

FEDERAL CIRCUIT HOLDS THAT “SUM CERTAIN” REQUIREMENT IS NOT JURISDICTIONAL AND SUBJECT TO FORFEITURE

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Reversing many years of precedent, on August 22, 2023, the Federal Circuit held the “sum certain” requirement for monetary claims is non-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 submitting a claim seeking monetary relief under the Contract Disputes Act (“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. *ECC Int’l Constructors, LLC v. Sec’y of the Army*, No. 2021-2323 (Fed Circ. Aug. 22, 2023).

1. **Facts:** ECC was awarded a contract by the Army Corps of Engineers in 2010 to design and build a military compound in Afghanistan. In 2014 ECC filed a claim for government delay with the contracting officer, and when it was denied, appealed to the Armed Services Board. After years of unsuccessful settlement discussions between the government and ECCI the Board held a nine day hearing on the merits. Three months after the hearing, the Corps moved to dismiss ECCI’s claim for lack of subject matter jurisdiction for failure to state a “sum certain” for each of three separate aspects of the claim. This occurred more than six years after the claim was filed. The Board granted the motion and dismissed the case, and ECCI appealed.
2. **Jurisdictional:** the word jurisdictional is “generally reserved for prescriptions delineating the classes of cases a court [or board] may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction.” The court noted that these were distinct from nonjurisdictional claim-processing rules. A party may raise subject matter jurisdiction at any time, and may move to dismiss the case immediately if it is not present. Cases have frequently been dismissed for failure to state a “sum certain.”
3. **Recent Supreme Court Guidance:** The Supreme Court has recently issued guidance that in order to consider a rule jurisdictional, there must be a clear statement from Congress, and courts should treat a procedural requirement as jurisdictional only if Congress clearly states so. The court noted that Congress had not provided a clear statement on a sum certain, but only included certain other elements of a claim in the CDA:
 - a. The sum certain requirement is not even mentioned in the CDA itself—it is located in the Federal Acquisition Regulation (“FAR”) at 2.101 and 52.233-1
 - b. When speaking of claims, 41 USC § 7103 (the CDA) requires submission of a claim to the contracting officer, the claim must be in writing, and must be submitted within 6 years of accrual of the claim. These are clearly jurisdictional.

The Federal Circuit concluded that Congress did not clearly state that a CDA claim must include a sum certain in order for the Board or a court to exercise jurisdiction. Rather it is an element of a CDA claim that the claimant must satisfy in order to recover, and is not a jurisdictional rule that a party can challenge at any time.

4. **Forfeiture:** Unlike a challenge to subject matter jurisdiction (which is “jurisdictional” as explained above), an objection based on a mandatory claim processing rule may be forfeited if the party waits too long to invoke the rule. The Federal Circuit remanded the case to the Armed Services Board to consider the government’s objection to the sum certain, because it was made six years after the claim was submitted.

Takeaway. The FAR requirement that monetary claims submitted under the CDA include a “sum certain” is a mandatory nonjurisdictional requirement that is subject to forfeiture. A monetary claim that doesn’t include a sum certain has not sufficiently pleaded the elements of a claim under the CDA and may be denied by the contracting officer and dismissed on appeal to the Boards or Court of Federal Claims for failure to state a claim. If a party challenges a deficient sum certain after litigation has “far progressed” however, that defense may be deemed forfeited.

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