

Ramish in Thomson Reuters: The CDA “Sum Certain” Requirement, Uncertainty And Opportunity After ECC International

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Haynes Boone Counsel [Dan Ramish](#) authored an article for Thomson Reuters on the decision in *ECC International, LLC v. Secretary of the Army*, 79 F.4th 1364 (2023), 65 GC ¶ 239, in which the U.S. Court of Appeals for the Federal Circuit held that the Contract Disputes Act sum certain requirement is not jurisdictional but merely a claim processing rule.

Read an excerpt below:

ECC is widely regarded as a landmark case because it upends the jurisdictional status of the sum certain rule and may have ramifications for disputes over other CDA requirements as well. The FAR definition of a “claim” requires that claims for monetary relief seek “payment of money *in a sum certain*.” FAR 2.101; FAR 52.233-1(c) (emphasis added). The U.S. Court of Federal Claims and the boards of contract appeals interpret the requirement to mean that a claim must state a specific amount sought, or at least provide sufficient information for the amount to be easily determined. See, e.g., *Metric Construction Co. v. U.S.*, 14 Cl. Ct. 177 (1988). When a claim fails to clearly state an amount, or includes qualifying language (e.g., “approximately,” “at least,” “in excess of,” “no less than”), it does not state a sum certain. See *Contract Disputes Act Claims: The “Sum Certain” Requirement*, 26 N&CR ¶ 41. The Federal Circuit has long enforced the sum certain requirement, considering it a jurisdictional rule as recently as 2021. *Creative Management Services, LLC v. U.S.*, 989 F.3d 955 (Fed. Cir. 2021), 63 GC ¶ 73. But a line of U.S. Supreme Court decisions, dating to *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006), raised the bar for jurisdictional stature.

ECC presented what the Federal Circuit characterized (at 1370) as “unique facts,” which prompted the court, *sua sponte*, to “reexamine the nature of the sum-certain requirement.” The contractor had stated a specific overall amount for its claim, but the board below held that the claim was composed of multiple distinct sub-claims relying on separate operative facts, each of which required—but did not state—a sum certain. The Government first raised the sum certain challenge during post-hearing briefing, three months after the hearing. By that time, the CDA statute of limitations had run, precluding the contractor from refiling its claims. Thus, the circumstances in *ECC* underscored both the complexities of applying the sum certain requirement and the harsh consequences of treating the requirement as jurisdictional.

The *ECC* decision, though a long time in coming, was clearly foreshadowed in *Arbaugh*. As the Supreme Court explained there, the Court applies a “readily administrable bright line” test: for a rule to be jurisdictional, Congress must clearly say so. Thus, when a rule is not contained in the jurisdictional provisions of a statute and “does not speak in jurisdictional terms or refer in any way to the jurisdiction” of the tribunal, it generally is not jurisdictional. The “sum certain” requirement, mentioned nowhere in the CDA, plainly fails the jurisdictional test.

It is tempting to greet the *ECC* decision like the fall of the Walls of Jericho, as though it provided CDA appellants free access to the courts and boards, long impeded by jurisdictional disputes. The

Federal Circuit, however, downplayed the significance of its holding, emphasizing that while the sum certain requirement is not jurisdictional it remains a mandatory claim requirement, and suggesting that the distinction will rarely make a difference. This article considers factors that will influence the practical effects of *ECC* on sum certain disputes and on disputes over other CDA procedural rules. Despite lingering questions, the *ECC* decision confers greater authority on the court and the boards either to countenance unnecessary procedural litigation or to put an end to it.

To read the full article in *Thomson Reuters*, click [here](#).