

## **SUM CERTAIN MUST BE INCLUDED IN CLAIM, NOT IN LATER DISCOVERY**

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What happens if you submit a claim to a contracting officer (“CO”) but instead of including a “sum certain” as required by the Contract Disputes Act (“CDA”) you state you will furnish that sum during discovery? The simple answer is that your claim is likely to be dismissed at some early stage of the litigation. See *Canpro Investments, Ltd. v United States*, No. 16-268C (Fed. Cl. May 4, 2023).

In order to comply with CDA requirements, a claim must:

1. Be in writing
2. Request a final decision from the contracting officer
3. Seek payment “as a matter of right”
4. Seek a sum certain (an exact amount)
5. Be made with specificity
6. Be certified if over \$100,000
7. Be submitted to the contracting officer
8. Be nonroutine (or in dispute), i.e. not be an invoice, voucher or other routine request for payment that was not in dispute when submitted.

Canpro had a lease with the General Services Administration and filed a CDA claim for damages relating to overcrowding of the premises (a Social Security Branch office), and because some visitors engaged in behavior inappropriate for commercial space. Instead of including a sum certain for its claim and damages, Canpro “reserved the right to amend its claim for damages as the litigation progresses.”

Canpro submitted a second CDA claim referring to “millions of dollars in damages” caused by excess volume of occupants, loss of reputation and loss of revenue. Finally, in its Seventh Amended Initial Disclosures ordered by the court, Canpro asserted damages “in a range of \$36,332,000 to \$41,332,000.” None of these categories of damages satisfies the CDA “sum certain” requirements. Further, Canpro relied especially on the future opinions of litigation experts.

In dismissing the CDA claim, the court noted that Canpro had things backwards. The “point of the CDA presentment requirement is not for contractors to check a box before expert discovery; it is to give the contracting officer notice and opportunity to pay a ‘sum certain’”. There is no jurisdiction at the Court of Federal Claims without these mandated requirements being met (except for the sum certain, please see below), and there will be no litigation and no expert discovery. Canpro tried to save for litigation something that should have been presented to the contracting officer. Canpro’s CDA claim was dismissed by the court because it had no jurisdiction over this dispute as presented by Canpro.

Note that recently the Federal Circuit held that “sum certain” was not a jurisdictional requirement. See recent blog on this matter. “Reversing many years of precedent, on August 22, 2023, the Federal Circuit held that the “sum certain requirement for monetary claims is not

jurisdictional, and the claim that doesn't state a sum certain may not be immediately dismissed at any point in the litigation. The Circuit held that it is mandatory for a party submitted a claim seeking monetary relief under the CDA to include a sum certain for each claim. If a claim doesn't state a sum certain, the claimant has not sufficiently pleaded the elements of a claim under the CDA and the claim may be denied by the contracting officer and dismissed by a board or court for failure to state a claim. If a party challenges a deficient sum certain after litigation has gone far, that defense may be deemed forfeited." Even though non-jurisdictional, the claimant must eventually include a sum certain.

Takeaway. Always ensure to include all the necessary elements of the claim when you submit it to your CO. If you do not state a "sum certain" then the amount must be readily ascertainable from the existing documents (e.g. if you claim a right to payment of a \$50,000 invoice (denied by the agency) and include the invoice with your claim, your sum certain is readily ascertainable.) Even though non-jurisdictional, failure to include a sum certain may result in dismissal for insufficiently pleading the elements of a claim under the CDA.

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