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Sum Certainty: The Federal Circuit Rules the CDA's Requirement to Plead a "Sum Certain" Damages Amount Is Not Jurisdictional

*By Lawrence S. Sher**

In this article, the author, analyzes a decision by the U.S. Court of Appeals for the Federal Circuit holding that the requirement that contractors state a sum certain in claims brought under the Contract Disputes Act is not a jurisdictional prerequisite to litigating that claim in federal court or before a board of contract appeals.

During oral argument in *ECC International Constructors, LLC v. Secretary of the Army* in May 2023,¹ the U.S. Court of Appeals for the Federal Circuit questioned whether the long-standing requirement to plead a "sum certain" monetary claim against the U.S. government under the Contract Disputes Act² (CDA) is jurisdictional. The court raised the issue sua sponte³ in the wake of the U.S. Supreme Court's recent decision in *Wilkins v. United States*,⁴ which outlined the test to determine when a pleading requirement is jurisdictional in nature and highlighted the significant expenditure of time and resources that are often wasted when such requirements are considered jurisdictional.

The Federal Circuit now has answered its own question, holding that the requirement that contractors state a sum certain in claims brought under the CDA is not a jurisdictional prerequisite to litigating that claim in federal court or before a board of contract appeals.⁵ The court acknowledged prior Supreme Court decisions holding that jurisdictional requirements must be "clearly state[d]" and, after analyzing the text of the CDA, concluded that it did not require a "sum certain" as a predicate to jurisdiction.⁶ The Federal Circuit

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¹ Nos. 21-2323, 22-1368 (2023).

² Contract Disputes Act of 1978, Pub. L. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. §§ 7101–7109 (2012)).

³ *ECC Int'l Constructors, LLC v. Sec'y of the Army*, No. 21-2323 (Aug. 22, 2023), slip op. at 2. ("We consider sua sponte whether the requirement . . . that claims submitted under the Contract Disputes Act ('CDA') state a 'sum certain' – i.e., specify the precise dollar amount sought as relief—is jurisdictional.")

⁴ 143 S. Ct. 870 (2023).

⁵ *ECC Int'l Constructors, LLC v. Sec'y of the Army*, No. 21-2323 (Aug. 22, 2023).

⁶ *Id.* at 17.

further noted that “Supreme Court precedent, and in particular the principles articulated in recent Supreme Court decisions, reflects that rules outside the statutory text are not jurisdictional.”⁷ Accordingly, the Federal Circuit held that courts must “treat the requirement as nonjurisdictional under the [Supreme] Court’s bright-line rule.”⁸ “Under that rubric,” the court ruled “the sum-certain requirement is an element of a claim for relief – in other words, it is an element of a CDA claim that a claimant must satisfy in order to recover – rather than a jurisdictional rule that a party could challenge after a trial on the merits. The requirement is no less mandatory under this framework; it does not, however, control the jurisdiction of the boards or courts.”⁹

Although the Federal Circuit asserted its decision will not impact “the vast majority of cases,” its *ECC International* decision is significant because it helps level the playing field for contractors bringing CDA claims by allowing courts to consider a contractor’s claims, including whether the sum certain requirement has been met, on its merits. The court has thus deprived the government from using one of its favorite procedural tools to obtain dismissals before the merits of claims are ever considered by the courts. While the government still may seek to challenge the sum certain sufficiency of a claim before the U.S. Court of Federal Claims (COFC) or the Civilian or Armed Services Boards of Contract Appeal (Boards), such challenges would be made on motions to dismiss or at summary judgment. As explained below, in opposing such motions, contractors should employ a number of procedural strategies to keep their CDA claims alive for consideration by the courts on their merits, instead of having them dismissed with prejudice on procedural grounds, after having spent many months or years litigating them.

BACKGROUND

The sum certain requirement appears in the Federal Acquisition Regulations (FAR) and specifically defines a “claim” as “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.”¹⁰ To fulfill this requirement, a contractor must have submitted its claim to a contracting officer, including an exact amount for which payment is sought, or the contracting officer must be able to compute the exact amount from the information contained in the claim.¹¹

⁷ Id. at 13.

⁸ Id. at 19.

⁹ Id.

¹⁰ FAR 52.233-1(c).

¹¹ *Cont. Cleaning Maint., Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987)

Notably, as the Federal Circuit observed, the sum certain requirement does not appear in the CDA itself.¹²

Prior to *ECC International*, if a contractor's claim for payment included qualifiers such as "at least," "at a minimum," or "approximately," the COFC or the Boards likely would dismiss these claims for lack of jurisdiction, as they routinely have done in the past, because the uncertainty of the qualifier violated the FAR's sum certain requirement.¹³ The COFC and the Boards historically have demanded strict compliance with the sum certain requirement, reasoning that otherwise, contractors leave the door open to request more money from the government absent any definite boundary.¹⁴

Prior to *ECC International*, the Federal Circuit also consistently held that the sum certain requirement was a jurisdictional prerequisite to filing a claim against the government under the CDA.¹⁵ Following the "bright-line rule"

(defining "sum certain" as a "clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim"). A claim also can be dismissed on this basis if a plaintiff contractor fails to provide sufficient information to substantiate the calculation of its monetary claims. See, e.g., *J.P. Donovan Constr., Inc. v. Mabus*, 469 F. App'x 903, 908 (Fed. Cir. 2012) (affirming the Board's dismissal of a claim for lack of jurisdiction because the claim did not include supporting documents that would allow the contracting officer to substantiate the claim).

¹² *ECC Int'l Constructors, LLC* at 9 ("In this case, it could not be more evident that Congress has not provided a clear statement: the sum-certain requirement is not even in the CDA itself.").

¹³ See, e.g., *Appeal of Precision Std., Inc.*, A.S.B.C.A. No. 55865, 2011 LEXIS 7, at *22–23 (Armed Serv. B.C.A. 2011) (finding the contractor's demand for "at least \$151,749.06" and incomplete listing of the dollar amount for each category of recovery sought did not describe a determinable amount); *Appeal of Rex Sys., Inc.*, A.S.B.C.A. No. 54436, 2007 LEXIS 73, at *11 (Armed Serv. B.C.A. 2007) ("[T]he phrase 'at a minimum' modifying the claimed 15 percent license fee is indistinguishable from the modifying phrases 'no less than,' 'not less than' and 'in excess of,' which we have previously found to disqualify a stated amount as a sum certain."); *Appeal of Northrop Grumman Sys. Corp. Space Sys. Div.*, A.S.B.C.A. No. 54774, 2021 LEXIS 55, at *136-37 (Armed Serv. B.C.A. 2021) (holding that the Board was without jurisdiction where the contractor sought "approximately \$5.5 million").

¹⁴ *Precision Std., Inc.*, 2011 LEXIS 7, at *23.

¹⁵ *ECC Int'l Constructors, LLC* at 12 ("It's true, as the government points out, that our prior cases have identified the sum-certain requirement as jurisdictional because the FAR defines a claim as a written demand that seeks payment of money in a sum certain."); see also *Dawco Constr., Inc. v. United States*, 930 F.2d 872, 878 (Fed. Cir. 1991) (holding that a claim must seek payment of a sum certain for a court to have jurisdiction under the CDA); *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (ruling the Board had jurisdiction because the plaintiff contractor's claim stated a sufficiently precise demand for payment of money in a sum certain); *Securiforce Int'l Am., LLC v. United States*, 879 F.3d 1354, 1359–60 (Fed. Cir. 2018) ("We

established in the Supreme Court's recent precedent,¹⁶ the Federal Circuit held "the sum-certain requirement is an element of a claim for relief" and no longer can be considered jurisdictional.¹⁷ The court reclassified the sum certain requirement as a nonjurisdictional claim-processing rule.

As the court emphasized in *ECC International*, there are important distinctions between jurisdictional requirements and claim-processing rules.¹⁸ Jurisdictional rules limit a court's adjudicative authority, and the failure to satisfy jurisdictional rules deprives the court of its jurisdiction to hear the claim.¹⁹ In contrast, claim-processing rules are procedural in nature and the court usually has considerable discretion regarding a party's adherence to them.²⁰ Additionally, unlike jurisdictional requirements, which never can be waived, claim-processing rules can be equitably tolled, conceded, and/or waived if not raised by the parties in a timely manner.²¹

have explained that for monetary claims, the absence of a sum certain is 'fatal to jurisdiction under the CDA.'" (citing *Northrop Grumman Computing Sys. v. United States*, 709 F.3d 1107, 1112 (Fed. Cir. 2013)).

¹⁶ *ECC Int'l Constructors, LLC* at 19.

¹⁷ *Id.*

¹⁸ *Id.* at 24-25 ("Unlike 'challenges to subject-matter jurisdiction,' which the defendant may raise at any point in the litigation and which courts must consider sua sponte, 'an objection based on a mandatory claim-processing rule may be forfeited' if the party waits too long to invoke the rule."); see also *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (describing the distinction between jurisdictional and claims-processing classification as a question that "is not merely semantic but one of considerable practical importance for judges and litigants. Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system.").

¹⁹ According to the Federal Circuit, "a rule should be referred to as jurisdictional only if it 'governs a court's adjudicatory capacity.'" *ECC Int'l Constructors, LLC* at 20 (internal citations omitted).

²⁰ *Id.* at 17-18. The court noted that "an array of mandatory claim-processing rules and other preconditions to relief" are "important but not jurisdictional." The court listed these rules including, for example, "filing deadlines; preconditions to suit, like exhaustion requirements; or the elements of a plaintiff's claim for relief." *Id.*

²¹ See *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004) ("Characteristically, a court's subject matter jurisdiction cannot be expanded to account for the parties' litigation conduct; a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point.").

WHY THE JURISDICTIONAL LABEL MATTERS

A prerequisite for the COFC's and the Boards' jurisdiction over a CDA claim is that there was a final decision by a contracting officer on a valid claim.²² If the underlying claim is found to be insufficient for any reason, the COFC and the Boards consistently have held that they lack jurisdiction over the claim under the CDA.²³ Therefore, the prior jurisdictional nature of the sum certain requirement often led to harsh results through the dismissal of claims, even after the contractors have expended considerable resources pursuing their claims.²⁴

In *ECC International*, for example, ECC timely submitted a claim to its contracting officer (CO) for certain government delays relating to a construction project in Afghanistan. ECC divided its claimed amount into various categories and asserted different reasons for delay. ECC's claim was deemed denied, and ECC appealed the deemed denial to the ASBCA. The government did not move to dismiss for lack of jurisdiction based on the sum certain requirement until six years after ECC first submitted its claim.²⁵ The Board ultimately agreed with the government and dismissed the claim that the ECC

²² Northrop Grumman, 709 F.3d at 1111–12 (emphases added); see also 28 U.S.C. § 1491(a)(2); 41 U.S.C. § 7104(b)(1).

²³ See, e.g., *Dawco Constr.*, 930 F.2d at 878 (holding that a claim must seek payment of a sum certain for a court to have jurisdiction under the CDA); *Sharman Co. v. United States*, 2 F.3d 1564, 1568 (Fed. Cir. 1993) (“Under the CDA, a final decision by the contracting officer on a claim . . . is a ‘jurisdictional prerequisite’ to further legal action thereon.”), overruled on other grounds by *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995); *Boeing Co. v. United States*, 26 Cl. Ct. 872 (1992) (granting the government’s motion to dismiss for lack of subject matter jurisdiction because the claim failed to present a request for a sum certain); *Appeal of Nexagen Networks, Inc.*, A.S.B.C.A. No. 60641, 2019 LEXIS 45, at *7 (Armed Serv. B.C.A. 2019) (holding that to meet the jurisdictional threshold, a claim must provide the contracting officer with adequate notice of the basis and amount of the claim); *Corr. Corp. of Am. v. Dep’t of Homeland Sec.*, C.B.C.A. No. 2647, 2015 LEXIS 167, at *17-18 (U.S. Civilian B.C.A. 2015) (noting that the Board possesses jurisdiction when a claim provides an adequate statement of the amount sought and an adequate statement of the basis for the request).

²⁴ See, e.g., *Northrop Grumman Computing Sys., Inc. v. United States*, 99 Fed. Cl. 651, 653-54, 660 (2011) (granting the government’s motion to dismiss for lack of subject matter jurisdiction due to a deficient sum certain statement even though the government did not file its motion to dismiss until a month before the scheduled trial and after nearly four years of pretrial litigation that included cross-motions for summary judgment and supplemental discovery); *J.P. Donovan Constr.*, 469 F. App’x at 903 (affirming the Board’s grant of the government’s motion to dismiss for lack of subject matter jurisdiction due to a deficient sum certain statement that the government filed after four years of “extensive discovery” and after the Board sent the parties a letter asking sua sponte whether the claim contained a sum certain).

²⁵ *ECC Int’l Constructors, LLC* at 4-6. This was long after the parties had gone through settlement discussions, discovery, alternative dispute, summary judgment briefing, and a Federal

had spent years litigating and could no longer bring as a result of the CDA's statute of limitations having expired. In its recent decision, the Federal Circuit highlighted that ECC's case "reflects the draconian consequences of a jurisdictional rule: a late-filed motion challenging jurisdiction can thwart both the claimant's ability to recover and any opportunity to timely refile."²⁶

As the Federal Circuit recognized in *ECC International*, "[h]arsh consequences attend the jurisdictional brand,' [and a]s the Supreme Court has noted, '[j]urisdictional rules may also result in the waste of judicial resources and may unfairly prejudice litigants.'"²⁷ The Federal Circuit's ruling that the sum certain requirement is not jurisdictional should serve as an important step to ending the inefficient, and at times unfair, outcomes that have occurred due to its previous jurisdictional classification under the CDA. This new bright-line rule should promote predictable outcomes and avoid the waste of resources.²⁸

Despite Congress' aspiration that the CDA would provide a fair, efficient, and flexible avenue for resolving government contract disputes, decades of decisions demonstrate that litigating claims under the CDA has been anything but that.²⁹ Instead, CDA litigation has resulted in much confusion and disappointment for the unwary plaintiff contractor. Worse yet, the COFC and the Federal Circuit have labeled many of the CDA's procedural requirements as jurisdictional, extinguishing claims before considering them on the merits.³⁰

Circuit appeal on one portion of ECC's claim and a nine-day hearing on the merits before the ASBCA.

²⁶ *Id.* at 8.

²⁷ *Id.* at 3 (internal citations omitted).

²⁸ *Id.* ("Because objections to subject-matter jurisdiction may be raised at any time, 'a party, after losing at trial, may move to dismiss the case because the trial court lacked subject matter jurisdiction.' 'Indeed, a party may raise such an objection even if the party had previously acknowledged the trial court's jurisdiction. And if the trial court lacked jurisdiction, many months of work on the part of the attorneys and the court may be wasted.'" (internal citations omitted); see also *Grupto Dataflux v. Atlas Glob. Grp.*, 541 U.S. 567, 582 (2004) ("Uncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful.").

²⁹ See S. REP. NO. 95-1118, at 1 (1978) ("The act's provisions help to induce resolution of more contract disputes by negotiation prior to litigation; equalize the bargaining power of the parties when a dispute exists; provide alternative forums suitable to handle the different types of disputes; and insure fair and equitable treatment to contractors and [g]overnment agencies.").

³⁰ See, e.g., *Paradigm Learning, Inc. v. United States*, 93 Fed. Cl. 465, 466, 471 (2010) (explaining that the CDA is currently interpreted to contain four jurisdictional prerequisites: (1) claim submission, (2) certification for claims over \$100,000, (3) issuance of a contracting officer's decision, and (4) timely appeal of the contracting officer's decision).

As with any jurisdictional requirement, the government was permitted to object to the adequacy of a sum certain statement at any time during the litigation process, without risk of waiver.³¹ This historically has provided the government with a significant procedural advantage, enabling it to dispose of a contractor's CDA claims permanently – at the motions stage – even in cases when the government's access to information regarding the amounts owed on the particular claim may be superior to that of the plaintiff contractor.

Even if the government fails to raise the sum certain defense during initial motions practice, discovery, or pretrial briefing, the jurisdictional nature of the requirement meant that the government could raise the defense at any time through trial. In some cases, courts even have permitted the government to raise it after years of protracted litigation.³² Such belated dismissals, based on a plaintiff's failure to satisfy the sum certain requirements, were an unnecessary waste of the parties' and the court's resources.³³

This is what transpired in *ECC International*. The parties had engaged in over eight years of litigation, including extensive motions practice involving multiple motions for summary judgment, years of discovery, and a two-week trial on the merits of the CDA claim before the government ever raised a concern about the court's lack of subject matter jurisdiction.³⁴ The Federal Circuit acknowledged that the “Board's interpretation of the sum-certain requirement as jurisdictional required it to dismiss ECCI's claim after much time, effort, and expense for both the litigating parties and the Board.”³⁵

The likelihood that the court would strip the sum certain requirement of its jurisdictional classification was buttressed by recent Federal Circuit decisions similarly holding that rules previously considered jurisdictional in nature are, instead, claim-processing rules.³⁶ In May 2023, the Federal Circuit issued decisions in two bid protest cases that overruled prior jurisdictional classifications.

³¹ Wilkins, 143 S. Ct. at 876.

³² See Northrop Grumman, 99 Fed. Cl. at 653–54, 660 n.16 (granting the government's motion to dismiss for lack of subject matter jurisdiction based on a deficient sum certain but noting that “[t]he court is mystified as to why defendant did not file its motion to dismiss until a month before the trial scheduled in this case (since cancelled)”).

³³ Id.

³⁴ Oral Argument at 4:35, *ECC Int'l Constructors, LLC v. Sec'y of the Army*, No. 21-2323 (2023) <https://www.courtlistener.com/audio/86622/ecc-international-constructors-llc-v-secretary-of-the-army/>.

³⁵ *ECC Int'l Constructors, LLC* at 24.

³⁶ See *Securiforce Int'l Am.*, 879 F.3d at 1359-60 (holding that “the absence of a sum certain is ‘fatal to jurisdiction under the CDA’”) (citation omitted).

These decisions indicated that the Federal Circuit was willing to overturn long-standing precedent and the court was similarly inclined in *ECC International*.

THE FEDERAL CIRCUIT'S RATIONALE IN *ECC INTERNATIONAL*

The Federal Circuit observed that “[p]roperly construed, ‘the word “jurisdictional” is generally reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction).” These rules are distinct from “nonjurisdictional claim-processing rules, which ‘seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.”³⁷

The Federal Circuit emphasized that “there is no dispute that the need to state a sum certain in submitting a claim under the CDA is a mandatory rule provided for in the FAR.”³⁸ Indeed, the court explained “[i]n many cases, we think it’s fair to presume that a claim lacking a sum certain is promptly denied by the contracting officer or dismissed on appeal, allowing, if appropriate, the claimant to timely revise and refile its claim to specify the sum certain.”³⁹ Nevertheless, in finding the sum certain requirement is nonjurisdictional, the court “turn[ed] to the Supreme Court’s recent guidance that a clear statement from Congress is necessary to consider a rule jurisdictional and then proceed[ed] to analogize the sum-certain requirement to other rules the Supreme Court has deemed nonjurisdictional.”⁴⁰

“[A]s instructed by the Supreme Court,” the Federal Circuit declared in *EEC International* that it was invoking “a clear statement rule” that “treat[s] a procedural requirement as jurisdictional only if Congress ‘clearly states’ that it is.”⁴¹ In this case, the Federal Circuit found that Congress had “not provided a clear statement” particularly where “the sum-certain requirement is not even in the CDA itself.”⁴² The court reasoned that “[i]f Congress intended for the sum-certain requirement to be jurisdictional, it could have made such a statement in the statute itself. It did not.”⁴³ Nor did the Federal Circuit find the

³⁷ Id. at 3 (citing *Fort Bend Cnty., Tex. v. Davis*, 139 S. Ct. 1843, 1849 (quoting *Henderson*, 562 U.S. at 435)).

³⁸ Id. at 8.

³⁹ Id.

⁴⁰ Id. at 8-9.

⁴¹ Id. (citing *Boechler, P.C. v. Comm’r*, 142 S. Ct. 1493, 1497 (2022) (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 510, 515 (2006))).

⁴² Id. at 9.

⁴³ Id. at 14. The court also noted at page 10 that although the CDA (§ 7103(a)) sets forth

FAR provisions defining a claim any more instructive, as the court found that the FAR references seeking payment for a “sum certain” were not included by Congress in the CDA.⁴⁴

Relying on the Supreme Court’s several decisions clarifying when rules should be considered jurisdictional, the Federal Circuit reasoned that the Supreme Court only treats a provision as jurisdictional “if Congress clearly states as much.”⁴⁵ Accordingly, the court clarified that “rules outside the statutory text are not jurisdictional.”⁴⁶ This is because the court found “Congress did not clearly state that a claim submitted under the CDA must include a sum certain in order for the Board or a court to exercise jurisdiction.”^{46.1} Under the Federal Circuit’s implementation of the Supreme Court’s bright-line rule, “the sum-certain requirement is an element of a claim for relief – in other words, it is an element of a CDA claim that a claimant must satisfy to recover – rather than a jurisdictional rule that a party could challenge after a trial on the merits.”^{46.2}

The practical effect of the Federal Circuit’s ruling is that ECC’s claim for payment of roughly \$13 million that was denied by the CO (and denied by the Board) is reversed and remanded, and “the sufficiency of a sum certain” is for the Board to explore on the merits.”⁴⁷

While the court noted the “distinction between whether the sum-certain requirement is jurisdictional or nonjurisdictional will be of little consequence because the FAR mandates a sum certain for claims seeking monetary relief,” in EEC’s case, and in claims filed by many other contractors, the government likely waited too long to raise the defense.⁴⁸

the requirements and timing for submitting a claim, it did not identify any requirement that a claim must state a sum certain.

⁴⁴ Id. at 9–10.

⁴⁵ Id. at 10–16. The Federal Circuit further clarified, “[O]ur prior cases that did not cite to any statutory language and relied solely on the FAR definition of a claim to deem the sum-certain requirement jurisdictional no longer control in light of recent Supreme Court guidance.” Id. at 12.

⁴⁶ Id. at 13.

^{46.1} Id.

^{46.2} Id.

⁴⁷ Id. at 21.

⁴⁸ Id. at 26.

FUTURE LITIGATION STRATEGIES TO PREVENT DISMISSAL FOR FAILURE TO SATISFY THE SUM CERTAIN REQUIREMENT

Now that the sum certain requirement is deemed to be a claim-processing rule, contractors and their counsel should be prepared to use strategic defenses to oppose government dismissal efforts before the COFC or the Boards.

Overcoming a Motion to Dismiss

As the Federal Circuit acknowledged in *ECC International*, it is “mandatory for a party submitting a claim under the CDA seeking monetary relief to include a sum certain indicating for each distinct claim the specific amount sought as relief.”⁴⁹ A contractor’s failure to sufficiently plead all of the elements of a claim under the CDA, including a sum certain, “may be denied by the contracting officer and dismissed on appeal to the boards or Court of Federal Claims for failure to state a claim.”⁵⁰ Dismissals for failing to satisfy the sum certain requirement are no longer jurisdictional and therefore are not necessarily fatal to the claim. The Boards and courts have the discretion to allow contractors to remedy nonjurisdictional pleading deficiencies through amended pleadings.⁵¹ Accordingly, plaintiff contractors should continue to allege in their initial complaints that the amount they have claimed is a sum certain as prescribed in the FAR. If the government later moves to dismiss for failure to state a claim asserting a deficient sum certain, then for the purposes of the Rule 12(b)(6) motion, the court must accept all factual allegations in the complaint as true and construe the allegations in the light most favorable to the plaintiff.⁵² The proof of that certainty would be subject to discovery and presumably could be resolved at summary judgment or at trial.⁵³ However, even if the government’s motion to dismiss is granted, it is likely the dismissal would be without prejudice.⁵⁴ This means that plaintiff contractors could gather

⁴⁹ *ECC Int’l Constructors, LLC* at 27.

⁵⁰ *Id.*

⁵¹ See U.S. Ct. Fed. Cl. R. 15(a); ASBCA Rule 6(d); *Am. K-9 Detection Servs. v. United States*, Nos. 20-1614, 21-1165, 2021 U.S. Claims LEXIS 1082, at *5–6 (U.S. Ct. Fed. Cl. June 7, 2021) (“If a party may not amend a pleading as of right, RCFC 15(a)(2) directs the Court to ‘freely give leave [to amend the pleading] when justice so requires.’”).

⁵² *Westlands Water Dist. v. United States*, 109 Fed. Cl. 177, 190 (2013) (citing *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001)).

⁵³ *Id.*; see also *Horn & Assoc. v. United States*, 123 Fed. Cl. 728, 750 (2015) (permitting plaintiffs to prove the amount of damages at trial for alleged violations of the CDA’s anti-fraud provision).

⁵⁴ See *United States v. Houck*, 2 F.4th 1082, 1084 (8th Cir. 2021) (failing to fulfill the requirements of a claim-processing rule results in dismissal without prejudice).

additional information and then request leave to amend their complaints to cure any perceived pleading defects.⁵⁵

Likewise, if the plaintiff contractor files a complaint before the Civilian Board of Contract Appeals (CBCA) and the government moves to dismiss for failure to state a sum certain, then the Board likely would follow these same procedures since the Board's rules instruct it to look to Rule 12(b)(6) of the Federal Rules of Civil Procedure for guidance when ruling on motions to dismiss.⁵⁶ Contractors can pursue this avenue before either the COFC or the Boards, which significantly increases the chance that the case will be decided on its merits.⁵⁷

Opposing Dismissal on Summary Judgment with a Motion for Additional Discovery

If the government does not move to dismiss, or if its Rule 12(b)(6) motion is denied, the government still could move for summary judgment arguing the plaintiff contractor failed to establish the sum certain requirement or provide sufficient substantiation for the amount demanded.⁵⁸ In many cases, a contractor does not have all of the invoices or other supporting documentation necessary to substantiate the full amount of its claim. Often, this vital information may be in the agency's possession.

If this is the case and the dispute is before the COFC, then a contractor could oppose the government's summary judgment motion by seeking additional discovery under Rule 56(d).⁵⁹ Rule 56(d) enables the COFC to deny or stay the government's motion for summary judgment to permit additional discovery on

⁵⁵ See U.S. Ct. Fed. Cl. R. 15(a)(2); see also *Groundbreaker Dev. Corp. v. United States*, 163 Fed. Cl. 619, 630 (2023) ("This court 'should freely give leave [to amend a complaint] when justice so requires.' . . . The court may deny leave to amend a complaint for 'undue delay, bad faith, dilatory motive, failure to correct deficiencies which could have been cured earlier and undue prejudice to the non-amending party by allowance of the amendment.'" (citations omitted)).

⁵⁶ See C.B.C.A. R. 8(e) ("A party may move to dismiss all or part of a claim for failure to state grounds on which the Board could grant relief. In deciding such motions, the Board looks to Rule 12(b)(6) of the Federal Rules of Civil Procedure for guidance.").

⁵⁷ See U.S. Ct. Fed. Cl. R. 15(a)(2); ASBCA Rule 6(d); see also C.B.C.A. R. 6(c) ("A party may amend a pleading once, before a responsive pleading is filed, with permission of the other party. Amending a pleading restarts the time to respond, if any. The Board may allow a party to amend a pleading in other circumstances.").

⁵⁸ *J.P. Donovan Constr.*, 469 F. App'x at 908 (affirming the Board's dismissal of a claim for lack of jurisdiction because the claim did not include supporting documents that would allow the contracting officer to substantiate the claim).

⁵⁹ U.S. Ct. Fed. Cl. R. 56(d).

the issue of the sum certain amount if the contractor explains by affidavits or declarations why it cannot set forth specific facts showing a genuine dispute of material fact.⁶⁰ The Boards generally permits the same practices as the COFC with respect to summary judgment, so a plaintiff contractor before the CBCA similarly could request that the record be supplemented so it can properly defend itself against summary judgment.⁶¹

Fortunately for contractors, the COFC often will liberally grant motions for additional discovery under Rule 56(d) because it is designed to safeguard non-moving parties from summary judgment motions that they cannot adequately oppose.⁶² To prevail on a Rule 56(d) motion, however, contractors cannot merely allege a general need for additional discovery.⁶³ Instead, the contractor must set forth “with some precision” the evidence it hopes to obtain, how the evidence would likely disclose issues of material fact in dispute, and why it is unable to access such evidence regarding the claim amount at issue without further discovery.⁶⁴ Ideally, to avoid a potential waiver defense by the government, the contractor should be able to demonstrate that it previously asked for such supporting information or documentation from the government to substantiate its claim. If permitted to engage in discovery, the contractor also should request such supporting information and documentation to substantiate the amount of its claim to a certainty through document requests, interrogatories, and, if necessary, deposition testimony.

The Timeliness Requirement When Objecting to Claims-Processing Rules

Importantly, now that the sum certain requirement is recategorized as a claim-processing rule, the government will be required to object to a sum certain in a timely manner. The court in *ECC International* cautioned that challenges based on a deficient sum certain asserted “after litigation has far progressed” may “be deemed forfeited.”⁶⁵ The court’s remand order specified that the Board must determine whether the government waited too long to

⁶⁰ *Id.*

⁶¹ See, e.g., C.B.C.A. R. 8(f) (“In deciding motions for summary judgment, the Board looks to Rule 56 of the Federal Rules of Civil Procedure for guidance.”); see also C.B.C.A. R. 4.

⁶² *Capstone Associated Servs. v. United States*, No. 21-913T, 2022 U.S. Claims LEXIS 279, at *3 (U.S. Ct. Fed. Cl. Feb. 1, 2022); *Clear Creek Cmty. Servs. Dist. v. United States*, 100 Fed. Cl. 78, 83 (2011); *Theisen Vending Co. v. United States*, 58 Fed. Cl. 194, 197 (2003).

⁶³ *Capstone*, 2022 U.S. Claims LEXIS 279, at *3.

⁶⁴ *Id.* (citing *Padilla v. United States*, 58 Fed. Cl. 585, 593 (2003)).

⁶⁵ *Id.* at 27.

assert the nonjurisdictional sum certain defense.⁶⁶ Similarly, in *Fort Bend County v. Davis*,⁶⁷ the Supreme Court held that an objection based on a claim-processing rule may be forfeited if the objecting party waits too long to raise the point.⁶⁸

Although the Federal Circuit in *ECC International* did not provide explicit guidance on exactly when an objection to a sum certain must be raised before the issue is forfeited, the court did strongly suggest on remand that the Board may find the government waited too long by waiting over six years to raise the sum certain defense, after multiple negotiations, numerous motions for summary judgment, extensive discovery, and a two-week trial.⁶⁹

Even though the court in *ECC International* did not explicitly answer the timeliness question, contractors should assume that objections to a stated sum certain must be raised in a timely manner. For example, at both the COFC and the Boards, the government must file motions to dismiss before filing its answer to the complaint, which typically are due within 60 days after being served with the complaint.⁷⁰ If the government raises the sum certain defense at summary judgment, that motion generally can be filed at any time until 30 days after the close of all discovery.⁷¹ These time limits would be consistent with other claim-processing rules, which seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.⁷²

CONCLUSION

The Federal Circuit's recent decision holding that the requirement to plead a sum certain is nonjurisdictional will deprive the government of one of its

⁶⁶ Id. at 26-27 (“We remand for the Board to consider these facts as well as any additional arguments by the parties concerning the government’s potential forfeiture of its right to challenge whether ECCI’s claim stated an appropriate sum certain.”).

⁶⁷ 139 S. Ct. 1849 (2019).

⁶⁸ Id. (quoting *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004)).

⁶⁹ Id. at 26. The court observed that ECC submitted its claim to the CO in 2014, but the government did not challenge the claim for failure to state a sum certain until six years after ECC’s claim was submitted. The court noted further that “the government waited until the Board was poised to finally decide the case on the merits to challenge jurisdiction.”

⁷⁰ See U.S. Ct. Fed. Cl. R. 12(a)(1)(A); see also C.B.C.A. R. 8(e).

⁷¹ See U.S. Ct. Fed. Cl. R. 56(b); see also C.B.C.A. R. 8(f).

⁷² *Henderson*, 562 U.S. at 435 (“Among the types of rules that should not be described as jurisdictional are what we have called ‘claim-processing rules.’ These are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.”).

favorite procedural dismissal tools and should help level the playing field for contractors bringing CDA claims. If the government waits too long to raise the sum certain defense, it may be waived. When opposing government motions to dispose of CDA claims in the future, contractors should consider employing one or more of the above procedural strategies to maximize the chances of keeping their CDA claims alive for adjudication on their merits.