

SUM CERTAIN: CAN YOU CHOOSE BETWEEN TWO DIFFERENT AMOUNTS?

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A claim for money requires “a written demand or written assertion ... seeking, as a matter of right, the payment of money in a **sum certain...**” FAR 2.101. The Boards lack jurisdiction (which will result in dismissal of an appeal) if the claim seeks “approximately [\$xxx]” or “about” [\$xxx]. But what happens if a contractor provides two certain sums? *Constellation New Energy, Inc.*, ASBCA No. 62518, December 9, 2020, provides the answer.

In *Constellation*, the contractor had a task order for energy conservation measures at the Naval Station Great Lakes. Constellation submitted what it called Change Order #3, seeking both additional money for work that had already been performed, as well as proposed future work, as follows:

- Option A \$2,117,253 for work performed as well as a proposal for additional energy conservation measures not yet performed
- Option B \$1,374,902 solely for work performed.

The question was, how could this claim be a “sum certain” when there were two sums certain? The contracting officer considered the claim, and issued a final decision referencing the original decision with two sums. However, she noted that the additional work in Option A had never been performed, and she accordingly addressed only Option B, allowing \$315,970.

When the final decision was appealed, the Navy moved to dismiss the appeal because there was no “sum certain.” The Board disagreed, noting that the Federal Circuit had held that a claim that submitted two certain sums was permissible because each sum presented a sum certain under two different legal theories. *Heyl & Patterson v. O’Keefe*, 986 F.2d 480 (Fed. Cir. 1993)

Furthermore, the Federal Circuit in *Hajran Hejrat Co. Ltd. V. US Army Corps Of Engineers*, 920 F. 3d 1354 (Fed. Cir. 2019) looked to whether a proper claim had been submitted by determining whether the contracting officer understood what had been submitted. In *Hejran*, the contracting officer’s statement that his decision was the government’s final determination showed he understood that the contractor had submitted a claim. Here, the contracting officer recognized in her final decision that the Navy had effectively eliminated Option A, and thus only Option B remained for consideration. Thus she considered only one option and one sum certain.

Takeaway: Never submit a claim saying “about” or “approximately” for the sum. When you submit a claim, try to submit only one “sum certain.” If you have two legal theories, you can submit two separate parts to your claim, with two sums certain. But it would be preferable to present your alternative legal theories (and amount) to the Board of Contract Appeals or to the Contracting Officer separately.

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