not, the contracting officer was able to issue a purported final decision that the contractor would have no choice but to appeal within ninety days to the Board or to challenge within twelve months at the Court of Federal Claims. Absent a timely challenge, the contractor would purportedly be barred from any further relief, meaning that the contracting officer, by issuing a decision on a non-claim, would have usurped the contractor's right to wait up to six years to submit a claim and forced the contractor to decide whether to litigate in a shorter one-year period. That right is not one that the contracting officer possesses. Any purported final decision that was issued in response to a submission that was not a claim is invalid and provides no basis for the Board's jurisdiction. *See, e.g., Paragon Energy*, 645 F.2d at 971; *Gulf Tech Construction LLC v. Department of Veterans Affairs*, CBCA 7447, 22-1 BCA ¶ 38,179, at 185,427-28; *Richter Developments*, 16-1 BCA at 177,038.

We lack jurisdiction to entertain CBCA 8412.

II. Jurisdiction to Consider the August to November 2024 Costs (CBCA 8370)

Gallium submitted a third invoice for HVAC overtime costs, this one submitted on November 30, 2024, in the amount of \$148,836 covering August through November 2024. Unlike the February and March 2025 invoices, Gallium supplemented its original invoice submission with a letter to the contracting officer, dated January 23, 2025, that the contracting officer considered to be a "claim" and upon which he relied to justify his issuance of a final decision. In considering whether that letter, either in conjunction with or without regard to the invoice, actually satisfied the CDA's statutory requirements for a "claim," it is not clear that Gallium, when submitting the letter, intended it as a CDA claim. Although it explained the reasons that it believed that it was entitled to HVAC overtime in its letter, it did not expressly request a final decision or seek to end the period of negotiations in which the parties were then engaged. *See Exhibit 15 at 170-71.*

Nevertheless, for purposes of considering our jurisdiction, there is only one defect in Gallium's January 23, 2025, submission that we need consider: Gallium's failure to certify its payment request of \$148,836. The CDA requires that, in any claim seeking more than \$100,000, the contractor certify that the claim is submitted in good faith, that supporting data are accurate and complete to the best of the contractor's knowledge, that the amount sought represents the contract adjustment to which the contractor believes itself entitled, and that the certifying official is authorized to certify. 41 U.S.C. § 7103(b)(1). Historically, proper certification of the claim was viewed as both a statutory requirement and a jurisdictional prerequisite to an appeal to the Board. *See, e.g., W.M. Schlosser Co. v. United States*, 705

F.2d 1336, 1337-39 (Fed. Cir. 1983); *Essex Electro Engineers, Inc. v. United States*, 702 F.2d 998, 1004 (Fed. Cir. 1983); *W.H. Moseley Co. v. United States*, 677 F.2d 850, 851-52 (Ct. Cl. 1982). In 1992, however, Congress enacted Pub. L. No. 102-572, 106 Stat. 4506 § 907 (Oct. 29, 1992), amending the CDA to provide that “[a] defect in the certification of a claim does not deprive a court or an agency board of jurisdiction over the claim.” 41 U.S.C. § 7103(b)(3). Despite that amendment, numerous tribunals, based on the view that “there is a significant difference between a defective certification and a nonexistent one,” *Williams v. United States*, 118 Fed. Cl. 533, 538 n.7 (2014), have since held that, although a defect in a claim certification is correctable, the complete *absence* of any certification is not and remains a jurisdictional defect. See, e.g., *Roxco, Ltd. v. United States*, 77 Fed. Cl. 138, 149-50 (2007); *Scan-Tech Security, L.P. v. United States*, 46 Fed. Cl. 326, 339-40 (2000); *Medina Construction, Ltd. v. United States*, 43 Fed. Cl. 537, 547 (1999); *Hamza v. United States*, 31 Fed. Cl. 315, 323-24 (1994); *Gulf Tech Construction*, 22-1 BCA at 185,427; *NEDA of Puerto Rico, Inc. v. General Services Administration*, CBCA 6793, 20-1 BCA ¶ 37,611, at 182,562-63; *Richter Developments*, 16-1 BCA at 177,038; *B&M Cillessen Construction Co. v. Department of Health & Human Services*, CBCA 931, 08-1 BCA ¶ 33,753, at 167,084 (2007); *Gulf Shores LLC v. Department of Homeland Security*, DOT BCA 4530, 06-2 BCA ¶ 33,384, at 165,505-06; *Industrial Marine, Inc.*, ASBCA 63975, 26-1 BCA ¶ 39,052, at 190,223; *Cobeal Consulting Group*, ASBCA 63815, 25-1 BCA ¶ 38,742, at 188,341; *Eurostyle Inc.*, ASBCA 45934, 94-1 BCA ¶ 26,458, at 131,654 (1993). The Federal Circuit’s recent guidance does not provide us a basis for diverging from those precedents. Because it contained no certification, Gallium’s January 23, 2025, letter to the contracting officer seeking payment of \$148,836 was not a “claim” under the CDA.

For jurisdictional purposes, it matters not that the GSA contracting officer viewed the January 23, 2025, letter as a “claim” or actually issued a final decision in response to it. As previously explained, “[w]ithout a presentation of a proper claim, in this case, one that is certified, no decision is possible and any action taken by the contracting officer is a nullity.” *Richter Developments*, 16-1 BCA at 177,038; see *Paragon Energy*, 645 F.2d at 971 (“The [CDA] denies the contracting officer the authority to issue a decision at the instance of a contractor until a contract ‘claim’ in writing has been properly submitted to him for a decision. Absent this ‘claim,’ no ‘decision’ is possible and, hence, no basis for jurisdiction.” (citation omitted)); *GulfTech Construction*, 22-1 BCA at 185,427-28 (citing *Paragon Energy* and additional cases).

We lack jurisdiction to entertain CBCA 8370.

III. The Parties' Request to Dismiss Without Prejudice

After the Board raised questions about its jurisdiction to entertain these appeals, the parties asked that the Board dismiss them without prejudice, without resolving the jurisdictional issues, and allow Gallium to submit a new claim to the contracting officer, after which Gallium would return to the Board for a decision on the merits. What the parties proposed would not have eliminated the need for the Board, when Gallium returns with a new appeal, to resolve the currently pending jurisdictional question.

If the Board possessed jurisdiction over Gallium's current appeals, dismissal of these appeals now, even if the dismissal was without prejudice, would likely preclude Gallium from returning to the Board following its submission to the contracting officer of a "new" claim based on the same operative facts as the previously decided claims. If we possessed jurisdiction to entertain the two pending appeals, it would have to be because Gallium's original payment requests constituted CDA "claims" that the contracting officer was authorized to decide. If the contracting officer issued final decisions on valid CDA claims, Gallium would have had to appeal to the Board within ninety days of receipt of those final decisions if it wanted to challenge them. 41 U.S.C. § 7104(a).

Although Gallium timely challenged the two decisions at issue in CBCA 8370 and 8412, if it simply withdrew its appeals of those enforceable decisions, it would now be time-barred from reviving or refiling them. "[T]he effect of a voluntary dismissal without prejudice pursuant to Rule 41(a) [of the Federal Rules of Civil Procedure] 'is to render the proceedings a nullity and,' at least as it relates to limitations periods and filing deadlines, 'leave the parties as if the action had never been brought.'" *Bonneville Associates, Ltd. Partnership v. Barram*, 165 F.3d 1360, 1364 (Fed. Cir. 1999) (quoting *Williams v. Clarke*, 82 F.3d 270, 273 (8th Cir. 1996) (quoting *Smith v. Dowden*, 47 F.3d 940, 943 (8th Cir. 1995))).⁸ Because we are well past the ninety-day period for filing an appeal, Gallium would be unable to refile appeals of the decisions underlying CBCA 8370 and 8412. *See id.* at 1365 ("[T]he consequence of a voluntary dismissal without prejudice [is] that the appellant cannot thereafter resurrect the appeal after the statute of limitations on the cause of action has run," meaning that the contractor's "attempt to reinstate its appeal . . . after the 90-day period for filing the appeal had run was untimely."). Further, if the contracting officer decisions

⁸ That being said, a voluntary dismissal without prejudice does not eliminate the original decision that the appellant made to pursue relief before the Board rather than at the Court of Federal Claims or the consequences under the "election doctrine" of that choice. *See Bonneville Associates v. United States*, 43 F.3d 649, 653-55 (Fed. Cir. 1994) (discussing the "election doctrine").

currently on appeal were found valid and enforceable, providing a basis for the Board's jurisdiction, Gallium would not be able to submit a new claim based on the same operative facts underlying those final decisions, meaning that, if we were to dismiss the appeals, Gallium effectively will have lost its right to seek the HVAC overtime costs that it currently seeks, even if dismissed without prejudice. *See D.L. Braugher*, 127 F.3d at 1483 (finding that, after a contracting officer's decision on a claim "became final and conclusive and no longer reviewable," the contractor could not revive its right of action by resubmitting a new mirror-image claim and then filing a new appeal). The parties' belief that a dismissal without prejudice, followed by a new appeal on a HVAC overtime cost claim that Gallium now intends to submit, would have eliminated the need to resolve the current jurisdictional issues is misguided.

When addressing past requests for dismissal without prejudice in other appeals where it has been obvious that the Board lacked jurisdiction over the appeal, we have found it necessary to dismiss for lack of jurisdiction rather than on procedural grounds. *See Shonto Governing Board of Education, Inc. v. Department of the Interior*, CBCA 6043-ISDA, 18-1 BCA ¶ 37,038, at 180,320 ("[O]nce we are aware that we lack jurisdiction to entertain an appeal, we have 'no other recourse but to dispose of the case by dismiss[ing]' it based on the jurisdictional defect.") (quoting *Duke University* 18-1 BCA at 180,291 (quoting *Rex Systems Inc. v. United States*, No. 92-411C, 1993 WL 13726058, at *3 (Fed. Cl. Dec. 13, 1993), *appeal dismissed*, 41 F.3d 1517 (Fed. Cir. 1994) (table))). We have done the same here. This dismissal for lack of jurisdiction "is, by necessity, without prejudice." *SRA International, Inc. v. Department of State*, CBCA 6563, et al., 20-1 BCA ¶ 37,543, at 182,314 n.1.

Decision

For the foregoing reasons, these appeals are **DISMISSED FOR LACK OF JURISDICTION**.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

We concur:

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

Elizabeth W. Newsom
ELIZABETH W. NEWSOM
Board Judge