



Clarifying a significant issue in government contracts litigation against the government, the U.S. Court of Appeals for the Federal Circuit has held that the so-called "sum certain" requirement for Contract Disputes Act (CDA) claims against the government is a nonjurisdictional rule, subject to forfeiture if not timely raised by the government.

In its August 22, 2023, opinion in *ECC International Constructors, LLC v. Secretary of the Army* (Fed. Cir. No. 21-2323), the court held that although contractors are required to specify a "sum certain" (a specific dollar value sought) when submitting monetary claims, their failure to do so does not preclude a court or board from later reviewing the government's decision on the contractor's claim. The court held, "We conclude that Congress did not clearly state that a claim submitted under the CDA must include a sum certain in order for the Board [of Contract Appeals] or a court to exercise jurisdiction."

The court's decision—the latest to re-examine the difference between jurisdictional rules and nonjurisdictional claim-processing rules in light of recent U.S. Supreme Court decisions—provides clarity on an important issue in CDA cases. Among other things, *ECC* puts the onus on the government to timely raise a defense that a contractor has failed to specify a "sum certain" or risk forfeiture of such an argument.

In this Update, we provide an overview of the court's decision and its significance.

## **Background: the CDA and "Sum Certain" Requirement**

Enacted in 1978 to adopt a uniform approach to government contracts disputes, the CDA (41 U.S.C. §§ 7101-7109) provides a mandatory dispute resolution mechanism. The CDA requires that contractors bring disputes related to their contracts before a contracting officer (CO) by requesting a final CO's decision on the contractor's claim. A contractor's claim can seek relief that is either monetary (relief in the form of a monetary adjustment under the contract) or nonmonetary (an interpretation of the contract) in nature. The government can also assert claims against contractors by issuing a CO's final decision.

The CDA is implemented in the Federal Acquisition Regulation's (FAR) Disputes clause at FAR 52.233-1. FAR 2.101 defines "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, *the payment of money in a sum certain*, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract" (emphasis added). Although FAR 52.233-1 provides an identical definition of the term "claim," there is no "sum certain" requirement in the statute itself.

## **The U.S. Supreme Court's Clear Statement Rule for Jurisdictional Requirements**

In a 2022 decision, the Supreme Court held that a clear statement by Congress is required to treat a procedural requirement as jurisdictional. *Boechler, P.C. v. Comm'r*, 142 S. Ct. 1493, 1497 (2022). As other recent Supreme Court case law cited in *ECC* explains, because jurisdiction can be raised at any time in a case, jurisdictional rules can result in "harsh consequences" and a "waste of judicial resources." *Ford Bend Cty. Tex. v. Davis*, 139 S.Ct. 1843, 1848 (2019). Thus, the Supreme Court's case law sets a high standard for determining that a particular requirement is jurisdictional, as opposed to a mandatory claims-processing rule that is merely intended to facilitate the orderly progress of litigation but is not a prerequisite to a court or board's jurisdiction.

## **The Federal Circuit's *ECC* Decision**

The *ECC* case involved a U.S. Army Corps of Engineers (USACE) contract awarded to ECC International Constructors, LLC (ECCI) in 2010 to construct a military compound in Afghanistan. In 2014, ECCI filed a claim to the CO claiming construction delays allegedly attributable to the government and seeking \$13.5 million.

ECCI appealed the CO's deemed denial of the claim to the Armed Services Board of Contract Appeals (ASBCA). In 2020, after six years of litigation and unsuccessful settlement discussions and three months after a hearing before the ASBCA, the government moved to dismiss ECCI's claim for lack of subject-matter jurisdiction for failure to state a "sum certain" for each distinct claim. ECCI contended that its claim met the "sum certain" requirement because its subclaims were readily calculable. The ASBCA disagreed and granted the government's motion, concluding that although ECCI had submitted a "bottom-line" sum certain, it did not set forth sums certain for the discrete subclaims that comprise its submission. ECCI appealed to the Federal Circuit.

Notably, the Federal Circuit raised the issue of whether the "sum certain" requirement is jurisdictional on its own before oral argument after the case had been fully briefed. Following oral argument, the three-judge panel directed the parties to file supplemental briefs addressing whether the "sum certain" requirement is jurisdictional

in light of recent Supreme Court precedent.

Reversing the ASBCA's decision, the court held that the answer is "no." The court explained that "there is no dispute that the need to state a sum certain in submitting a claim under the CDA is a mandatory rule provided for in the FAR." However, relying on the Supreme Court's decision in *Boechler* and other recent Supreme Court precedent noted above for the proposition that a jurisdictional rule requires a "clear statement" by Congress, the court explained that here, "it could not be more evident that Congress has not provided a clear statement: the sum-certain requirement is not even in the CDA itself." As the court noted, section 7103(a) of the CDA "sets forth requirements and timing for submitting a claim," but "it identifies no requirement that a claim must state a sum certain. In fact, not a single provision of § 7103(a) mentions the term 'sum certain.'" Thus, the court held, the "sum certain" requirement is not jurisdictional.

The court acknowledged that in prior cases decided as recently as 2021, the court had identified the "sum certain" requirement as jurisdictional. However, the court explained that those cases "no longer control in light of recent Supreme Court guidance" because they relied "solely on the FAR definition" of a claim and not the text of the CDA. The court explained that the Supreme Court's recent cases reflect that "rules outside the statutory text are not jurisdictional."

The court rejected the government's arguments that other considerations besides the text of the statute support finding that the "sum certain" requirement is jurisdictional. For example, the court was unpersuaded by the government's argument that the ordinary meaning of the term "claim" requires a demand for a sum certain, or that the FAR requirement that claims over \$100,000 be accompanied by a certification supported a "sum certain" requirement.

Turning to the consequences of its holding, the court explained that a defense that a claim lacks a "sum certain" can be forfeited if it is not timely raised. As the court explained, an objection based on a nonjurisdictional claims-processing rule may be forfeited "if a party waits too long to invoke the rule." The court remanded to the ASBCA for a determination as to whether the government waited too long to raise its defense in this particular case.

As of this writing, it is unclear if the government will seek rehearing *en banc* of the panel decision in *ECC* by the full Federal Circuit.

## **Implications for CDA Litigation**

Several takeaways from the court's decision can be made, including:

- The *ECC* decision will produce more predictability in the adjudication of CDA cases by clarifying that at least one recurring defense—that a claim has failed to specify a "sum certain"—will not result in a dismissal for lack of jurisdiction.
- A government challenge that a contractor's claim fails to specify a "sum certain" must be promptly raised, or it risks being forfeited. This may result in the government raising an alleged "sum certain" defect in a Rule 12(b)(6) motion or its equivalent at an early stage of the litigation.
- The "sum certain" requirement is still a mandatory prerequisite to a valid claim, even if it is not jurisdictional. The Federal Circuit states in *ECC* that it is "fair to presume" that if a claim lacks a sum certain, it will either be denied by the CO or dismissed on appeal, "allowing, if appropriate, the claimant to timely revise and refile its claim to specify the sum certain." The court did not elaborate on the circumstances in which refiling of a defective claim would be appropriate, and contractors in such situations will have to be prepared to argue for such relief.

- Determining the quantum of a claim—in addition to entitlement—can be time-consuming, especially in complex cases under multiple theories. Supporting documentation should be assembled at the earliest possible stage when preparing a claim. Contractors must also be attentive to other requirements in FAR 52.233-1 and the CDA, including the certification requirement for claims over \$100,000.
- *ECC* may signal the court's willingness to examine whether other rules in government contracts disputes and bid protests are jurisdictional. As the court noted in a footnote in *ECC*, it recently relied on the Supreme Court's case law involving jurisdictional rules to revisit the interested party rule in bid protests.

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