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¶ 79 POSTSCRIPT VI: The CDA "Sum Certain" Requirement: Uncertainty And Opportunity After *ECC International*

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Addendum by Ralph C. Nash

This REPORT has closely covered events up to and including the decision in *ECC International, LLC v. Secretary of the Army*, 79 F.4th 1364 (2023), 65 GC ¶ 239, in which the U.S. Court of Appeals for the Federal Circuit held that the Contract Disputes Act sum certain requirement is not jurisdictional but merely a claim processing rule. *Postscript V: The CDA Sum Certain Requirement: Federal Circuit Continues Correction of CDA Jurisdiction*, 37 NCRNL ¶ 66.

ECC is widely regarded as a landmark case because it upends the jurisdictional status of the sum certain rule and may have ramifications for disputes over other CDA requirements as well. The FAR definition of a "claim" requires that claims for monetary relief seek "payment of money *in a sum certain*." FAR 2.101; FAR 52.233-1(c) (emphasis added). The U.S. Court of Federal Claims and the boards of contract appeals interpret the requirement to mean that a claim must state a specific amount sought, or at least provide sufficient information for the amount to be easily determined. See, e.g., *Metric Construction Co. v. U.S.*, 14 Cl. Ct. 177 (1988). When a claim fails to clearly state an amount, or includes qualifying language (e.g., "approximately," "at least," "in excess of," "no less than"), it does not state a sum certain. See *Contract Disputes Act Claims: The "Sum Certain" Requirement*, 26 N&CR ¶ 41. The Federal Circuit has long enforced the sum certain requirement, considering it a jurisdictional rule as recently as 2021. *Creative Management Services, LLC v. U.S.*, 989 F.3d 955 (Fed. Cir. 2021), 63 GC ¶ 73. But a line of U.S. Supreme Court decisions, dating to *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006), raised the bar for jurisdictional stature.

ECC presented what the Federal Circuit characterized (at 1370) as "unique facts," which prompted the court, *sua sponte*, to "reexamine the nature of the sum-certain requirement." The contractor had stated a specific overall amount for its claim, but the board below held that the claim was composed of multiple distinct sub-claims relying on separate operative facts, each of which

required—but did not state—a sum certain. The Government first raised the sum certain challenge during post-hearing briefing, three months after the hearing. By that time, the CDA statute of limitations had run, precluding the contractor from refiling its claims. Thus, the circumstances in *ECC* underscored both the complexities of applying the sum certain requirement and the harsh consequences of treating the requirement as jurisdictional.

The *ECC* decision, though a long time in coming, was clearly foreshadowed in *Arbaugh*. As the Supreme Court explained there, the Court applies a "readily administrable bright line" test: for a rule to be jurisdictional, Congress must clearly say so. Thus, when a rule is not contained in the jurisdictional provisions of a statute and "does not speak in jurisdictional terms or refer in any way to the jurisdiction" of the tribunal, it generally is not jurisdictional. The "sum certain" requirement, mentioned nowhere in the CDA, plainly fails the jurisdictional test.

It is tempting to greet the *ECC* decision like the fall of the Walls of Jericho, as though it provided CDA appellants free access to the courts and boards, long impeded by jurisdictional disputes. The Federal Circuit, however, downplayed the significance of its holding, emphasizing that while the sum certain requirement is not jurisdictional it remains a mandatory claim requirement, and suggesting that the distinction will rarely make a difference. This article considers factors that will influence the practical effects of *ECC* on sum certain disputes and on disputes over other CDA procedural rules. Despite lingering questions, the *ECC* decision confers greater authority on the court and the boards either to countenance unnecessary procedural litigation or to put an end to it.

Effect Of *ECC* On "Sum Certain" Disputes

After *ECC*, the "sum certain" requirement is finally relegated to a claim processing rule. The Circuit's suggestion that this "will be of little, if any, consequence" in "the vast majority of cases" is premised on three questions the Circuit touched on in dicta, but did not decide: (1) whether sum certain is treated as an element of a claim for relief or an affirmative defense; (2) what standard will apply for forfeiture of claim processing rules; and (3) whether a sum certain deficiency requires the claimant to refile its claim or is correctible in litigation.

The Circuit stated several times in *ECC* that the sum certain rule is "an element of a claim for relief." While the court was not squarely presented with the question of whether the sum certain rule is an element of a cause of action, an affirmative defense, or something else, and while the court in one instance referred to a "deficient sum certain" as a "defense," on balance the *ECC* opinion suggests (in dicta) that proper statement of a sum certain goes to the merits of a claim. That would be significant because it determines which party bears the burden of proof.

The Federal Circuit's decision in *Sikorsky Aircraft Corp. v. U.S.*, 773 F.3d 1315 (Fed. Cir. 2014), 56 GC ¶ 403, is instructive, along with decisions before and after that opinion. *Sikorsky* held that the CDA's six-year statute of limitations was not jurisdictional. Previously, when the statute of limitations was treated as a jurisdictional rule, a party asserting a statute of limitations defense could move to dismiss for lack of jurisdiction, placing the burden on the claimant to prove its claim was timely filed. See *Raytheon Missile Systems*, ASBCA 58011, 13 BCA ¶ 35,241, 2013 WL 685219, 55 GC ¶ 73. Since *Sikorsky*, the court and boards have treated the CDA limitations period as an affirmative defense, with the burden of proof on the party asserting the defense. See, e.g., *CB & I AREVA MOX Servs., LLC v. U.S.*, 138 Fed. Cl. 292 (2018); *DRS Global Enterprise Solutions, Inc.*, ASBCA 61368, 18-1 BCA ¶ 37,131, 2018 WL 4427235. Here, by contrast, if the Circuit's dicta in

ECC is followed and the sum certain requirement is treated as an element of a cause of action, the claimant will continue to bear the burden of proving that its claim satisfies the sum certain requirement.

The standard established for forfeiture of claim processing rules will be even more important. In the wake of *ECC*, an appeal of a claim that does not assert a sum certain will remain subject to dismissal for failure to state a claim (not for lack of jurisdiction). Indeed, the Federal Circuit predicted in its opinion (at 1370) that in many cases claims lacking a sum certain would be dismissed on appeal if they were not denied by the Contracting Officer at the outset. In such cases, the "claim processing" rule would have the same practical effect as the old jurisdictional rule: dismissal. But the courts and boards will have latitude to limit the Government's ability to raise formalistic sum certain objections well into litigation by establishing a sensible standard for forfeiture.

The Federal Circuit observed in *ECC* (at 1380) that because the sum certain requirement is a mandatory claim processing rule, "if a party challenges a deficient sum certain after litigation has far progressed…that defense may be deemed forfeited." The court also noted, however, that "[t]he Supreme Court has not articulated in the nonjurisdictional rule context precisely how long is 'too long' for a party to delay in raising objections before forfeiture comes into play." The court remanded the case to the board to determine whether the Government forfeited its sum certain objection. The Supreme Court's decisions addressing forfeiture of claim processing rules state only that objections can be raised no later than trial on the merits. If the Government were able to move to dismiss for failure to state a claim based on the lack of a sum certain at any time through trial, the nonjurisdictional status of the rule would be an empty gesture.

The solution is a standard that requires a party asserting a sum certain objection to raise the argument early in CDA litigation to avoid forfeiture. Enforcing the sum certain requirement after the complaint and answer have been filed serves no useful purpose, particularly because claimants are generally free to increase the amount claimed during litigation. See, e.g., *Bick-Com Corp.*, ASBCA 24782, 84-1 BCA ¶ 16,957 (permitting a contractor to amend its complaint to increase the amount claimed without altering the substance of the claim, noting that the claim amount does not preclude proof and recovery of a higher amount in the appeal).

Indeed, appellants may go a step further and argue that, once the CO issues a final decision denying a claim on its merits without raising any concern as to whether the claim stated a sum certain, the Government ought not to be able to have an appeal dismissed for failure to state a claim based on the absence of a sum certain in the underlying claim. After all, the purpose of the sum certain requirement is to provide adequate notice of the amount of the claim. *Creative Management Services, LLC v. U.S.*, 989 F.3d 955, 962 (Fed. Cir. 2021). If the CO had sufficient information to issue a decision, that purpose has arguably been served.

Enterprising counsel will also argue that the failure to assert a claim in a sum certain should be correctible during litigation without starting over with a new claim and CO's final decision, now that the requirement is a merits issue rather than a jurisdictional one. In many cases, such a correction may consist of simply removing a qualifying term or confirming which of multiple figures in a claim is the amount sought. In *ECC*, the Federal Circuit suggested in dicta (at 1370) that a claimant would be required to "refile its claim to specify a sum certain." But nothing is gained by requiring refiling, and it is not consistent with the boards of contract appeals' statutory mandate to provide "informal, expeditious, and inexpensive resolution of disputes." 41 USCA § 7105(g)(1). As

the Circuit has recognized, Congress intended the CDA to grant "relatively free access to the boards of contract appeals and the Court of Federal Claims." *Alliant Techsystems, Inc. v. U.S.*, 178 F.3d 1260 (Fed. Cir. 1999), 41 GC ¶ 308.

ECC thus offers government contract tribunals a number of avenues to avoid unproductive procedural fights regarding the sum certain requirement, and other CDA claim requirements as well, as they should now be recategorized as claim processing rules.

Effect Of *ECC* On Other CDA Procedural Rules

As this REPORT has observed, *ECC* should pave the way for the downgrade of the jurisdictional status of most other CDA requirements, specifically: (a) claim submission (requirements for claims to be "in writing" and submitted to the CO), (b) certification of claims valued $100,000 or more, and (c) timely appeal of COs' final decisions. 37 NCRNL ¶ 66. The reasoning adopted in *ECC* should relegate each of these requirements to claim processing rules. See Castellano, *After Arbaugh: Neither Claim Submission, Certification, Nor Timely Appeal Are Jurisdictional Prerequisites to Contract Disputes Act Litigation*, 47 PUB. CONT. L.J. 35 (Fall 2017).

In contrast to other CDA requirements, a CO's final decision (whether formalized in writing or a deemed denial) is a jurisdictional precondition to CDA litigation before the boards and Court of Federal Claims under *ECC* and *Arbaugh* and its progeny. 41 USCA § 7105(e) grants jurisdiction to the Armed Services and Civilian boards over "any appeal *from a decision of a contracting officer*" (emphasis added). Similarly the jurisdictional grant to the Court of Federal Claims under the Tucker Act is founded on a "claim by or against or dispute with, a contractor…*on which a decision of the contracting officer has been issued*." 28 USCA § 1491(a)(2) (emphasis added). So, a CO's final decision is necessary for CDA jurisdiction within the limits imposed by *Arbaugh*. As such, government contract tribunals cannot go as far with the CDA as the courts did with the Federal Tort Claims Act, 28 U.S.C. § § 2671–2680. The Sixth Circuit, after ruling that the FTCA's sum certain requirement was not jurisdictional under *Arbaugh*, held later that filing an administrative claim with the agency was not a jurisdictional requirement either. *Copen v. U.S.*, 3 F.4th 875 (2021); *Kellom v. Quinn*, Nos. 20-1003/1222, 2021 WL 4026789 (6th Cir. Sept. 3, 2021). The boards and court must stop short of that, as the CDA and Tucker Act jurisdictional grants are expressly based on a final decision. But again, neither the remaining claim submission rules, nor certification, nor timely appeal should properly be jurisdictional. All such other rules should be revisited and downgraded to claim processing status.

The boards and the Court of Federal Claims should not wait for the Federal Circuit to act, but should complete the work begun in *Sikorsky* and continued in *ECC*, and correct the remaining CDA jurisdictional rules to conform to the *Arbaugh* standard. As a practical matter, the Federal Circuit is the ultimate arbiter of most CDA questions. As the ASBCA demonstrated recently, however, the boards and the court do not need instructions from the Federal Circuit to apply Supreme Court precedent. In *Lockheed Martin Aeronautics Co.* , ASBCA 62209, 21-1 BCA ¶ 37,886, 2021 WL 2912095, 63 GC ¶ 242, relying on the Supreme Court's decision in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products*, LLC, 137 S. Ct. 954 (2017), the board held that laches is not generally available as an affirmative defense under the CDA. The board noted that: "While it would be preferable if the Federal Circuit had been given the opportunity to previously consider this issue, this Board is ultimately subject to the precedent of the United States Supreme Court and will ad-

here to its decisions." The boards and the court thus should implement *Arbaugh*, make a clean sweep, and require nothing more for CDA jurisdiction than a CO's final decision.

Concluding Thought

No less a figure than beloved and recently departed Judge Ruth Burg decried the problem of "procedural issues…obstruct[ing] the inexpensive and expeditious resolution of disputes" called for by the CDA. 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, 174 (Fall 2012). Judge Burg observed that motions to dismiss on procedural grounds such as claim certification "proved the adage that 'justice delayed is justice denied.' " While *ECC* did not remove all unnecessary procedural obstacles to CDA litigation, it opened the door for trial tribunals to do so. In approaching sum certain disputes and other CDA procedural requirements, the court and boards should remove pointless procedural hurdles and (once and for all) focus only on substance. *Daniel H. Ramish*

ADDENDUM

For years we have been discussing the lunacy of litigation over the sum certain requirement in the definition of "claim" in Federal Acquisition Regulation 2.101. But while the lack of a sum certain has led, and may continue to lead, to litigation issues, it has rarely been a concern to COs facing the need to settle or dispose of claims. It is a rare CO who cares if the claim states that the contractor is entitled to "approximately" a specified amount. What the CO needs is sufficient cost or pricing data to support a negotiated settlement. Ideally, that data should include the actual costs of work already performed and estimates of the cost of work to be performed—supported by credible explanations of how these estimates were arrived at. After all, COs cannot give away money—they have to justify the amount of any settlement. Lacking data supporting the amount claimed, all the CO can do is deny the claim or refuse to issue a decision. Hopefully, the boards and the Court of Federal Claims will recognize this reality and rule that the lack of a sum certain defense will only apply if it is asserted by the CO in the decision on the claim. That would mean rejecting the defense if it is first asserted during litigation. Otherwise, the *ECC* decision will turn out to be a hollow victory for a more efficient claims resolution process. *RCN*