CERTIFICATION REQUIREMENTS UNDER THE CONTRACT DISPUTES ACT

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I. INTRODUCTION

Contracts awarded by government agencies prior to the enactment of the Contract Disputes Act (CDA or Act)[1] in 1978 included mandatory clauses for resolution of disputes arising out of the performance of the contract. If the parties could not resolve these disputes through negotiations the government contractor could first ask the government contracting officer to resolve the dispute. An appeal could then be taken to the head of the contracting agency and this appeal was decided by an administrative body known as a board of contract appeals. A limited review of these decisions was allowed in the United States Court of Claims under the standards of the so-called "Wunderlich Act" which limited judicial review to a review of the administrative record before the board.[2]

With the passage of the CDA in 1978, Congress established a comprehensive new process for the resolution of disputes arising out of the performance of government contracts. Under the CDA, disputes by or against the government relating to a contract must be initially

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[1] Pub. L. No. 95-563, 92 Stat. 2383, 41 U.S.C. §§ 601-613.

[2] The Wunderlich Act provides in 41 U.S.C. § 321-22 as follows:

> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute

(Footnote Continued)

submitted to a contracting officer for decision.[3] The CDA provides procedures for the resolution of disputes

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(Footnote [2] Continued:)

> involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
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> No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

The limits of the Wunderlich Act were defined in a series of Supreme Court decisions. See United States v. Carlo Bianchi and Co., 373 U.S. 709 (1963); United States v. Anthony Grace & Sons, Inc., 384 U.S. 424 (1966); United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966). The final decision of the Supreme Court construing the limits of the Wunderlich Act was S & E Contractors, Inc. v. United States, 406 U.S. 1 (1972) where the Court held that the government had no right to appeal a board decision. Since the boards of contract appeals were operating as independent administrative tribunals, this created a somewhat anomalous situation for the government and led in part to the enactment of the CDA.

[3] The Contract Disputes Act applies to contracts made by executive branch agencies. It does not apply to contracts entered into by judicial and legislative branch agencies as well as certain other contracts. See G. Coburn, The Contract Disputes Act of 1978 at 10-11 (Pl1 1982).

first by the government contracting officer and then either by an agency board of contract appeals[4] or by the United States Claims Court.[5] (Figure 1)

In a recent series of decisions the Court of Claims and its successor, the Court of Appeals for the Federal Circuit, have held that a contractor cannot secure judicial relief provided under the CDA for a claim over $50,000 unless it has first presented the claim in the proper form to the contracting officer.[6] By implication it has also concluded that the boards of contract appeals may deny relief on similar grounds. In so doing the courts have narrowed the threshold issue for the adjudication of claims to the physical form of the claim and not its substance. The formalistic approach taken in these cases portends significant problems for contractors seeking resolution of a broad range of claims where the quantum (dollar value) of the claim is not known with certainty at the time the claim actually arises or where the extent of the government's ultimate liability will not be known until long after the claim initially arises.

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[4] 41 U.S.C. § 606. If the appeal from the contracting officer's decision is taken initially to a board of contract appeals, the decision of the board may be appealed to the Court of Appeals for the Federal Circuit. 41 U.S.C. § 607, as amended by Pub. L. No. 97-164 (1982).

[5] 41 U.S.C. § 609, as amended by Pub. L. No. 97-164 (1982).

[6] See Paul E. Lehman, Inc. v. United States, 673 F.2d 352 (Ct. Cl. 1982); W. H. Moseley Co. v. United States, 677 F.2d 850 (Ct. Cl. 1982); Skelly & Loy v. United States, 685 F.2d 414 (Ct. Cl. 1982). Although the Court of Claims has been replaced by the Court of Appeals for the Federal Circuit and the Claims Court, its decisions will continue to be binding precedent. See South Corp. v. United States, 690 F.2d 1368 (Fed. Cir. 1982). More recently the Court of Appeals for the Federal Circuit stated that certification was one of the most "significant" provisions of the CDA and was a jurisdictional requirement. Fidelity Construction Co. v. United States, 700 F.2d 1379, 1384 (Fed. Cir. 1983).

II. CLAIMS, SUBMITTED CLAIMS, AND SUBMITTED CERTIFIED CLAIMS

The CDA does not define the terms "dispute" or "claim." However, in 41 U.S.C. § 605(a) the CDA authorizes contractors to submit claims to the contracting officer for decision. This subsection provides in part that:

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. . . . The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor.

This subsection, which is the only place in the CDA where the Congress attempted to give some definition to a claim, only requires that a claim be in writing and be submitted to a contracting officer. Section 605(b) of the CDA also provides that the contracting officer's decision on a claim shall be final and conclusive and not subject to review unless an appeal is timely commenced as authorized by the Act.

In addition to providing for submission of written claims under subsection 605(a), the Act provides in 41 U.S.C. §§ 605(c)(1) and (c)(2) that:

> (c)(1) A contracting officer shall issue a decision on <u>any submitted claim of $50,000 or less</u> within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.
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> (c)(2) A contracting officer shall, within sixty days of receipt of <u>a submitted certified claim over $50,000--</u>

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued. [Emphasis supplied.]

Certification is mentioned only in these two subsections and its principal effect would appear from the plain language of the statute to simply give the contracting officer the authority to set a date for resolution of "a submitted certified claim" beyond the 60-day limit provided for resolution of "any submitted claim of $50,000 or less." This is further suggested by subsection (c)(3) of section 605 which provides that:

> The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor. [Emphasis supplied.]

Subsections 605(c)(1), (2) and (3) make a clear distinction between submitted claims and submitted certified claims. For "any submitted claim of $50,000 or less," the contracting officer must issue a decision, if so requested in writing, within 60 days. On a "submitted certified claim over $50,000" the contracting officer either must issue a decision within 60 days or within that period notify the contractor when a decision will be issued. However, decisions on all submitted claims must be issued within a reasonable period of time under subsection 605(c)(3).

In determining what is a reasonable time for issuing a decision, the provisions of subsection 605(c)(3) allow the contracting officer to consider such factors as "the adequacy of the information in support of the claim provided by the contractor." Presumably, if a claim is not certified, the contracting officer can certainly consider the lack of certification in determining whether the information provided is adequate to support a

claim.[7] The failure of a contractor to supply a certification, however, is but one factor which can be taken into consideration in determining whether or not there is adequate information to support a claim. Despite the conclusions reached by the courts in the certification cases,[8] there is nothing in the specific language of the CDA which indicates that the failure to supply a certification would be a per se basis for a contracting officer to refuse to act on a claim within a reasonable time. Furthermore, there is nothing in the express language of the statute which indicates that a contracting officer cannot issue a final decision on an uncertified claim over $50,000.[9]

The somewhat limited legislative history of the certification provision could also be read to support the interpretation suggested above. The requirement for certification was not in the initial bill reported by either the House or Senate committees responsible for the legislation. Rather, the certification requirement was added on the floor of the Senate.[10] The sponsor of the amendment, Senator Byrd, said that the certification requirement was added "'due to concern expressed by . . . [among others] Admiral Rickover' about

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[7] See Newell Clothing Company, ASBCA No. 24482, 80-2 BCA ¶ 14,774 (1980).

[8] Supra note 6.

[9] Indeed, the General Services Board of Contract Appeals prior to the decisions cited supra note 6, held that where a contracting officer has rendered a final decision on an uncertified claim after reviewing the data before him, it is apparent that certification was unnecessary. Piedmont-Courtland Associates, Ltd., GSBCA Nos. 5433, 5710, 81-1 BCA ¶ 15,004 (1981). Furthermore, contracting officers had issued final decisions on uncertified claims in each of the cases cited supra in note 6.

[10] Lehman, supra note 6, at 354-55.

time constraints."[11] The amendment clearly responded to these concerns about time constraints by allowing the contracting officer in subsection 605(c)(3) a "reasonable time" to resolve claims over $50,000.[12]

III. THE CERTIFICATION REQUIREMENT AS INTERPRETED BY THE COURT OF CLAIMS

The Court of Claims and the Court of Appeals for the Federal Circuit have taken a very restrictive view of the meaning of certification in a series of cases brought under the direct review provisions of section 609 of the CDA. In Paul E. Lehman, Inc. v. United States,[13] the Court of Claims initially found that unless the certification requirement of subsection 605(c)(1) is met the court does not have the jurisdiction to consider a direct challenge to a contracting officer's decision. They also found that certification must occur before a contracting

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[11] Lehman, 673 F.2d at 352 (quoting 124 Cong. Rec. 36,267 (Oct. 12, 1978)). Admiral Rickover in his testimony at hearings on the legislation urged that a contractor be required to submit to the government a "certificate" with its claim. See Contract Disputes Act of 1978: Joint Hearings on S. 2292, S. 2787 & S. 3178 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 21 (1982). Written suggestions by Admiral Rickover were similar to the actual language of subsection 605(c)(1). 673 F.2d at 355.

[12] Certification is also intended to "discourage the submission of unwarranted contractor claims." See Lehman, 673 F.2d at 354. Accordingly, it would certainly be difficult to argue that a claim should actually be paid before a contractor submits a certification which meets the requirements of §§ 605(c)(1). As a practical matter, however, certification provides no greater assurance than existing law that a contractor is claiming funds to which it is entitled. See, e.g., 18 U.S.C. §§ 1001-1028 which establish a variety of civil and criminal penalties for such actions as making false statements to the government or submitting false claims to the government. See also United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982).

[13] 673 F.2d 352 (Ct. Cl. 1982).

officer renders a final decision and that any decision by a contracting officer on an uncertified claim for more than $50,000 is a nullity since "[t]he contracting officer, . . . had no authority to waive a requirement that Congress imposed."[14]

In W. H. Moseley Co., v. United States,[15] the court reaffirmed its holding in Lehman and found that a contractor cannot establish jurisdiction in the court by certifying the claim after the final decision of the contracting officer. The court in Moseley also held that "to properly certify a claim a contractor must make a statement which simultaneously makes all of the assertions required by 41 U.S.C. § 605(c)(1)."[16]

Both Lehman and Moseley involved contracts entered into prior to enactment of the CDA and were before the court under a special provision of the CDA dealing with claims submitted under such contracts after the effective data of the Act.[17]

In Skelly & Loy v. United States,[18] the court dealt with a contract in which all the relevant events occurred after the effective date of the CDA and in which the CDA controlled all avenues of appeal available to the plaintiff. In Skelly & Loy, the court reaffirmed

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[14] 673 F.2d at 356.

[15] 677 F.2d 850 (Ct. Cl. 1982).

[16] 677 F.2d at 852. The Claims Court recently appears to have limited a further extension of Moseley by rejecting the government's arguments that a contractor had to append to the claim all documents referenced in the claim's statement of certification. Metric Construction Co., Inc. v. United States, 1 Cl. Ct. 383 (1983).

[17] This provision allows a contractor to choose to follow the Wunderlich Act procedure, supra note 2, or to use the procedures of the CDA. Once a contractor chooses to use the CDA procedures the contractor cannot later elect to have the claim processed under the Wunderlich Act. W.M. Schlosser Co. v. United States, 705 F.2d 1336 (Fed. Cir. 1983). The claims in Lehman and Moseley were processed under the CDA. 41 U.S.C. § 601 note.

[18] 685 F.2d 414 (Ct. Cl. 1982).

its holdings in the Lehman and the Moseley cases. It concluded that "any proceedings on an uncertified claim - under the CDA - are of no legal significance," and therefore, the process for reviewing claims under the Act "simply has not begun."[19]

The holdings in Lehman, Moseley and Skelly & Loy, are at direct odds with the interpretation of the certification requirements suggested above. This may be in part because the court never analyzed the plain language of the CDA. Rather, the court in Lehman gave substantial weight to Admiral Rickover's testimony at hearings leading to passage of the Act urging that Congress impose a certification requirement on claims in order to discourage the submission of unsubstantiated claims.[20] While the court accurately quoted the Admiral's testimony,[21] there is nothing in his testimony which even remotely suggests that certification, prior to a contracting officer's decision, should be a jurisdictional predicate to direct judicial review of a final decision of a contracting officer. The court in Lehman also relied on decisions of the Armed Services Board of Contract Appeals.[22] Again, there is nothing in these decisions that suggests that either the board or the court is without jurisdiction to hear appeals from decisions of the contracting officer on uncertified

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[19] 685 F.2d at 419. In Fidelity and Deposit Co. of Maryland v. United States, 2 Cl. Ct. 137 (1983), the Claims Court extended the rationale of Lehman et al. to multiple claims arising out of the same fact situation holding that where such claims constitute a "unitary" claim it is the amount of the "unitary" claim and not the amount of each individual claim which determines whether the certification requirements of the CDA must be followed. See also Warchol Construction Co. v. United States, 2 Cl. Ct. 384 (1983); Black Star Security, Inc. v. United States, 5 Cl. Ct. 110 (1984).

[20] 673 F.2d at 355.

[21] See supra notes 10-12 and accompanying text.

[22] 673 F.2d at 355.

claims.[23]

Most significantly, the court in Lehman relied on the definition of a claim contained in the Defense Acquisition Regulation (DAR) § 1-314(b)(1). This regulation is the only direct support for the holding in Lehman. The DAR provided that a demand by a contractor for payment of money in excess of $50,000 "is not a claim unless or until certified."[24] However, the regulations controlling the contract at issue in Lehman were not the DAR but the Federal Procurement Regulations (FPR) and the FPR at that time adopted the Office of Federal Procurement Policy Letter 80-3 to agencies on the Contract Disputes Act.[25] This policy letter defined a claim as a "written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief."[26] Certification is treated not as part of the claim, but as an additional item that should be submitted with the claim.

The Court of Appeals for the Federal Circuit carried its decisions on certification to their logical

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[23] The board in the two cited cases did refuse to consider uncertified claims but did not conclude that it did so because it lacked jurisdiction to hear the claims. In Newell Clothing Co., ASBCA No. 24482, 80-2 BCA ¶ 14,774 (1980), there was no final decision of a contracting officer. Furthermore, the board in Newell did not decide the applicability of certification to disputes which do not involve monetary claims. In Harnischfeger Corp., ASBCA Nos. 23918, 24733, 80-2 BCA ¶ 14,541 (1980), the issue was the form of the certification.

[24] DAR § 1-314(b)(1) cited in 673 F.2d at 355. The contract at issue was not a Defense Department contract but rather a Department of Agriculture contract. 673 F.2d at 354. A similar definition of a claim has been incorporated in the new Federal Acquisition Regulation (FAR), 48 C.F.R. § 33.001. The FAR replaces the DAR and the Federal Procurement Regulations System.

[25] 49 Fed. Reg. 31,035 (May 9, 1980).

[26] Id.

conclusion in W.M. Schlosser Co. v. United States.[27] In this case, the court vacated a decision by the board of contract appeals rendered on a claim which was not certified by the contractor at the time the contracting officer rendered his final decision on the claim. The claim was certified before the board of contract appeals rendered its final decision on the claim. No change was made in the claim at the time it was certified. The court held that because the claim was not certified when it was submitted to the contracting officer, the board should have neither heard nor ruled on the appeal.

In United States v. Hamilton Enterprises, Inc.,[28] the court finally did provide some limited relief from the rigid strictures of the Lehman line of cases. In the Hamilton Enterprises case, the contractor submitted an uncertified claim to the contracting officer involving a default termination. This claim was denied and an appeal was taken to the Armed Services Board of Contract Appeals. While the matter was pending before the Board, the contractor filed a supplemental complaint seeking reformation. The contractor had originally asked the contracting officer to find that the contract should not have been terminated for default.

The claim for reformation was certified in accordance with the requirements of the CDA. By stipulation the parties agreed that the contractor was merely seeking an alternative remedy based on the same operative facts that formed the basis for the contracting officer's original decision. They further stipulated that if the contracting officer were to be asked for a final decision, the contracting officer would deny the reformation claim on the same basis as his original decision. The parties further stipulated that the original decision constituted a de facto final decision on the reformation claim.

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[27] 705 F.2d 1336 (Fed. Cir. 1983). In Fidelity Construction Co. v. United States, 700 F.2d 1379 (Fed. Cir. 1983), the court held that a contractor cannot recover the interest which is authorized to be paid on a claim submitted under the CDA pursuant to section 12 of the Act, 41 U.S.C. § 611, unless and until the claim, if it exceeds $50,000, has been properly certified.

[28] 711 F.2d 1038 (Fed. Cir. 1983).

The government argued that the court could not exercise jurisdiction over the reformation claim because the claim was never submitted as a formal certified claim to the contracting officer for a final decision. The court disagreed indicating that "[t]his position of the Government collides head-on with the facts set forth in the stipulation. There is no doubt that the reformation claim was certified in the language of the statute and sworn to as required." The reformation claim was considered by the contracting officer and the court stated "for all practical purposes it was denied."

The court felt that the facts in the case were essentially similar to the situation where the contractor asserts a new claim after an appeal to the board and obtains a contracting officer decision on that claim before the board proceeds to exercise jurisdiction under the CDA. The court held that the stipulations amounted to "substantial compliance with the certification requirements with the CDA" and therefore the board had jurisdiction to consider the merits of the claim for reaffirmation.[29]

Some limited relief from a rigid application of the certification requirements has also been provided by the Federal Circuit's decision in Tecom, Inc. v. United States.[30] In this case, the court held that a board of contract appeals had jurisdiction to consider an uncertified claim for more than $50,000 where the amount properly asked at the time of the contracting officer's final decision was less than $50,000. The increase in the amount of the claim to bring it above $50,000 occurred after the contracting officer's decision. It resulted in part from the decision of the government to exercise an option in the contract and extend the performance period for the contract from one year to three years. The court in Tecom cited with approval the decision of the Claims Court in J.F. Shea Co. v. United States,[31] in which the Claims Court upheld the right of a contractor to increase the monetary amount of a claim without further certification on the basis of new information on damages. The court in reaching its holding concluded that the claims considered in Tecom and J.F. Shea Company were the

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[29] 711 F.2d at 1043.

[30] ____ F.2d ____, 2 FPD ¶ 162 (Fed. Cir. April 24, 1984).

[31] 4 Cl. Ct. 46 (1983).

"very same claims[s] (but in an increased amount reasonably based on further information)" that were "properly" considered by the contracting officer.[32]

IV. DECISIONS BY BOARDS OF CONTRACT APPEALS ON UNCERTIFIED CLAIMS

A. Introduction

In a series of decisions prior to and following Lehman, the boards of contract appeals have considered their jurisdiction under the CDA to decide uncertified claims. Prior to Lehman the boards were somewhat equivocal as to their jurisdiction to consider uncertified claims.[33] With the decision in Lehman, the boards took a seemingly more forthright position. The 1982 decision in the John R. Hundley case is typical. There the Armed Services Board of Contract Appeals (ASBCA) held:

> In accordance with Section 6(c)(2) of the Act, we have long recognized that certification is a prerequisite to obtaining a contracting officer's decision on a contractor claim of more than $50,000. Newell Clothing Co., ASBCA No. 24482, 80-2 BCA ¶14,774; Allied Materials & Equipment Co., ASBCA No. 24373, 80-1 BCA ¶14,340. The prerequisite of 'a properly certified claim over $50,000' is similarly reflected in Rule 1(c). Therefore, under our Rules and decisions, and under the express language of Section 6(c)(2) of the Act, a contractor who fails to certify a claim for monetary adjustment over $50,000 is entitled to neither a decision on its claim by the contracting officer nor to notification of when a decision will be issued.[34]

As will be seen from the discussion below, it is far from clear that the position of the ASBCA is far from unequivocable. While certification is now a generally recognized requirement for its consideration of claims

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[32] 2 FPD ¶ 162 at 6.

[33] See cases discussed supra note 23.

[34] ASBCA No. 26689, 82-1 BCA ¶ 15,691 at 77,616 (1982).

over $50,000, the ASBCA has from its first decisions under the CDA qualified and carved out exceptions to its interpretation of the certification requirement of the CDA.

In Trinity Services, Inc.,[35] one of the first cases to deal with the certification requirements of the CDA, the claim at issue was filed before the effective date of the CDA. The contracting officer's decision on the claim came after the CDA became effective. Because the claim was in the amount of $55,018 and was not certified, the government moved to dismiss for lack of jurisdiction under the CDA. The ASBCA, while conceding that certification was a requirement for claims over $50,000, refused to dismiss the appeal. The board based its decision on the fact that the claim was submitted before the effective date of the CDA, at a time when certification was not required.[36] The board ruled that since the contractor had elected to proceed under the CDA, the government could request a suspension of proceedings for the purpose of certification.[37] The Court of Claims in Folk Construction Co. v. United States[38] recognized a similar exception to the certification requirement.

In Harnischfeger Corporation,[39] one of the

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[35] 79-2 BCA ¶ 14,090.

[36] 79-2 BCA at 69,302.

[37] Id. The government at the time Trinity Services was decided apparently did not consider certification to be a jurisdictional prerequisite to CDA consideration by a contracting officer of claims over $50,000. In Trinity, the government argued that the ASBCA should dismiss the contractor's appeal on the grounds, inter alia, that the contractor failed to appeal the contractor's decision on the uncertified claim within the time limits for appeal set by the CDA.

[38] No. 99-80C (Ct. Cl. order entered January 16, 1981).

[39] ASBCA Nos. 23918, 24733, 80-2 BCA ¶14,541 (1980).

first decisions of the ASBCA involving an uncertified claim that was filed after the effective date of the CDA, the ASBCA again found that it has some flexibility to apply the CDA certification requirements. In this case the contractor submitted a claim for $17,528,073. The claim included the elements of certification required by section 605(c)(1) of the CDA except that the amount requested "was qualified by the phrase 'as amended according to proof at the time of trial.'"[40] The board found that on the basis of this limitation, the contractor had not made the type of unqualified certification of a "sum certain" required by the CDA.[41]

The claim was certified in this manner because the contractor was concerned that by certifying to a "sum certain" before the contracting officer's final decision it would be precluded from proving a higher amount at an ASBCA hearing. The contractor also worried that under the CDA it would be liable for making a fraudulent statement if it were unable to establish at hearing the full amount of the claim as certified. The board stated that certification as to one sum "does not preclude proof of a higher amount at a hearing."[42] The board also stated that if a claim is initially made in good faith and to the best of the contractor's knowledge and belief at that time, it would not constitute fraud to prove less

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[40] Id. at 71,676-77.

[41] Id. at 71,679.

[42] Id. at 71,679. Initially it appeared that this holding was cast in doubt by the Court of Claims subsequent decision in W.H. Mosely Co. v. United States, 677 F.2d 850 (Ct. Cl. 1982) where the court stated that "to properly certify a claim a contractor must make a statement which simultaneously makes all of the assertions required by 41 U.S.C. § 605(c)(1)." 677 F.2d at 852. For example, if an initial claim for $100,000 were amended to increase the claimed amount to $250,000, the amendment would not occur "simultaneously" with the other elements of the original certifications. However, Tecom, Inc. v. United States, supra note 30, has laid that concern to rest.

than the full amount at the hearing.[43]

In Newell Clothing Co.,[44] the ASBCA again took up the question of certification in a complex case involving a contractor's appeal from a contracting officer's failure to issue a decision on the government's ultimate liability, i.e. the contractor's entitlement to recover on his claim. The issue of quantum or amount of claim was not before the contracting officer. The government asserted that the contracting officer did not decide the claim because the contractor had not filed the certification required by the CDA and moved to dismiss the appeal. The board concluded that under the CDA, since the ultimate amount of the claim was more than $50,000, the contracting officer could demand a full certification as to both entitlement and quantum.[45] Significantly, however, the board concluded that the contracting officer could also in his or her own discretion determine "that, pending a board or court decision on entitlement, it is not in the government's interest to dispute quantum"[46] and therefore the contracting officer may "accept a certification of the data in support of entitlement only."[47] In effect, the board allowed the contracting officer to defer his decision on quantum until after

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[43] Harnischfeger Corporation, supra note 39, at 71,679.

[44] ASBCA No. 24482, 80-2 BCA ¶ 14,774 (1980).

[45] Id. at 72,920. Where a claim under a Department of Defense contract exceeds $100,000, certification of the claim also is required under Section 813 of the Department of Defense Appropriation Authorization Act of 1979, Pub. L. No. 95-485, 92 Stat. 1611, 1624-25 (1978). This requirement is discussed extensively in the majority and dissenting opinions in Newell Clothing where the board stated that while Section 813 was not a jurisdictional statute, no funds could be used to pay a claim that is not certified and complete certification as to entitlement and quantum is needed. Without such a certification, an appeal would be "valueless." 80-2 BCA, at 72,919-20.

[46] 80-2 BCA at 72,919.

[47] Id. at 72,920.

the board decides entitlement.[48]

The board, as in the Harnischfeger case, left open the door for submission to the board of a claim in an amount in excess of the amount originally certified, stating:

> Even after a certification has been submitted, a contractor is not precluded from changing the amount of the claim or producing additional data. The only requirements are that the contractor certify to the amount he then honestly believes is due and that the data furnished at the time are accurate and complete to the best of his knowledge and belief.[49]

The Agricultural Board of Contract Appeals (AGBCA) has also recognized the inequities that can result from unreasonable application of certification requirements. In Summit Contractors,[50] the AGBCA, citing with approval the decisions of the ASBCA in Newell and Harnischfeger, held that certification is not required whenever the contractor is claiming relief under a remedy clause which provides for no monetary relief. In this case, a clause in the contract permitted the government to extend the contract term where the contractor encountered excusable delays.

The board allowed the contractor to seek a decision on an uncertified claim because it recognized that while such relief has a monetary value, it would be extremely difficult for the contractor to express his claim in terms of money. This is because the board stated

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[48] The board dismissed the Newell appeal without prejudice giving the contracting officer "the opportunity to determine whether he wished to dispute quantum as well as entitlement pending a decision by this Board." 80-2 BCA at 72,916. The board did not decide the applicability of certification to disputes which do not involve monetary claims. Id. at 72,920.

[49] 80-2 BCA at 72,916.

[50] AGBCA No. 81-136-1, 81-1 BCA ¶ 14,872 (1980).

"any additional time granted is simply a right to harvest and remove timber at a purchase price which would have applied but for the excusable delay and the end result in money is unknown."[51] The board thus recognized that where an issue of excusable delay is presented, the contractor will not be able in many instances to know what monetary damages are suffered until performance under the time extension has been completed and certification should not be required. This rationale could easily be extended to a host of similar claims arising under the standard Changes Clause of government contracts.[52]

In B.D. Click Co.,[53] the ASBCA opened the door to further consideration of uncertified claims by creating a new doctrine -- abuse of certification requirements. In B.D. Click, the contractor filed 12 separate claims over a six-months period. None of the individual claims exceeded $50,000. However, the government advised the contractor that the 12 separate claims would be treated as one claim for over $149,000, and that a certification was required for the combined claim. The contractor refused to file the requested certification and after the contracting officer did not act on any of the 12 claims, he filed an appeal on December 4, 1980, approximately one year after the first claim had been filed.

The ASBCA reviewed each of the individual claims and found that each met the definition of a claim in the DAR regulations concluding that:

> Each item is an independent dispute concerning contractual rights and is not intertwined in the merits of any of the other requests for equitable adjustment. Therefore, each of the

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[51] Id., at 73,438.

[52] See Newell Clothing Co., supra note 44, at 72,923 (dissenting opinion). The CDA is not limited to the resolution of monetary claims. See 41 U.S.C. § 605(a) quoted supra page 5.

[53] ASBCA No. 25609, 81-2 BCA ¶ 15,394 (1981).

> instant claims must exceed $50,000 before certification is required for that claim.[54]

The board concluded that the certification requirements were "abused" because the government had allowed individual claims to accummulate without a contracting officer's final decision until the aggregated claim exceed $50,000 and then demanded a certification.[55] The board noted that despite repeated requests for a contracting officer's decision, no decision was ever made and that the total claims might not have reached such a high figure if they had been acted on in an expeditious manner.[56]

The government also asserted that the contractor had not quantified a number of the claims before filing the appeal and that the contracting officer was, therefore, unable to determine which, if any, required certification and which, if any, therefore, he was to act on. In very broad language, which opened the board to consideration of uncertified claims for more than $50,000, the board in light of its earlier finding of abuse stated that:

> The simple fact is, however, that, prior to the docketing of this appeal, appellant was not advised by the contracting officer that its claims should be quantified and that its requests for final decisions were therefore premature. Certainly, the contracting officer should have at least notified the appellant that he could not act upon the claims without additional information. We will therefore not permit the Government to use appellant's earlier lack of quantification to excuse the absence of a contracting officer's final decision in an effort to deny appellant

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54 Id. at 76,264.

55 Id.

56 Id.

> access to the Board.[57] [Emphasis supplied.]

The ASBCA in B.D. Click appeared to create yet another exception to the certification requirement holding that:

> If appellant is unable to estimate the quantum of any claim it shall explain to the Board the nature of the difficulty and shall state to the Board that the quantum claim is less than $50,000.[58]

In Allied Repair Service, Inc.,[59] the ASBCA relied on its decision in B.D. Click to reject the government's contention that the contractor was required to combine two separate identifiable claims of less than $50,000 into a single claim, which in this case would have amounted to more than $50,000, and to provide a certification to the combined claim before taking an appeal to the board.

The board observed that each of the separate claims were properly submitted to the contracting officer. However, the government asserted that all claims, which raised the issue of whether the contractor should do more work under the contract, should be joined as a single claim. The board rejected this argument stating that the argument if "carried to its logical conclusion" would require mandatory joinder "for all constructive change

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57 Id.

58 Id. at 76,265. The board did limit this exception by also holding that:

> If appellant is unable to state that any of the claims are for less than $50,000, appellant shall provide the proper certification for that claim or face dismissal of that claim.

81-2 BCA at 76,265.

59 ASBCA No. 26619, 82-1 BCA ¶ 15,785 (1982).

claims under the same contract."[60] The board concluded that "[t]he only requirement affecting the timing of such claims is that they be 'asserted' within the time limit prescribed by the Changes clause."[61]

In Computer Sciences Corporation,[62] the ASBCA extended the Newell holding to provide relief when a contractor could not know the full value of a claim at the time the claim was filed. The ASBCA had before it a contracting officer's decision on a certified claim of $1,406,630.00. The claim included $520,521.00 in anticipated future cost based on identified government changes. The $520,521.00 portion was forward priced and was based on predictions by Computer Sciences Corporation based on certain assumptions with respect to an expected course of government with respect to this contract. Relying on Newell the ASBCA found that consideration of the entire claim was proper under the CDA. The board stated that it was not an "improper qualification of the claim for appellant to notify the Government therein of a potential upward adjustment of the claimed amount. It is sufficient for compliance with the CDA that appellant certified to all existing data supporting its claim."[63]

In Brinegan and Fuller, Inc.[64] the ASBCA held that an amended claim requires a new certification only when it contains one or more bases for recovery which

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[60] Id. at 78,164. If the multiple claims arose out of the same set of facts and therefore amounted to a "unitary" claim, joinder of the multiple claims for certification purposes would be required under Fidelity and Deposit Co. of Maryland v. United States and the other cases cited supra note 19.

[61] Allied Repair Service, 82-1 BCA at 78,164. This is 30 days for actual changes, and a reasonable time for constructive change but in any event no later than the date of final payment.

[62] ASBCA No. 27275, 83-1 BCA ¶ 16,452 (1983).

[63] Id. at 81,843.

[64] ASBCA No 28427, 83-2 BCA ¶ 16,802 (1983).

were not included in the original claim. An amended claim, however, does not require certification even where there is a substantial increase in the amount of the claim where the amendment was attributable in large part to information concerning actual cost which was not available when the claim was originally certified and decided by the contract officer.

B. Summary

While the general rule is that claims over $50,000 must be certified, the boards have made numerous exceptions to the certification requirement of the CDA. These include:

(1) claims filed before the effective date of the CDA;[64]

(2) amounts claimed above the initial amount certified to the contracting officer;[65]

(3) quantum of claims over $50,000 at the discretion of the contracting officer;[66]

(4) claims where the contractor is unable to estimate quantum;[67]

(5) claims where the government has abused the certification process;[68] and

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[64] Trinity Services, Inc., supra note 35; Folk Construction Co. v. United States, supra note 38.

[65] Harnischfeger Corporation, supra note 39; Newell Clothing Co., supra note 44.

[66] Newell Clothing Co., supra note 44.

[67] Summit Contractors, supra note 50; B.D. Click Co., supra note 53.

[68] B.D. Click Co., supra note 53; Allied Repair Service, Inc., supra note 59.

(6) claims based on estimates of anticipated costs.[69]

V. IMPLICATIONS OF THE CERTIFICATION DECISIONS

By establishing certification as a jurisdictional prerequisite to the consideration of claims under the CDA, the boards and the courts have created a series of artificial and complex barriers to the resolution of claims under government contracts. It is exactly the opposite of what Congress had in mind in creating the CDA.[70]

The complexity is particularly shown by the decisions of the BCA in the B.D. Click and the Allied Repair Service cases. As a result of these two decisions, contracting officers must act in a reasonable time on each separate claim submitted by a contractor. These claims can be quite numerous in major systems development and construction contracts and the resolution of these claims could lead ultimately to increases in appeals since each contracting officer's decision on each claim is appealable to a board of contract appeals.[71]

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[69] Computer Sciences Corporation, supra note 62.

[70] In Newell Clothing, for example, the dissenting judges observed that a requirement for a contractor to compile data in support of quantum was inconsistent with the general purposes of the CDA. They stated that:

> [T]he Act seeks to induce the resolution of disputes by negotiation, and an efficient and inexpensive resolution by agency boards where settlement by agreement is not possible.

Newell Clothing, supra note 44, at 72,922 (dissenting opinion).

[71] The decision in Newell Clothing, under which a contracting officer can demand certification as to quantum and entitlement for claims over $50,000, will lead to further delays in resolving disputes before the boards of contract appeals and could lead to even further delay. See Newell Clothing, supra note 44, at 72,923 (dissenting opinion).

This is even more likely because the certification requirement of the CDA has been coupled with the provision of the CDA which allows contractors to recover interest on claims and now contractors can recover interest on claims over $50,000 only where they are certified.[72] Accordingly, contractors, who want to assure that they recover interest on their claims can be expected to submit each claim to the contracting officer as soon as they become known to contractors.

On first reading, it might appear that the implications of Lehman, Moseley, and Skelly & Loy are limited. The cases would appear to be an unfortunate by-product of the shake-out process that is inevitable when any new remedy-creating legislation is passed by Congress. Now that contractors know that certification is required before a contracting officer's decision, and now that the contracting officers know that certification is required before the issuance of a final decision, it might appear that the cases will have a very limited application in the future. A closer reading of the decisions could lead to another conclusion.

There are numerous claims involving substantial amounts of money where it is virtually impossible for a contractor to certify that the amount of money requested accurately reflects the government's liability until the passage of months or even years after the claim initially arises. However, under notice requirements imposed on government contractors by the FAR changes clause the contractor has an obligation to notify the government of claims and request an equitable adjustment of the contract terms within 30 days after the contractor learns of the change.[73] In contracts for construction and major systems acquisitions, for example, the contractor cannot possibly determine with any certainty the amount of money

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[72] See, for example, Fidelity Construction Company v. United States, supra note 6; Luedtke Engineering Co., ENG BCA No. 4556, 82-2 BCA ¶ 15,851 (1982); Federal Electric Co., ASBCA No. 24002, 82-2 BCA ¶ 15,862 (1982).

[73] 48 C.F.R. § 52.243-4.

involved in the equitable adjustment.[74] Prior to the enactment of the CDA, it was common practice for the contracting officer to first determine the contractor's entitlement under the claim and to then resolve the quantum of that entitlement. That option would appear to be precluded now.[75]

While the contractor would be able to certify that the amount claimed in an equitable adjustment is over $50,000, the literalness with which the Court of Claims has interpreted a certification requirements is almost certain to result in the contractor being required to wait until it knows the full amount of the claim before seeking recovery.[76]

VII. CONCLUSION

Contractors taking direct appeals to the new Claims Court from decisions of contracting officers or claims that do not fit the rigid procrustean bed created by the courts face almost certain dismissal and subsequent rejection of their claims. With the W.M. Schlosser Company decision, they now face similar problems before the boards of contract appeals.

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[74] This is recognized by the FAR in the "Notification of Change" clause for major systems acquisition contracts. 48 C.F.R. § 52.243-7.

[75] See for example Newell Clothing, supra note 44, at 72,926 (dissenting opinion).

[76] While the Computer Sciences Corporation, supra note 62, decision clearly provides some relief by allowing a contractor to certify a claim which includes an estimate of future costs, it is not certain that the Court of Appeals for the Federal Circuit is willing to adopt this approach. In Tecom, Inc., supra note 30, the Federal Circuit, while allowing proof of a claim in an amount exceeding that which was before the contracting officer, noted that in the case before it "[t]here is no violation of either the letter or the purpose of the Contract Disputes Act, i.e., to push contractors into being careful and reasonably precise in the submission of claims to the contracting officer." Id. at 5.

The practical effect of the decided cases has been to require the contractors to relitigate their claims through the entire adjudication process beginning with a request for a "new" final decision of the contracting officer through trial before a board of contract appeals and the courts. This result is required notwithstanding the fact that such litigation is costly and time-consuming and will in all likelihood not lead to any change in the final decision at issue.

Unless and until the CDA is amended by Congress,[77] contractors seeking resolution of claims for sums-uncertain have cause to be concerned. Such contractors would be well advised to carefully structure their claims to give as much certainty as possible to the amount claimed and, if they need timely resolution of these claims, to make every effort using the Computer Sciences precedent to initially claim in "good faith" the full amount to which they are likely to be entitled.

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[77] Legislation to eliminate the certification requirement of the Contract Disputes Act has been introduced by Representative Thomas Kindness, H.R. 3668, and by Senator Grassley, S. 2093. Representative Kindness' bill is awaiting action on the floor of the House. There has been no action on Senator Grassley's bill.

Appendix 1 - Contract Disputes Act
Appendix 2 - Letter from Leonard J. Suchanek, Chairman, Board of Contract Appeals, General Services Administration, to John S. Pachter, dated March 4, 1983, Subject: Contract Disputes Act of 1978 - Proposed Amendments to the Certification Provisions