

Jurisdiction Ruling Could Have Wide Effect On Contract Cases

By **Daniel Wilson**

Law360 (August 23, 2023, 8:12 PM EDT) -- A jurisdictional decision the Federal Circuit has suggested will apply only in limited and unusual circumstances is instead likely to have a significant effect on how the government and federal contractors litigate Contract Disputes Act cases, experts say.

The circuit court ruled Tuesday that a requirement for contractors to state a "sum certain" — a request for specific amount of money — in claims to the government filed under the Contract Disputes Act is mandatory but not jurisdictional. That means the government effectively forfeits any related defense if it raises the sum certain issue "too late," U.S. Circuit Judge Sharon Prost said.

Judge Prost said that in the "vast majority" of CDA cases, the ruling will be of "little, if any, consequence," as the specific case before the court involved "unique facts." The government had sought to dismiss ECC International Constructors LLC's case based on a failure to state a sum certain in a claim to the U.S. Army only following years of settlement discussions, a nine-day merits hearing and after the CDA's six-year statute of limitations on ECC's underlying claim had already passed, she said.

But the actual impact of the decision is likely to be more profound than what Judge Prost suggested, shaking up CDA disputes by in effect pushing the government to clearly assert its defenses in the early stages of a dispute, "[ushering] in a new era of CDA litigation [that] levels the playing field for contractors," Crowell & Moring LLP partner Rob Sneckenberg said.

"Now that the sum certain requirement is not jurisdictional, it prevents certain gamesmanship, such as what happened in the ECC International case, and will require the government, if it has defenses, to argue those defenses much earlier in the litigation," he said.

Although the specific fact pattern in the ECC case is unusual, considerations regarding a sum certain, and how contractors should structure their claims, are part of "essentially every CDA claim that is seeking monetary relief," Sneckenberg said.

In addition, motions to dismiss for an alleged lack of jurisdiction are a common part of CDA litigation, and the circuit court's decision could mean that in many cases where the government would have previously attempted to have a case tossed on jurisdictional grounds, it will now instead have to turn to different types of motions that require a different standard of pleading, according to Jeff Chiow, co-chair of Greenberg Traurig LLP's government contracts practice.

"Hopefully, it's going to lead to fewer 'gotchas,' and a little bit more litigation on the merits," Chiow said.

According to Sneckenberg, that will help to bring CDA litigation back in line with the statute's goal of "effective and efficient resolution of disputes" between contractors and the government.

That doesn't necessarily mean the government won't try to continue to push the boundaries, however, with the Federal Circuit leaving open the question of exactly when it is "too late" for the government to raise a defense based around an allegedly inadequate sum certain request. The panel said the Armed Services Board of Contract Appeals could address that issue on remand in ECC's case.

"I think it's going to be a pretty clear-cut case here," said Wiley Rein LLP of counsel Ryan Frazee. "But it's going to be interesting to see, in other litigation, how long is too long to raise this issue ... I think forfeiture is going to be a key point of litigation in these sorts of cases."

More broadly, the Federal Circuit's decision will also likely prompt contractors to try to challenge a number of other requirements for filing a CDA claim with the government that the Court of Federal Claims and boards of appeal currently treat as jurisdictional, especially in light of similar recent decisions from the circuit court, according to Frazee.

The jurisdiction of the Court of Federal Claims is of great importance to contractors because it is the only court that can hear monetary claims against the government.

"Some of the assumptions that people have had to date about whether certain elements of claims or bid protests are jurisdictional may be, if not mistaken, something that people need to revisit, because the Federal Circuit is clearly doing that," Frazee said.

Two relevant Federal Circuit decisions, both issued in May, involved bid protests rather than CDA disputes. But both showed that the appellate court is willing to revisit issues that frequently arise in disputes between the government and contractors that it had previously found to be jurisdictional, particularly after the U.S. Supreme Court had made rulings on similar jurisdictional issues.

In the first of those earlier cases, the Federal Circuit found that the issue of statutory standing under the Tucker Act, which sets out the Court of Federal Claims' authority to hear cases, was a merits issue and not a jurisdictional one.

Then, later in May, another circuit court panel **ruled** that the so-called Blue & Gold waiver rule, requiring bidders to dispute clear errors in contract solicitations before the bidding deadline or waive any related argument, was also not jurisdictional. Instead, the rule was "more akin to a nonjurisdictional claims-processing rule," the court found.

"The Federal Circuit has had its jurisdictional responsibility in its current shape since 1996 [when related legislation was enacted], and I feel like these cases are [just] now beginning to create ... a more coherent bid protest and claims jurisprudence. They're providing additional guidance to the Court of Federal Claims through these decisions," Greenberg Traurig's Chiow said.

--Editing by Jill Coffey and Emily Kokoll.