

SUM CERTAIN NOT NEGATED BY LANGUAGE TO PREVENT DOUBLE COUNTING

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Readers know that to provide a complete claim, one of the elements is that the contractor provide a “sum certain” for the dollar damages that are sought. You cannot qualify the sum by stating that it is “approximate” or “about” since that is not a certain sum. But what if you explain in your claim that the sum stated could be changed if there are other payments made, i.e., there may be some double counting. *A4 Const. Co, Inc.*, ASBCA Nos. 63252, et al provides the answer.

A4 Const. received a copy from the Army Corps of Engineers (the “Corps”) for design and construction of a special operations mountaineering facility at Fort Carson Colorado. A4 submitted a claim for four separate items (COVID related price increases, Extra work and differing site conditions, jobsite flooding, and other increases. These separate claims were consolidated in this case.

The Government moved to dismiss the contractor’s appeal of the Corps’ claim denial, asserting that A4’s overall claim failed to meet the sum certain requirement. The Corps’ pointed to a footnote whereby A4 stated that the claimed amount should be adjusted as needed to avoid a double payment if the Corps pays some of the claimed subcontractor costs to the bonding company that subsequently pays the subcontractor directly. The Corps asserted that this qualifying language prevented the number from being a sum certain.

The Board rejected this motion, and stated that an indication that a claim may need adjusting in the future does not invalidate the sum certain. That was precisely what A4 did, and A4’s notification of a possible future adjustment to prevent a potential double recovery does not defeat the sum certain requirement. Accordingly the Board rejected the Government’s motion to dismiss all the claims.

However, the Board agreed to dismiss 3 of the claims that were consolidated in this case because they failed to provide a sum certain for each individual claim submission to the contracting officer.

Takeaway. If you suspect that there will be double counting of the amount in your claim (or some other important future change), you may provide a sum certain that may be modified in the future if that eventuality occurs. The sum certain may be adjusted. But be sure that each separate claim includes an adequate notice of the claim amount (i.e., a sum certain).