

ALERT

Federal Circuit Holds “Sum Certain” Requirement for CDA Claims Is Not Jurisdictional

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WHAT: After previewing earlier this year that it was reconsidering its existing precedent, the Federal Circuit held yesterday that the requirement that contractors state a “sum certain” in claims brought under the Contract Disputes Act (CDA) is not a jurisdictional prerequisite to litigating that claim in federal court or a board of contract appeals. *ECC Int’l Constructors, LLC v. Sec’y of the Army*, No. 21-2323 (Aug. 22, 2023). Recent Supreme Court decisions caused the Federal Circuit to revisit on its own its earlier line of cases holding otherwise and to conclude that a procedural requirement is jurisdictional only if Congress (and the applicable statute) clearly states that it is.

WHAT DOES IT MEAN FOR INDUSTRY: Although the court posits that its decision will not impact “the vast majority of cases,” the *ECC* decision is a significant step in leveling the playing field in CDA disputes and may have implications beyond the “sum certain” requirement. As we noted in an earlier alert about this case, the government has long enjoyed a powerful litigation advantage against contractors: the ability to move to dismiss for lack of jurisdiction at any point in the litigation. *ECC* means that a defect in a claim does not deprive a board or the Court of Federal Claims of jurisdiction. It also means that a government defense that a claim is defective can be forfeited.

By way of background, *ECC* timely submitted a claim for government delays relating to a construction project in Afghanistan. It divided its claimed amount into various categories and asserted different bases for delay and compensation. That claim was deemed denied, and

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ECC appealed the deemed denial to the Armed Services Board of Contract Appeals (ASBCA or Board). Once there, the parties engaged in settlement discussions, discovery, alternative dispute resolution before a Board judge, summary judgment briefing, a Federal Circuit appeal on one portion of the claim, and a nine-day hearing on the merits. Three months after the hearing, during post-hearing briefing and *six years* after ECC first submitted its claim, the government moved to dismiss the appeal for lack of jurisdiction, arguing for the first time that ECC’s claim failed to state a sum certain because portions of ECC’s claim were actually separate claims that required a separate sum certain for each. The Board ultimately agreed with the government and dismissed the claim that ECC had spent years litigating and could no longer bring because the CDA’s statute of limitations had expired.

As the Federal Circuit put well, “[t]his case presents facts that reflect the concerns underlying misapplication of the jurisdictional label.” Whether a requirement is jurisdictional or merely a mandatory procedural step may have no practical impact in other cases. But in *ECC*, that distinction made all the difference, and it “reflect[ed] the draconian consequences of a jurisdictional rule: a late-filed motion challenging jurisdiction can thwart both the claimant’s ability to recover and any opportunity to timely refile.” If, however, a sum certain is merely a mandatory claims-processing step, then the government could forfeit an argument that the claim lacked that element by failing to raise it in a timely fashion.

Acknowledging the Supreme Court decisions holding that jurisdictional requirements must be “clearly state[d],” the Federal Circuit analyzed the text of the CDA and found that it did not require a “sum certain” as a predicate to jurisdiction. Indeed, the words “sum certain” are not in the statute. That language and requirement comes instead from the Federal Acquisition Regulation’s (FAR) Disputes clause. The court rejected the government’s attempts to bootstrap a “sum certain” requirement into the CDA through various statutory references to a “claim,” returning repeatedly to the Supreme Court guidance that a jurisdictional requirement must be clearly stated in the statute.

The Court did not hold that the “sum certain” requirement is irrelevant. It recognized that a “sum certain” is an important, mandatory element of a claim for relief that a claimant must satisfy in order to recover. But, unlike a challenge to subject matter jurisdiction that can be raised at any point in the litigation or by the tribunal itself, a nonjurisdictional procedural defect can be forfeited if a party waits too long to raise it. The Court ultimately remanded the case to the Board to consider whether the government forfeited its right to raise a substantive challenge based on the “sum certain” requirement, and if it did, to consider ECC’s claim on the merits.

The Court’s analysis is a must-read for practitioners who pursue claims under the CDA, and the upshot of *ECC* is that at least one litigation advantage, previously (and practically) available only to the government, is now off the table. And just as the court has reexamined its precedent in the bid protest context in light of recent Supreme Court guidance, *see, e.g., M.R. Pittman Grp. LLC v. United States*, 68 F.4th 1275 (Fed. Cir. 2023) (determining that the *Blue & Gold* waiver rule regarding solicitation challenges is not jurisdictional), the court could potentially extend that guidance to other elements of CDA claims litigation previously understood to be

jurisdictional.