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ALERT

Federal Circuit Reconsiders What Is Jurisdictional: Will It Level the Playing Field in CDA Disputes?

May 5, 2023

WHAT: On May 5, 2023, the United States Court of Appeals for the Federal Circuit questioned its previous understanding that the requirement to state a "sum certain" as part of any monetary claim under the Contract Disputes Act (CDA) is jurisdictional. The court raised this issue *sua sponte* following the U.S. Supreme Court's decision in *Wilkins v. United States*, 143 S.Ct. 870 (Mar. 28, 2023). In *Wilkins*, the Court highlighted the "risk of disruption and waste that accompanies the jurisdictional label" and confirmed that it would "treat a procedural requirement as jurisdictional only if Congress 'clearly states' that it is." This issue arose during oral argument in *ECC International Constructors, LLC v. Secretary of the Army*, No. 21-2323.

WHAT DOES IT MEAN FOR INDUSTRY: If the court holds that the "sum certain" requirement is not jurisdictional, it would be an important step toward leveling the playing field in CDA disputes. Although Congress enacted the CDA – to provide "for the efficient and fair resolution of contract claims" – 45 years ago, uncertainties still remain today. We recently discussed a few of these uncertainties here and here. And because the Government has historically succeeded in arguing that these uncertainties relate to the court's jurisdiction, it has enjoyed a powerful weapon to wield against contractors: a motion to dismiss for lack of jurisdiction – a filing that can be raised at any time, even after the contractor's opportunity to cure any potential issue may have passed. Otherwise, if the issue were not jurisdictional, the Government would have to plead it as an affirmative defense in its answer, or risk waiving it, and would likely carry the burden of proving that affirmative defense.

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During oral argument, the judges probed counsel for the Government on the crux of the problem with treating the "sum certain" requirement as jurisdictional. The Supreme Court has focused on Congress's intent: It will "treat a procedural requirement as jurisdictional only if Congress 'clearly states' that it is." But Congress's only statement on the matter – the text of the CDA – does not expressly state that the "sum certain" requirement is jurisdictional. In fact, Congress never even used the term "sum certain." The FAR Council added that when it defined the term "claim."

ECC International also provides a good example of the inequities and disruption that the jurisdictional label has created, a key motivation for the Court's holding in *Wilkins*. In *ECC International*, the Government waited until after years of discovery and well after a nine-day hearing to raise any concern that the contractor had not adequately shown the "sum certain" in its original claim. But because the Board viewed the "sum certain" requirement as jurisdictional, the Government's delay was irrelevant, and the Board dismissed the appeal.

As we have discussed before, this is not an isolated or theoretical issue. As reflected in the annual reports from the Armed Services Board of Contract Appeals (ASBCA), over the last two years, the Government has filed motions to dismiss for lack of subject matter jurisdiction in more than 10% of the pending cases. We will continue to monitor this case and await the court's ruling.

Wiley's Government Contracts group represents contractors of all sizes in connection with requests for equitable adjustment and claims before boards of contract appeals, the U.S. Court of Federal Claims, and the Federal Circuit.