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The Requirement to State a “Sum Certain” No Longer a Jurisdictional Bar to Government Contract Claims

The Boards of Contract Appeals, Court of Federal Claims, and the Federal Circuit have long held that the elements of a claim under the Contract Disputes Act (“CDA”) to be jurisdictional. Those requirements are as follows:

- A. Claims generally.--
 1. Submission of contractor’s claims to contracting officer.--Each claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision.
 2. Contractor’s claims in writing.—Each claim by a contractor against the Federal Government relating to a contract shall be in writing.
3. Contracting officer to decide Federal Government’s claims.--Each claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer.
4. Time for submitting claims.
 - a. In general.—Each claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim.¹

In addition to these procedural requirements of a claim, the Boards and Courts have also held that the actual definition of a “claim” that only appears in the Federal Acquisition Regulation (“FAR”), not the CDA, is also relevant to jurisdictional analysis.² On August 22, 2023, the Federal Circuit, in *ECC International Constructors, LLC v. Secretary of the Army* reversed this line of cases and found that only statutory requirements may be considered jurisdictional, with important consequences for contractors.³

In *ECC International*, the contractor submitted a delay claim to the Army contracting officer (“CO”) without including a specific demand for money but instead relying on the ability of the Agency to calculate the claim amount based on the submission of cost estimate reports and daily costs for the delay period. After the contracting officer failed to respond to the claim, the contractor submitted an appeal of a deemed denial to the Armed Services Board of Contract Appeals (“ASBCA”). The ASBCA dismissed the delay claims for lack of jurisdiction, finding that the Appellant did not show the amounts were “readily calculable by simple arithmetic.”⁴ On appeal, the Federal Circuit noted that the requirement that a claim state a “sum certain” is derived from the definitions section of the FAR, not the language of the CDA. As such, Congress could not have intended that it be jurisdictional.

This holding does not mean that contractors should fail to include the required elements of a claim: a written request for a specific amount made within six years about which a final decision from a contracting officer is made. The Government will still have a basis to dismiss a claim that does not include a sum certain—the FAR rules remain important claim processing rules that are essential elements of recovery under a CDA claim. As such, an Agency may still move to dismiss a contractor’s claims for failure to meet any mandatory claim element. However, while a jurisdictional requirement can be brought by a defendant at any time—and may be ruled on by the court of its own volition (“*sua sponte*”)—a defense based on the failure to meet a claim element may be

forfeited by an Agency if not brought in a timely manner. While contractors should still present a specific sum of money in their monetary claims, they no longer have to be frustrated by having a case dismissed for failure to state a sum certain very late into litigation. On that point, the Federal Circuit notes that an Agency's failure to assert a defense based on CDA's rules before the court reaches the merits of the case will likely result in the forfeiture of such a defense. The Federal Circuit notes that the Contracting Officer waited "until six years after ECCI submitted its claim, waiting until after settlement discussions, discovery, ADR with a Board judge, summary judgment briefing, an appeal to this court on a specific sub-issue, and a nine-day hearing on the merits in June 2020."⁵ Due to the time that had passed, in its remand to the ASBCA for a decision, it noted that the merits of the case were already under consideration. The Board's decision on remand, and any potential further appeal, will provide additional guidance regarding the timeframe of dismissal of a claim that fails to include a sum certain.

Again, contractors would be well-served to include all of the requirements of the Contract Disputes Act and FAR when submitting a claim or risk dismissal. If you are not certain whether your claim meets those requirements, the attorneys at Peckar & Abramson are on standby to assist you with your claim submission.

¹ 41 U.S.C. § 7103.

² See *Creative Management Services, LLC v. United States*, 989 F.3d 955 (Fed. Cir. 2021); *Securiforce Int'l Am., LLC v. United States*, 879 F.3d 1354, 1359 (Fed. Cir. 2018); In a 2017 article in the *Public Contract Law Journal*, Nathaniel Castellano noted that *Arbaugh v. Y&H Corporation* was inconsistent with the Court and Boards' treatment of the requirement to certify a claim, submit it, and make a timely appeal as jurisdictional. The certification and submission requirements, he argued, were merely "important claim-processing rules." In *ECC*, however, the Federal Circuit states that "the [CDA] links the claim in § 7103 to the jurisdictional hook of § 7104," suggesting that they are not ready to hold that the procedural requirements of § 7103 **are not** jurisdictional. This belies the requirement stated by the Supreme Court that Congress must "clearly state" that a requirement is jurisdictional, particularly since *Arbaugh* included specific reference to statutory requirements that SCOTUS found non-jurisdictional. However, that specific issue appears to have not been briefed, and the Federal Circuit's statements regarding § 7104 appear to be dicta. See 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).

³ *ECC International Constructors, LLC v. Secretary of the Army*, No. 2021-2323, 2023 WL 5355302 (Fed. Cir. Aug. 22, 2023).

⁴ *ECC Int'l Constructors, LLC*, ASBCA 59586, 21-1 BCA ¶ 37862.

⁵ *Id.* at 12.

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