# It's Not *All* About the Benjamins: *J&J Maintenance* and the Continued Viability of Nonmonetary Claims

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Nonmonetary claims have long been a useful mechanism for contractors to obtain government direction on ambiguous or disputed contractual requirements. Nonmonetary claims allow the parties to address and resolve disputes before they incur substantial costs, avoiding the need to submit a claim for a sum certain.

In its 2018 decision in *Securiforce International America, LLC v. United States*, however, the U.S. Court of Appeals for the Federal Circuit ruled that when "the only significant consequence" of a claim will be money damages, the claim is in essence a monetary one and thus requires a sum certain.[1] The decision seemed to narrow (if not prohibit) contractors' ability to bring claims for nonmonetary relief. *Securiforce* raised the question of what claims are *not* ultimately reducible to money.

In the intervening years, the courts and boards of contract appeals have subjected nonmonetary claims to heightened scrutiny. An issue not previously resolved in cases applying *Securiforce* was whether "significant" nonmonetary consequences include effects on a contractor's performance. In its recent decision in *J&J Maintenance*, the Armed Services Board of Contract Appeals (ASBCA) squarely addressed the issue, confirming that when the outcome of a claim may allow the contractor to avoid performing a contractual task or incurring costs, that may support a nonmonetary claim.[2] The decision has the potential to breathe new life into nonmonetary claims for contracts on which performance is still ongoing.

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## History of Nonmonetary Claims

Nonmonetary claims are founded in statute and regulation. The Contract Disputes Act (CDA) does not define what constitutes a claim.[3] The courts and boards look to the definition of *claim* in the Federal Acquisition Regulation (FAR).[4] That definition expressly contemplates claims for nonmonetary relief, stating in pertinent part that the term *claim* "means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the *adjustment or interpretation of contract terms*, or *other relief* arising under or relating to the contract."[5] That is consistent with the scope of the Court of Federal Claims' jurisdiction under the Tucker Act:

> The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor . . . including a *dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes* on which a decision of the contracting officer has been issued. . . .[6]

The boards' exercise of jurisdiction over nonmonetary claims predates the enactment of the CDA in 1978.[7] The Court of Federal Claims' jurisdiction over nonmonetary claims came into being with the Federal Courts Administration Act of 1992.[8]

Two landmark Federal Circuit decisions in the 1990s defined the bounds of nonmonetary claims: *Garrett v. General Electric Co.* and *Alliant Techsystems, Inc. v. United States*.

*Garrett v. General Electric Co.* *Garrett* involved a dispute regarding 18 production contracts.[9] The U.S. Navy accepted 1,200 jet aircraft engines but then alleged that certain engine components failed, damaging the engines and aircraft. The Navy contracting officer issued final decisions asserting that acceptance of the engines was not conclusive due to purported latent defects, requiring General Electric Company (GE) to correct or replace the alleged defects at no cost to the Navy. The final decisions did not demand monetary relief (with the exception of an ancillary monetary demand in one decision) and were not prompted by contractor claims. GE thus appealed the final decisions as nonmonetary government claims.

In a decision of its Senior Deciding Group, the ASBCA exercised jurisdiction over the government's nonmonetary claims.[10] The board observed that

procurement regulations and the Disputes clause recognized "three distinct types of 'claims': those seeking, as a matter of right, (1) 'the payment of money in a sum certain,' (2) 'the adjustment or interpretation of contract terms,' or (3) 'other relief arising under or relating to the contract.'"[11] The contract's Inspection clauses provided that in the event of a latent defect, the government could elect between alternative remedies of requiring correction or replacement of defective work at no cost or demanding a refund of part of the contract price. The board held that the remedy of requiring correction or replacement constituted "other relief" within the FAR's third category of claims. The board said that its decision was supported by Federal Circuit precedent recognizing government nonmonetary claims terminating contractors for default, as well as its own precedent recognizing nonmonetary claims involving the government's right to examine records, government attempts to exercise an option after the expiration of an option period, determinations of cost accounting standards (CAS) noncompliance, and assertions of unlimited government rights in technical data.[12] Following the Senior Deciding Group's decision on jurisdiction, a three-judge panel held on the merits that the Navy's direction that GE repair or replace the engines due to latent defects was improper.[13]

The Federal Circuit affirmed the board's exercise of jurisdiction on appeal from the merits decision.[14] The Federal Circuit noted that the board's decision was in harmony with the purposes of the CDA, including the objective to achieve parity between the Court of Federal Claims and the boards of contract appeals—the court's jurisdiction had recently been expanded to encompass nonmonetary claims.[15] The Federal Circuit also held that the board's decision constituted a "final decision" for purposes of appellate review because the board had entertained and resolved GE's appeal and "had nothing more to do" and because "the Board's decision had immediate legal consequences."[16] Finally, with regard to potential concerns about "piecemeal litigation and premature involvement in contract administration," the court said that the case did not implicate such concerns because the government's revocation of acceptance "exceed[ed] the bounds of ordinary contract administration."[17]

*Alliant Techsystems, Inc. v. United States:* In the second landmark decision, *Alliant Techsystems*, involving a CDA appeal from the Court of Federal Claims, the Federal Circuit revisited the scope of nonmonetary claims.[18]

Alliant Techsystems, Inc. (Alliant) asserted a claim seeking a declaration that it was not obligated to perform an option.[19] The contract at issue involved demilitarization of bombs.[20] The U.S. Army contracting officer issued a unilateral contract modification purporting to exercise an option to increase the number of bombs to be demilitarized by 100 percent.[21] Alliant argued that the option was invalid because it was exercised after the time frame specified in the contract had expired and because the modification called for a delivery rate not provided for in the option clause.[22] When the contracting officer rejected its argument, Alliant appealed to the Court of Federal Claims, seeking a declaration that it was not required to perform and an injunction barring the government from enforcing the option clause or terminating the contract for default for failing to perform the option.[23]

The Court of Federal Claims held that it did not have jurisdiction to enter an injunction but did have jurisdiction to issue a declaratory judgment.[24] On the merits, the court held that Alliant was required to perform the option but was not required to meet the higher rate ordered by the contracting officer.[25] Both parties appealed.[26]

Before the Federal Circuit, the government contested the trial court's jurisdiction with an array of alternative arguments.[27] The government argued (among other things) that Alliant's letter was not a claim, that the claim would not be within the court's nonmonetary claims jurisdiction in any event, and that prudential considerations weighed against the trial court having jurisdiction over Alliant's request for declaratory relief.[28]

The government argued that Alliant's letter was not a claim because it did not seek relief "as a matter of right." Specifically, per the government, the Disputes clause required the contractor to "comply with the contracting officer's directive first and litigate about the directive's propriety later."[29] The Federal Circuit rejected this argument, holding that seeking relief "as a matter of right" only required Alliant to "specifically assert entitlement to the relief sought," which it had done in its letter by asserting specific legal and factual bases for its claim.[30] The government's reading would have required the court to decide a merits issue (whether obligations under the option clause were subject to the continuing performance obligations of the Disputes clause) before deciding jurisdiction.[31] Further, the Disputes clause and parallel language in the CDA contemplated that contractors may litigate disputes while continuing performance "pending final resolution" of an appeal or action.[32] Finally, the Federal Circuit observed that to bar submission of claims before completion of performance "would render largely meaningless those portions of the definition of a claim that refer to requests for nonmonetary relief."[33]

As to the court's nonmonetary claims jurisdiction, the government asserted that two constraints barred the court from entertaining Alliant's request for declaratory relief.[34] First, the government argued that disputes that arise before contract performance is complete are matters of contract administration, outside the court's jurisdiction.[35] Second, the government argued that nonmonetary claims are limited to claims "that otherwise would be entirely excluded from the court's jurisdiction."[36] Along those lines, the government contended that "disputes that have not 'ripened into a monetary dispute, but . . . could by the contractor's efforts alone'"—that is, through contractor performance—are not proper nonmonetary claims.[37]

The Federal Circuit ruled that the government's attempted restrictions on nonmonetary claims were at odds with the open-ended language of the statute, as well as legislative history and precedent.[38] The Tucker Act includes expansive language to describe nonmonetary claims: "[T]he statute begins by broadly granting the court jurisdiction over 'any claims'; it starts the list of specific kinds of nonmonetary disputes with a nonrestrictive term ('including'); and it ends the list with equally nonrestrictive language ('and other nonmonetary disputes')."[39] Reviewing the legislative history of the 1992 amendments to the Tucker Act, which authorized Court of Federal Claims jurisdiction over nonmonetary claims, the Federal Circuit found that the Department of Justice and others raised concerns that conferring jurisdiction to grant declaratory relief could result in "piecemeal attacks" that would adversely affect day-to-day contract administration.[40] The Federal Circuit noted that Congress rejected those concerns in moving forward with the legislation, perhaps because the Disputes clause requirement that contractors continue performance during disputes limits the risk that litigation might interfere with the operation of ongoing contracts.[41] The Federal Circuit concluded that the government's other proposed limitation, invalidating nonmonetary claims that a contractor could convert to monetary ones through performance, was inconsistent with the Federal Circuit's decision in *Garrett v. General Electric*, which affirmed jurisdiction over just such a claim, as well as a long line of board cases.[42]

Finally, the government reframed its argument regarding interference with contract administration as a "prudential consideration" weighing against the Court of Federal Claims' jurisdiction over Alliant's claim for declaratory relief.[43] The Federal Circuit held that prudential considerations "cannot alter the jurisdictional lines that Congress has drawn" and that there was similarly no authority supporting institution of "a broad, non-jurisdictional bar to judicial consideration of nonmonetary claims raised prior to contract performance."[44] Rather, Congress "granted relatively free access to the boards . . . and Court of Federal Claims," and the FAR "ensured that review of contract claims will be relatively easy to obtain" by defining *claim* broadly.[45]

Prudential considerations relate only to "whether the court should grant relief on the merits and what form such relief should take."[46] Courts and boards reviewing nonmonetary claims for contract interpretation may "consider the appropriateness of declaratory relief, including whether the claim involves a live dispute between the parties, whether a declaration will resolve that dispute, and whether the legal remedies available to the parties would be adequate to protect the parties' interests."[47] The Court of Federal Claims regarded Alliant's claim as "a particularly suitable candidate for declaratory relief."[48] The trial court observed that Alliant "objected to the requirement that it perform at all, not to the requirement that it perform without additional compensation," and a requirement that the contractor perform under the circumstances "would have denied Alliant any meaningful relief."[49] The Federal Circuit held that the trial court acted within its discretion in granting declaratory relief.[50]

### *Securiforce*: Disruption to the Law of Nonmonetary Claims

In its 2018 decision in *Securiforce*, the Federal Circuit altered the standard for nonmonetary claims, guided not by statute or regulation or its own precedent regarding nonmonetary claims but by the separate body of decisional law governing Administrative Procedure Act (APA) jurisdiction.[51]

*Securiforce* involved a government contract for fuel delivery to eight locations during the Iraq War.[52] The government terminated the contract for convenience with respect to two of the sites after determining that deliveries to those sites would violate the Trade Agreements Act.[53] The government later terminated the entire contract for default, alleging late deliveries.[54] The contractor appealed the default termination to the Court of Federal Claims, along with several other issues.[55] After filing its complaint at the court, the contractor submitted a letter to the contracting officer requesting a final decision that the termination for convenience was improper.[56] The contracting officer denied the demand in the letter on the basis that it did not state a sum certain. In reaction, Securiforce International America, LLC (Securiforce) amended its complaint to include an additional request for declaratory judgment that the convenience termination was a material breach.[57] The trial court held that Securiforce's challenge to the convenience termination was a valid claim for nonmonetary relief and that it had jurisdiction.[58]

The Federal Circuit reversed, holding that Securiforce's convenience termination claim was properly regarded as a monetary claim requiring a sum certain:

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"While contractors may in some circumstances properly seek declaratory relief without stating a sum certain, they may not circumvent the general rule requiring a sum certain by reframing monetary claims as nonmonetary."[59] The court introduced a new test to distinguish between monetary and nonmonetary claims, borrowed from what it characterized as "a related context."[60] District courts have jurisdiction under the APA over nonmonetary claims against the government only where "there is no other adequate remedy in court."[61] Monetary claims must be brought at the Court of Federal Claims under the Tucker Act.[62] The Federal Circuit adopted the APA test to distinguish monetary claims from nonmonetary ones: "If 'the only significant consequence' of the declaratory relief sought 'would be that [the plaintiff] would obtain monetary damages from the federal government,' the claim is in essence a monetary one."[63]

Applying this test, the court found that Securiforce's claim challenging the propriety of the convenience termination, "though styled as one for declaratory relief," would yield no significant consequences other than recovery of money damages.[64] The court observed that this was confirmed by the contractor's own claim letter, which asked the contracting officer to determine whether Securiforce was "entitled to breach damages," without stating an amount: money damages are always the default remedy for breach of contract.[65] The court also noted that Securiforce later sent another letter quantifying damages associated with the convenience termination breach in the amount of $47 million, and that the contractor's prior claim letter was invalid because it did not present that sum certain. For these reasons, the court held that the Court of Federal Claims erred in assuming jurisdiction of the convenience termination claim.[66]

Commentators were critical of the *Securiforce* decision for "gratuitously establish[ing] a new jurisdictional barrier" by purporting to bar nonmonetary claims that could be converted to monetary claims.[67] Some pointed out that this appeared directly contrary to the *Alliant Techsystems* decision, which expressly held that "nonmonetary claims are not outside the jurisdiction of the Court of Federal Claims simply because the contractor could convert the claims to monetary claims."[68] Under Federal Circuit rules, only the court en banc may overrule a binding precedent.[69] Further, the court's adoption of the test applicable for narrow APA jurisdiction over nonmonetary claims, available only where "there is no other adequate remedy in a court," was not appropriate in the context of the broad nonmonetary claims for jurisdiction set forth in the FAR and the Tucker Act, which include no such limitation.[70] Nonmonetary CDA claims also do not present the same risks of jurisdictional gamesmanship as may be present under the APA because the Court of Federal Claims has jurisdiction over both monetary and nonmonetary claims.[71] Most fundamentally, there loomed the possibility that *Securiforce* would lead the government to argue that every claim was ultimately about money, thus eradicating the court's and boards' jurisdiction of nonmonetary claims.

## Court and Board Decisions Applying *Securiforce*: Raising the Bar for Nonmonetary Claims

Recent decisions of the courts and boards suggest that *Securiforce* has made it more difficult for contractors to seek nonmonetary relief. Indeed, the Federal Circuit's ruling seemed to alter the course of several ongoing contract appeals.

In one of the ongoing cases, *Duke University v. Department of Health & Human Services*, the Civilian Board of Contract Appeals (CBCA) asked the parties to provide supplemental briefing regarding jurisdiction.[72] Duke University (Duke) had submitted a letter to the contracting officer challenging the contracting officer's interpretation of FAR 52.215-23 (Limitations on Pass-Through Charges) and FAR 31.203-1(i) as restricting Duke's recovery of facilities and administrative (F&A) costs applied to subcontracted portions of the work on three task orders. The Department of Health and Human Services (HHS) took the position that Duke had not sufficiently demonstrated added value, rendering F&A costs on the subcontracted work unallowable "excessive pass-through charges."[73]

Relying on *Securiforce*, the CBCA dismissed Duke's claim for lack of jurisdiction as "an uncertified and unquantified monetary claim."[74] The board noted that Duke had "already incurred costs associated with its contract interpretation dispute, and it could have quantified those costs and stated them in a sum certain in a claim to the contracting officer."[75] Further,

> [u]nlike the contractor in *Alliant*, Duke is not asking us to allow it to stop performing work or to preclude it from incurring additional costs in the future based upon its interpretation of the contract. . . . A ruling in Duke's favor would not result in Duke avoiding costs, but instead would be used only to entitle Duke to monetary relief in a separate proceeding.[76]

Therefore, the board determined that it did not have jurisdiction over Duke's claim.

In another case later that year, *Northrop Grumman Systems Corp. v. United States*, the Court of Federal Claims considered a contractor nonmonetary claim seeking reformation of a contract, asserting that the agency effected a cardinal change to the contract.[77] Specifically, Northrop Grumman Systems Corporation (Northrop Grumman) contended that "the Postal Service fundamentally altered the nature of the contract by wresting design control from the contractor," resulting in a cardinal change, and asked the court to "reform the contract to a cost-plus-fixed-fee structure."[78]

The court held that Northrop was in effect seeking only money, noting that Northrop's first claim acknowledged that the remedy for a cardinal change is breach damages:

> Although Northrop argues that the Postal Service would not be paying Northrop money damages if the contract were reformed but instead would be reimbursing Northrop for costs incurred, that is a distinction without a difference. Despite Northrop's creativity in stating this claim, the theory of cardinal change calls for a breach remedy—money damages—and Northrop is in fact seeking a payment of money from the Postal Service.[79]

On that basis, the court dismissed Northrop's claim for lack of jurisdiction because it did not state a sum certain.[80]

In *Greenland Contractors I/S*, decided before the Federal Circuit issued its decision in *Securiforce*, the ASBCA denied a government motion to dismiss for lack of jurisdiction in relation to an appeal of a purported government nonmonetary claim.[81] But after the *Securiforce* decision was issued, and based on additional factual development, the board granted in part a renewed government motion to dismiss on the same grounds.[82]

The U.S. Air Force and Greenland Contractors I/S (Greenland) disagreed whether certain engine repairs were within the scope of the parties' contract for maintenance and repair of electrical generation equipment.[83] In a January 11, 2017, letter, the contracting officer directed Greenland to perform the contested repairs on the equipment, the appeal of which was docketed as ASBCA No. 61113.[84] Following an inspection, the government issued a unilateral modification reducing the contract price by $3.2 million based on contested repairs that Greenland had not performed, the appeal of which was docketed as ASBCA No. 61248.[85]

The board held that the unilateral modification in ASBCA No. 61248 was a government monetary claim for a sum certain of $3.2 million.[86] By contrast, the board dismissed the appeal of the government's letter in ASBCA No. 61248 as a monetary claim lacking a sum certain.[87] The board noted that if the "resolution of the contract interpretation issue could have determined whether Greenland was required to perform maintenance on the generators pursuant to the contract . . . relieving Greenland of an obligation to perform[] would have been a significant consequence of the declaratory relief sought that was not monetary in nature."[88] However, it turned out that Greenland "had performed work that it contends was beyond the scope of the contract before it filed its appeal," such that "a holding in Greenland's favor would not allow Greenland to avoid performing, but would only be used to entitle Greenland to monetary relief"—specifically under ASBCA No. 61248, consolidated in the same proceeding.[89] Therefore, the board dismissed ASBCA No. 61113.[90]

*Parsons Government Services, Inc.* involved a contractor claim styled as a nonmonetary claim but dismissed by the ASBCA as a monetary claim that failed to state a sum certain.[91]

The contractor's parent company had constructed a building, which was later sold to a third party that leased the building back to another subsidiary of the parent.[92] The parties disagreed over the extent to which Parsons Government Services, Inc. (Parsons) was entitled to be reimbursed for its leaseback costs.[93] Parsons submitted a nonmonetary claim for contract interpretation, seeking an interpretation of the FAR provisions regarding contractor leaseback costs that would allow it to be reimbursed additional lease costs.[94]

The board held that Parsons's claim was a monetary claim that required a sum certain.[95] The board reasoned that the only significant consequence of the claim was payment of money because the contractor's parent company had signed a fifteen-year lease, which it had occupied for eight years when it submitted its claim and in which it was obligated by lease to remain for another seven years.[96] Parsons thus had not alleged that it would "be able to avoid performance of a contractual task."[97] Therefore, the board ruled that Parsons had not asserted a valid nonmonetary claim.[98]

The ASBCA dismissed another nonmonetary claim in *MAC Electric Inc.*[99]

MAC Electric Inc. (MAC) had performed a construction task order for the U.S. Army to make various upgrades to a building's heating, ventilation, and cooling (HVAC) system. On December 23, 2019, MAC submitted a nonmonetary claim to establish January 1, 2017, as the date of substantial completion.

The board held that the only "significant consequence" of establishing the date of substantial completion "would be to permit MAC to use that determination in a delay claim seeking monetary damages."[100] Again, the board noted that the decision regarding contract interpretation could not relieve the contractor from its obligation to perform, nor would "determination of the date of substantial completion . . . allow MAC to avoid costs." Therefore, the claim was, in essence, a monetary one.

### *J&J Maintenance*: Confirmation That Contractors' Avoiding Performing a Task or Incurring Costs Can Be a "Significant Consequence" Under *Securiforce*

The ASBCA has now confirmed in *J&J Maintenance* that where the outcome of a claim may result in the contractor avoiding performing a task or incurring costs, the circumstances may form the basis for a nonmonetary claim under the CDA.[101]

*J&J Maintenance* involved three Defense Commissary Agency (DeCA) task orders for preventive maintenance and repair services for commissary facilities, procured on a time and materials basis. J&J Maintenance (J&J) and DeCA disagreed about the proper treatment of materials costs of subcontractors under the task orders. On time and materials contracts, materials are reimbursed at cost. J&J contended that its "cost" for materials supplied by subcontractors under the task orders was the price it paid the subcontractors for the materials, including the subcontractor's markup. DeCA's position was that it would

only pay the subcontractor's cost for the materials, without subcontractor markup, and that the contractor was required to provide supply house invoices documenting the subcontractor's actual costs. Before the ASBCA, J&J sought declarations that subcontractor markup was allowable under the task orders and that J&J was not required to submit "supply house" invoices, as well as money damages of $5,861.40 in challenged subcontractor markups on pending invoices.

The board dismissed J&J's monetary claim because the claim was asserted for the first time in the complaint and was not first presented to the contracting officer. The primary issue was thus the validity of J&J's nonmonetary claims.

J&J argued that the board had jurisdiction over its nonmonetary claims because performance of the task orders was ongoing and a ruling regarding subcontractor markups would affect its performance. If the board disallowed subcontractor markup, J&J said it would self-perform a greater portion of the work or purchase materials directly that it had been purchasing through subcontractors. J&J further argued that the decision regarding submission of supply house invoices would affect its obligation to perform the task of obtaining and submitting those invoices, which it had been performing under protest. The government countered that J&J's claims were properly regarded as monetary because the outcome of the claims had "significant—and arguably primary—monetary components" and there was no requirement that "the *sole* consequence or impact of a claim be monetary to trigger the jurisdictional requirement for a 'sum certain.'"[102]

The ASBCA ruled that it had jurisdiction over J&J's nonmonetary claims. The board observed that, contrary to the government's arguments, the test for a valid nonmonetary claim was whether money was the "sole" or "only" significant consequence that would result from the claim. The government had turned the test on its head: "The jurisdictional question . . . is not whether the claim may have a significant monetary impact, but whether it may have a significant nonmonetary impact."[103] The government's interpretation of the law "would dramatically curtail, if not completely nullify, contractors' ability to bring [nonmonetary] claims."[104] To limit nonmonetary claims to "those infrequent occasions when the outcome is financially meaningless" would be "contrary to the longstanding recognition that [the courts and boards] have jurisdiction to hear contract dispute issues even in situations where the contractor could perform as the government directs and seek compensation afterwards."[105] While the government argued that the ASBCA did not have jurisdiction over J&J's nonmonetary claim based on its decisions in *MAC Electric*, *Parsons Government Services*, and *Greenland Contractors I/S*, as well as the CBCA's decision in *Duke University*, the ASBCA distinguished those decisions: "In each of the decisions [the government] cites, there was no plausible assertion that the purported nonmonetary claim could result in changes to contract performance or the avoidance of costs, as opposed to purely monetary relief."[106]

The board held that J&J plausibly alleged that the outcome of the claim could "allow it to avoid costs going forward and relieve it from an obligation to perform a task the government is insisting upon over [its] objections," which constituted "significant consequences" other than money damages sufficient for a valid nonmonetary claim.[107] The board noted that, in denying the motion to dismiss as to the nonmonetary claim and taking jurisdiction, it was not required to grant declaratory relief but was free to determine whether declaratory relief is appropriate considering whether there is a live dispute, whether a declaration would resolve that dispute, and whether the available legal remedies would be adequate to protect the parties' interests.

## Conclusion

The *J&J Maintenance* decision should broaden the path for contractors to assert nonmonetary claims for contract interpretation when contract performance is not yet complete and should alleviate concerns that *Securiforce* all but ended jurisdiction over nonmonetary claims. As the board noted, this is consistent with Congress's intent to grant free access to the boards of contract appeals, as well as with the FAR policy that review of contract claims should be easy to obtain.

The decision has beneficial potential for the government as well as for contractors. Specifically, nonmonetary claims may allow the parties to resolve disputes at a comparatively early stage, before performance is disrupted and costs balloon—thus forestalling much more costly and complex litigation. This is so regardless of whose claim is at issue (i.e., a contractor claim or a government claim).

Moreover, other forms of nonmonetary claims also survived *Securiforce*, including nonmonetary claims regarding default terminations,[108] rights in technical data,[109] and performance evaluations.[110] Though it has not been tested under *Securiforce*, a government determination of CAS noncompliance should still constitute a valid nonmonetary claim as well.[111]

As a final aside, astute commentators have predicted that the Federal Circuit may soon rule that the sum certain requirement, like the CDA statute of limitations, is not jurisdictional (perhaps even by the time this article is in print).[112] That result is required by a recent but firmly established line of U.S. Supreme Court decisions.[113] Should that come to pass, the distinction between monetary and nonmonetary claims would remain important. If the sum certain requirement is determined to be a claim-processing rule, objections regarding the absence of a sum certain could be equitably tolled, forfeited, or waived if not timely asserted.[114] But claims would still be subject to legal challenge for lack of a sum certain where

they are in essence seeking monetary relief, albeit without the special favorable procedural posture accorded to jurisdictional requirements.[115] Accordingly, nonmonetary claims—and disputes over them—are here to stay. PL

## Endnotes

1. Securiforce Int'l Am., LLC v. United States, 879 F.3d 1354, 1360 (Fed. Cir. 2018).
2. J&J Maint., Inc., ASBCA No. 63013, 23-1 BCA ¶ 38,353.
3. Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1575 (Fed. Cir. 1995); *see* 41 U.S.C. §§ 7101–09.
4. *Reflectone*, 60 F.3d at 1576.
5. FAR 2.101 (emphasis added). The Disputes clause contains the same definition. *See* FAR 52.233-1(c).
6. 28 U.S.C. § 1491(a)(2) (emphasis added).
7. Ralph C. Nash & John Cibinic, *Nonmonetary Claims: Jurisdiction to Exercise Discretion*, 13 Nash & Cibinic Rep. ¶ 57 (Nov. 1999); *see* McDonnell Douglas Corp., ASBCA No. 26747, 83-1 BCA ¶ 16,377, at 81,421–22, *aff'd in part, rev'd in part on other grounds*, 754 F.2d 365 (Fed. Cir. 1985); Michael M. Grinberg, DOT BCA No. 1543, 87-1 BCA ¶ 19,573, at 98,980–82, *motion for reconsideration denied*, 87-3 BCA ¶ 20,102 (discussing pre-CDA board jurisdiction over nonmonetary claims). The Federal Circuit has held that the enactment of the CDA did not disturb the boards' prior exercise of jurisdiction and, indeed, broadened the boards' jurisdiction by permitting consideration of breach of contract issues, in addition to disputes arising under the contract. *See* Malone v. United States, 849 F.2d 1441, 1444 (Fed. Cir. 1988), *modified*, 857 F.2d 787 (Fed. Cir. 1988).
8. Nash & Cibinic, *supra* note 7 (citing Pub. Law No. 102-572); *see also* Garrett v. Gen. Elec. Co., 987 F.2d 747, 750 (Fed. Cir. 1993).
9. *Garrett*, 987 F.2d 747.
10. Gen. Elec. Co., ASBCA No. 36005, 91-2 BCA ¶ 23,958, 119,942-943.
11. *Id.* at 119,943.
12. *See id.* (*citing* McDonnell Douglas Corp., ASBCA No. 26747, 83-1 BCA ¶ 16,377, *aff'd in part, rev'd in part on other grounds*, 754 F.2d 365 (Fed. Cir.1985) (assertion of government's right to examine records stated as appropriate for a nonmonetary claim); Boeing Co., ASBCA No. 37579, 89-3 BCA ¶ 21,992 (exercising jurisdiction over a unilateral option purporting to exercise an option after it expired as a nonmonetary claim); Systron Donner, Inertial Div., ASBCA No. 31148, 87-3 BCA ¶ 20,066 (holding that government determination of CAS noncompliance was a nonmonetary claim); Gen. Elec. Automated Sys. Div., ASBCA No. 36214, 89-1 BCA ¶ 21,195 (holding that contracting officer's final decision asserting unlimited rights in contractor technical data was a nonmonetary claim)).
13. General Elec. Co., ASBCA No. 36005, 91-3 BCA ¶ 24,353, 121,691-692.
14. *Garrett*, 987 F.2d 747.
15. *Id.* at 750.
16. *Id.* at 751.
17. *Id.* at 751–52.
18. Alliant Techsystems, Inc. v. United States, 178 F.3d 1260 (1999).
19. *Id.* at 1263.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 1264.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 1264–72.
28. *Id.*
29. *Id.* at 1265.
30. *Id.*
31. *Id.*
32. *Id.* at 1265–66.
33. *Id.* at 1266–67.
34. *Id.* at 1268.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 1268–69.
41. *Id.* at 1269.
42. *Id.* at 1269–70.
43. *Id.* at 1270.
44. *Id.*
45. *Id.* at 1270–71.
46. *Id.* at 1270.
47. *Id.* at 1271.
48. *Id.*
49. *Id.*
50. *Id.* at 1272.
51. Securiforce Int'l Am., LLC v. United States, 879 F.3d 1354 (Fed. Cir. 2018).
52. *Id.* at 1358.
53. *Id.*
54. *Id.*
55. *Id.* at 1358–59.
56. *Id.* at 1359.
57. *Id.*
58. *Id.*
59. *Id.* at 1360. The court disregarded the language of the Tucker Act providing jurisdiction over "a dispute concerning termination of a contract . . . and other nonmonetary disputes on which a decision of the contracting officer has been issued," stating that the amendment of the Tucker Act "did not relieve parties' obligation to comply with the separate requirements of the CDA, including the statement of a sum certain, where, as here, the party is in essence seeking monetary relief." *Id.* at 1361 (citing 28 U.S.C. § 1491(a)(2)).
60. *Securiforce*, 879 F.3d at 1360.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 1360–62.
66. *Id.* at 1362.
67. Karen L. Manos, *The Most Notable Government Contract Cost and Pricing Decisions of 2018*, 14 Gov't Cont. Costs, Pricing & Acct. Reps. ¶ 1 (2019); *see also* Richard C. Johnson & Ashley N. Barbera Amen, *Stirring the Muddy Waters: The Federal Circuit's Decision in* Securiforce *Thickens the Confusion Surrounding* Maropakis *and Upsets Settled Law on Nonmonetary Claims*, 109 Fed. Conts. Rep. 247 (Mar. 13, 2018).
68. *Id.* (*citing* Alliant Techsystems, Inc. v. United States, 178 F.3d 1260, 1268 (1999)).
69. *See* Fed. Cir. R. 35(a)(1).
70. Johnson & Amen, *supra* note 67, at 4.
71. *Id.*
72. CBCA No. 5992, 18-1 BCA ¶ 37,023, 180,291.
73. *Id.* at 180,289.
74. *Id.* at 180,290-291.
75. *Id.* at 180,291.
76. *Id.*
77. 140 Fed. Cl. 249 (2018).
78. *Id.* at 256–57.
79. *Id.* at 257.
80. *Id.*

81. ASBCA Nos. 61113 et al., 18-1 BCA ¶ 36,942.
82. ASBCA Nos. 61113 et al., 19-1 BCA ¶ 37,259.
83. 18-1 BCA ¶ 36,942, at 179,971.
84. *Id.* at 179,972.
85. *Id.*
86. 19-1 BCA ¶ 37,259, at 181,329.
87. *Id.* at 181,329-330, 181,332
88. *Id.* at 181,332.
89. *Id.*
90. *Id.*
91. ASBCA No. 62113, 20-1 BCA ¶ 37,586.
92. *Id.* at 182,507.
93. *Id.* at 182,508-509.
94. *Id.* at 182,510.
95. *Id.* at 182,511.
96. *Id.*
97. *Id.*
98. *Id.*
99. ASBCA No. 62503, 21-1 BCA ¶ 37,768.
100. *Id.* at 183,328.
101. ASBCA No. 63013, 23-1 BCA ¶ 38,353.
102. *Id.* at 186,256 (emphasis in original) (citations omitted).
103. *Id.* at 186,257.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *See, e.g.*, Groundbreaker Dev. Corp. v. United States, 163 Fed. Cl. 619, 625 (2023) (noting that the contractor's nonmonetary challenge to a default termination "satisfies the CDA's jurisdictional prerequisites"). Indeed, in *Securiforce* itself the government conceded (and the Federal Circuit agreed) that the trial court had jurisdiction over the default termination as a government nonmonetary claim. *See* Securiforce Int'l Am., LLC v. United States, 879 F.3d 1354, 1363 (Fed. Cir. 2018).
109. *See, e.g.*, Raytheon Co. v. United States, 160 Fed. Cl. 428, 429 (2022) (granting partial summary judgment to contractor on a nonmonetary claim seeking declaratory judgment that contractor vendor lists did not constitute technical data).
110. *See* Protec GmbH, ASBCA No. 61161, 18-1 BCA ¶ 37,064 (in a decision issued after *Securiforce*, denying a government motion to dismiss a nonmonetary claim challenging a Contractor Performance Assessment Reporting System (CPARS) rating, noting: "The government is correct that we do not possess jurisdiction to order an agency to revise a CPARS rating. . . . However, we may remand a matter to require a CO [contracting officer] to follow applicable regulations and provide appellant with a fair and accurate performance evaluation."). For more on claims regarding CPARS ratings, see Kathryn T. Muldoon Griffin, Erica J. Geibel & Todd M. Garland, *Performance Evaluations: Leveling the Playing Field*, 53 Procurement Law. 7 (Fall 2017).
111. It was settled law at the court and boards before *Securiforce* that contractors could appeal CAS noncompliance determinations as nonmonetary claims in the absence of an asserted monetary impact or attempt to recoup funds, and the language of the Tucker Act lends support for that position as well—however, as *Securiforce* demonstrates, that is no guarantee. *See* Newport News Shipbuilding & Dry Dock Co. v. United States, 44 Fed. Cl. 613 (1999); Litton Sys., Inc. Guidance & Control Sys. Div., ASBCA Nos. 37131, 37137, 94-2 BCA ¶ 26,731; 28 U.S.C. § 1491(a)(2) ("The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor . . . including . . . *compliance with cost accounting standards, and other nonmonetary disputes* on which a decision of the contracting officer has been issued. . . ."(emphasis added)); Karen Manos, Government Contract Costs & Pricing § 60:27 (July 2022) ("Contractor appeals").
112. *See* Nathaniel E. Castellano, *Postscript IV: The CDA "Sum Certain" Requirement*, 37 Nash & Cibinic Rep. ¶ 41 (June 2023); *see also* ECC Int'l Constructors v. Sec'y of the Army, Nos. 21-2323, 22-1368 (Fed. Cir. May 8, 2023) (sua sponte order requesting supplemental briefing "to address whether the requirement to state a sum certain in filing a claim under the Contract Disputes Act is a jurisdictional or nonjurisdictional requirement in light of Supreme Court precedent distinguishing rules that implicate subject matter jurisdiction from mandatory claim-processing rules"). Castellano has been predicting the demise of troublesome jurisdictional prerequisites to CDA litigation, including the sum certain requirement, for years. *See* Nathaniel E. Castellano, *After Arbaugh: Neither Claim Submission, Certification, nor Timely Appeal Are Jurisdictional Prerequisites to Contract Disputes Act Litigation*, 47 Pub. Cont. L.J. 35 (Fall 2017) [hereinafter Castellano, *After Arbaugh*]; Nathaniel E. Castellano, *The End of Days for Litigation over Contract Disputes Act Jurisdiction*, 56 Procurement Law. 1 (Summer 2021). Similarly, following the *Securiforce* decision, Karen Manos observed that the Federal Circuit had erred in elevating "sum certain" to a CDA jurisdictional requirement, noting the irony that "the same judge who wrote the *Securiforce* decision also wrote the decision in *Sikorsky Aircraft Corp. v. U.S.*, in which the Federal Circuit held that the CDA statute of limitations is not a jurisdictional requirement." *See* Manos, *supra* note 67 (internal citations omitted).
113. Arbaugh v. Y&H Corp., 546 U.S. 500 (2006); Castellano, *After Arbaugh*, *supra* note 112, at 41.
114. *See* Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region, 558 U.S. 67, 81–82 (2009); Kontrick v. Ryan, 540 U.S. 443, 456 (2004).
115. The situation is broadly analogous to the CDA statute of limitations. The Federal Circuit determined that the statute of limitations is not jurisdictional but instead a claim-processing rule. Sikorsky Aircraft Corp. v. United States, 773 F.3d 1315, 1321 (Fed. Cir. 2014). Nevertheless, claims remain subject to challenge on timeliness grounds. *See, e.g.*, Al-Juthoor Contracting Co. v. United States, 129 Fed. Cl. 599, 613 (2016) (ruling that certain contractor claims were barred by the statute of limitations). So too, defendants will be able to challenge monetary claims that fail to state a sum certain.