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## ¶ 47 FEATURE COMMENT: The Most Important Government Contracts Disputes Of 2023

In 2023, the U.S. Court of Appeals for the Federal Circuit set important new jurisdictional precedent regarding the "sum certain" requirement in Contract Disputes Act claims that will impact how Government contracts cases are litigated, and will likely have reverberations for other jurisdictional decisions moving forward. At the Boards of Contract Appeals, the Armed Services Board of Contract Appeals provided grounds for contractors to challenge the statute of limitations timing of the Government's cost claims following an audit, and the Civilian Board of Contract Appeals clarified that certain clauses can give the Government audit rights to fixed-price portions of a Government contract, even when the contractor was not obligated to submit certified cost or pricing data. These decisions, and others, are discussed in detail below.

**Federal Circuit Finds That "Sum Certain" Requirement Is Not Jurisdictional** (*ECC Int'l Constructors, LLC v. Army*, 79 F.4th 1364 (Fed. Cir. 2023); 65 GC ¶ 239). The Federal Circuit determined that the "sum certain" requirement for claims was not a jurisdictional requirement.

ECC International Constructors LLC (ECCI) submitted a request for equitable adjustment (REA) and delay claim after it encountered Government-caused delays on a contract to design and build a military compound in Afghanistan. After failing to receive a contracting officer final decision (COFD) and considering the nonresponse a deemed denial, ECCI filed an appeal with the ASBCA. Finally, after several rounds of settlement discussions, alternative dispute resolution, and a full hearing, the Government filed a motion to dismiss for lack of jurisdiction stating that ECCI's claim failed to state a sum certain for each distinct claim. The ASBCA granted the Government's motion, finding that while EECI's submission had included a "bottom-line sum certain," the submission was actually a collection of separate and divisible claims. The ASBCA determined the submission lacked a sum certain for each of the divisible claims that comprised the submission and, therefore, did not satisfy the jurisdictional "sum certain" requirement of the CDA.

The Federal Circuit, sua sponte, looked to more recent Supreme Court decisions that have held that jurisdictional requirements must be clearly stated in a statute in order for the requirements to be jurisdictional. Applying that rule, the Federal Circuit looked at the CDA's statutory text and determined that in previous cases it had incorrectly "looked outside the statute to the [Federal Acquisition Regulation] to articulate the various requirements for a

claim." Accordingly, in *ECC International*, the Federal Circuit held that it had to treat the sum certain rule as a non-jurisdictional claim processing rule. It found that while a jurisdictional challenge can be raised at any time, a non-jurisdictional defect, such as a failure to submit a sum certain, can be waived if a party fails to challenge it timely.

The Federal Circuit found that the requirement to submit a sum certain still was a necessary part of a claim under the CDA and the FAR, and that if a contractor or the Government fails to include a sum certain, when required, the CO should reject it, or if it proceeds to a board or the Court of Federal Claims, then a party can challenge the failure through a motion to dismiss for failure to state a claim. This decision signals that contractors and the Government are likely to be considering whether other purportedly jurisdictional requirements of CDA claims are open to challenge in the years ahead.

**CBCA Finds That Government Claim Which Did Not Identify a "Sum Certain" Did Not Start the Contractor's Appeal Clock** (*Crystal Clear Maint. v. Gen. Servs. Admin.*, CBCA 7547, 23-1 BCA ¶ 38,234). The CBCA denied the Government's motion to dismiss a contractor's claim as untimely because it found that the appeal clock did not start until it asserted a claim with a definite amount of monies due.

Crystal Clear Maintenance (CCM) held a maintenance contract with the General Services Administration for the maintenance of the Little Rock Bankruptcy Courthouse building. After water intruded on the courthouse causing damage, the CO asserted a demand for repayment from CCM but stated that "only a portion of the costs were known at the time." Specifically, the letter stated that the "total cost of damage continues to be assessed, but is currently a minimum of $173,978.19." Then, over one year later, GSA issued an "Updated Demand for Payment," which stated the total cost of repairs as $741,797.50. CCM then filed its appeal within 90 days after it received the "Updated Demand for Payment."

At the CBCA, the Government filed a motion to dismiss for lack of jurisdiction for "failure to submit a timely appeal" following the receipt of the initial demand for repayment. The CBCA denied the Government's motion. It found that the Government's use of the qualifying phrases, "at a minimum of" and that cost of the damage was "continuing to be assessed," did not satisfy the sum certain requirement. Specifically, the CBCA found that the initial demand for repayment failed to put CCM on notice as to the exact amount of the Government's claim, and it provided no way for CCM to know the total amount until the Government issued its second letter. Accordingly, it found that CCM did appeal the Government's decision within the CDA's 90-day requirement, and dismissed the Government's motion.

Contractors should be sure to review Government correspondence carefully to ensure that there is not language that could trigger the CDA's appeal deadlines, even when correspondence does not include the "magic" claim language contemplated in the FAR. See *M. Maropakis Carpentry, Inc. v. U.S.,* 84 Fed. Cl. 182, 196 (2008), *aff'd*, 609 F.3d 1323 (Fed. Cir. 2010) (stating that the CDA does not require particular words or format for a claim, and that use of any specific "magic words" are not required); 52 GC ¶ 225. Further, it is a reminder that qualifying phrases do not satisfy the requirement to state a sum certain, and that even if this is not a jurisdictional requirement anymore because of *ECC International*, parties can still challenge a Government or contractor failure to adequately state a sum certain.

**Federal Circuit Decision Confirms UCAs Are Not Government Claims But Leaves Some Questions Unanswered** (*Lockheed Martin Aeronautics Co. v. Sec'y of Air Force*, 66 F.4th 1329 (Fed. Cir. 2023); 65 GC ¶ 121). In a unanimous decision, the Federal Circuit dismissed a contractor's appeal of a CO's unilateral price definitization on two undefinitized contract actions (UCAs).

This case involved two UCAs with the Air Force for upgrades to the F-16 fighter jet. The contracts contained price definitization clauses, FAR 52.216-25 and Department of Defense FAR Supplement 252.217-7027, which required Lockheed Martin to begin performance while the parties worked to definitize a price

by a target date. The relevant terms of the UCAs stipulated "the [CO] may … determine a reasonable price … subject to Contractor appeal as provided in the Disputes Clause." If the parties were unable to reach an agreement on price, the clauses allowed the CO to determine and set a reasonable price. The parties were unable to reach an agreement after several years of negotiation, and the CO unilaterally determined a price for each of the contracts. Lockheed Martin immediately appealed the price determination to the ASBCA, arguing the CO's established prices were unreasonable, and that the unilateral actions constituted COFDs. The ASBCA rejected the appeal for lack of jurisdiction, and Lockheed Martin appealed the decision to the Federal Circuit.

The Federal Circuit's decision was centered around the question of what constitutes a Government "claim" for purposes of disputes between contractors and their Government customers under the CDA. Based upon its prior decisions, and the regulatory definition of the term, the Federal Circuit reasoned that a valid claim, whether by the Government or a contractor, must be a demand for something due or believed to be due. It found that the relevant boards and COFC are not authorized under the CDA to resolve such disputes absent (1) a separate submission by the contractor of a claim objecting to the unilateral prices; and (2) a COFD denying such a contractor claim. Contract price definitization actions, explained the Federal Circuit, are "simply following the agreed upon procedure for determining the final contract price."

From a practical perspective, this decision provides little guidance on the broader issue of when a dispute ripens into a Government "claim" that may be appealed to the boards or COFC. Consequently, now, as much as ever, contractors should carefully review all of the facts and circumstances relevant to any potential dispute with their Government customers to determine if protective appeals and/or additional prerequisites should be pursued in seeking relief at the boards or COFC under the CDA.

**The CDA Statute of Limitations Is Not Automatically Suspended until the Submission of a GDM** (*Beechcraft Def. Co.*, ASBCA 61743, et al., 2023 WL 2118274 (Feb. 3, 2023); 65 GG ¶ 62). In this case the ASBCA rejected the Government's argument that the requirement to submit a general dollar magnitude (GDM) suspended the CDA's six-year statute of limitations.

In June 2011, the Government issued three audit reports finding that Beechcraft was noncompliant with several Cost Accounting Standards (CAS), including CAS 401, 403, 418, and 406. It subsequently issued findings of noncompliance, and requested that Beechcraft submit GDMs. Beechcraft did not provide the GDM impact analyses regarding the CAS noncompliances until several years later in 2015. Then, it was not until 2018 that the Defense Contract Management Agency (DCMA) issued a COFD asserting a CAS noncompliance. On appeal to the ASBCA, Beechcraft asserted that the statute of limitations began to run in 2011 when the Defense Contract Audit Agency (DCAA) issued the audit reports. DCMA countered that it believed that the statute of limitations did not begin to run until Beechcraft's submission of the GDM in 2015.

The ASBCA found that the current record contained disputed facts about when the claims accrued, but found that the CAS administration clause (FAR 52.230-6) did not automatically toll the statute of limitations. According to the clause, contractors are required to submit GDMs after the Government discovery of a CAS noncompliance. Failure to provide the GDM allows the Government to either withhold up to 10 percent of payments under the contractor's CAS-covered contracts until the contractor provides the GDM, or issue a COFD and unilaterally adjust the contracts by the cost impact. FAR 52.230-6(j). The ASBCA found that importantly, the clause "says nothing about suspending the accrual period for presenting a claim" and, therefore, it is not a "pre-claim requirement that automatically suspends the accrual period for presenting a claim." Further, the ASBCA found that Beechcraft pointed to some evidence that the Government could have known that it suffered injury at the time it conducted the audit, but ultimately denied the motion for summary judgment because the record lacked sufficient evidence that the Government should have known some injury occurred.

For contractors, this decision provides greater support for the position that the Government cannot toll the statute of limitation indefinitely after it has commenced an audit. However, if the Government itself delays the commencement of an audit and, therefore, does not have a reason to know of the alleged injury, contractors could possibly still remain potentially liable despite the CDA's six-year statute of limitations. See *AAI Corp. d/b/a Textron Sys.,* ASBCA 61195, 2022 WL 1154833 (Mar. 23, 2022) (finding that the appellant did not establish that the CO knew, or should have known, about its defective pricing claims at the time the contract was executed despite the Government having all information needed to determine whether or not the contractor disclosed all cost or pricing data at that time). Given that the Government often takes years to commence an audit, this case can provide at least some additional support for the challenging of the statute of limitations in the context of an alleged CAS noncompliance.

**Audit Rights Can Extend to Fixed-Price Portion of Contract** (*HPM Corp. v. Dep't of Energy*, CBCA 7559, 2023 WL 4839050 (July 12, 2023)). The CBCA found that the audit clauses granted the agency access to the fixed-price portion of hybrid contracts.

HPM Corporation (HPMC) held a hybrid cost reimbursement and fixed-price contract with the Department of Energy (DOE) for the provision of occupational medical services. During a fiscal year 2019 incurred cost audit, DCAA complained to the DOE CO that HPMC was not providing certain records that it was requesting. HPMC claimed that it was within its rights to not provide the information sought because it "contained HPMC's proprietary information and related to the FFP portion of the Contract," and because HPMC did not submit any cost or pricing data to DOE for the fixed-price contract line item numbers (CLINs). Eventually, after negotiations broke down, the CO issued a COFD finding that DOE was permitted access to the data related to the firm, fixed-price (FFP) portion of the contract, and that DOE would proceed with its "remedy to remove all unsupported costs associated with the FY 2020 indirect rates and FY 2022 provisional billing rates."

On appeal to the CBCA, the CBCA addressed the merits of whether the contract's audit clauses granted DOE access to records related to the FFP portion of the contract. The contract had three audit clauses which the CBCA addressed (1) Audits and Records—Negotiation (Oct 2010), FAR 52.215-2(b); (2) Allowable Cost and Payment (Jun 2013), FAR 52.216-7; and (3) the Access To and Ownership of Records (Oct 2014) clause from DOE Acquisition Regulation (DEAR) 970.5204-3. The CBCA first addressed FAR 52.215-2. It found that the clause provided "generally" for audits of cost-reimbursement contracts, and although HPMC asked the CBCA to decide that the clause only applied to the cost-reimbursement CLINs or to the contract as a whole, the CBCA found that it did not need to do so because the documents could be relevant to DCAA's incurred cost audits. In making this decision, the CBCA explained that "[a] well-known audit risk is misallocation and/or cost shifting between fixed price, cost reimbursable, and indirect work/costs." The CBCA also recognized that even without FAR 52.216-7, the DEAR clause at DEAR 970.5204-3 gave DCAA broad audit access rights. It dismissed HPMC's argument that the DEAR clause was meant to allow the Government access to contractor records because of the hazardous materials handled at DOE facilities, and found that the DEAR clause did not limit DCAA's audit scope to only the cost-reimbursable CLINs.

The CBCA's decision suggests that inclusion of FAR 52.215-2 into a hybrid contract entitles the Government in incurred cost audits to audit both the cost-reimbursable CLINs and the FFP CLINs to ensure that the contractor is not cost-shifting. It remains to be seen whether or not the Government will cite to this decision to try to support its incurred cost audit rights to a contractor's FFP contract records where FAR 52.215-2 was not included in the contract. Regardless, this decision constitutes a possible broadening of the Government's audit rights under hybrid contracts, and an unwelcome development for Government contractors.

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