Recommendation 83-1

The Certification Requirement in the Contract Disputes Act

(Adopted June 10, 1983)

The Contract Disputes Act, 41 U.S.C. 601-613, enacted in 1978, established a comprehensive system for resolving disputes arising out of federal government contracts. Under the Act, disputes initiated by or brought against an executive branch agency relating to a contract must first be submitted in writing to the agency's contracting officer for decision. Appeals from that decision may then be taken either to an agency board of contract appeals or to the United States Claims Court.

The Act specifies in section 605(c) that claims submitted to the contracting officer by a contractor for more than $50,000 must be certified: "the contractor shall certify 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." It is generally recognized that this requirement was inserted to discourage the submission of frivolous or unwarranted contractor claims. (Defense contractor claims are also subject to a second certification requirement, contained in section 813 of the Department of Defense Appropriation Authorization Act, Pub. L. 95-485, that predates the Contract Disputes Act. It requires a similar certification, but applies only to claims exceeding $100,000.)

Decisions by the Court of Claims[1] have held the certification requirement in the Contract Disputes Act to be jurisdictional. The Court has ruled that unless a contractor has presented a proper certification to the contracting officer prior to the officer's decision, any such decision is a nullity, and the court will dismiss any appeal based on such a decision. Moreover, the Court has intimated in dicta that agency boards of contract appeals should likewise dismiss appeals from decisions on uncertified claims—a position followed in several board decisions.

[1] The Court of Claims has been replaced by the United States Claims Court and the Court of Appeals for the Federal Circuit (Pub. L. No. 97-264). However, the Claims Court has adopted the decisions of the Court of Claims as binding precedent. General Order No. 1, United States Claims Court, preceding Rule 1, Rules of the United States Claims Court, 28 U.S.C.A. (October 7, 1982). The Court of Appeals for the Federal Circuit has also adopted the decisions of the Court of Claims as precedent, subject to its power to overrule earlier holdings when sitting *en banc*. *South Corp. v. United States*, 690 F. 2d 1368, 1370 (Fed. Cir. 1982).

This formalistic approach presents significant problems for contractors. Sometimes a contractor cannot state the exact amount of a claim at the time the claim first arises because damages have not fully accrued or because the necessary information is otherwise unavailable. Also, a contractor who believes his certification is correct when made may later discover new information affecting the amount of the claim. In these situations, under existing law, the contractor may have to return to the starting point of the whole process, at the cost of delay and added expense, if he seeks to amend his certification. Contractors have also been required to begin again, even when their cases have reached the Court of Appeals for the Federal Circuit, when contracting officers have issued decisions before receiving certification.

The Conference believes that the certification requirement serves a valid purpose—that of discouraging frivolous or unwarranted claims. However, this purpose can be achieved in the context of a more flexible certification requirement. When the exact amount of a claim is not definitely known, a contractor should be permitted to certify the validity of his claim without specifying an exact amount, providing instead his best estimate of the amount along with an explanation of why the exact amount cannot be stated. Customary standards of proof should continue to apply in establishing the precise measure of liability, including the protections available under section 604 of the Contract Disputes Act and 18 U.S.C. 1001. Where a matter is later appealed to a board of contract appeals or the Claims Court, that body should require the contractor to state an exact amount before trial on the merits.

In addition, if for any reason a contractor has failed to make certification at the proper time or in the proper amount, this failure should not automatically nullify any action already taken on the contractor's claim. On a finding that the interests of justice so require, the contracting officer, board of contract appeals, or Claims Court should have authority to permit the contractor to make or amend the certification at any time before that officer or reviewing body issues a decision on the claim.

The $50,000 threshold, coupled with the jurisdictional certification requirement, also creates some problems. A contractor who files an uncertified claim, believing it to be worth less than $50,000, and who then discovers that the value is higher may have to start the process over, regardless of any decision by the contracting officer. Moreover, the benefits of certification apply equally to claims above $50,000 and those below that figure. If the certification requirement is modified as suggested above, the $50,000 threshold for certification should be eliminated.

This recommendation does not address the question of when interest should begin to accrue on a contractor's claim. Congress should examine this question in connection with its consideration of this recommendation.

Recommendation

1. Congress should amend section 605(c) of the Contract Disputes Act to provide that:

(a) when the contractor believes that the exact amount of a claim cannot be determined at the time the claim is filed, the certification shall include the contractor's best estimate of the amount of the claim and an explanation of why the exact amount cannot be stated, provided, however, that the Claims Court or board of contract appeals shall set a date a reasonable time before trial on the merits of the claim for the filing of a statement of the exact amount of the claim;

(b) on an express finding that justice so requires, the contracting officer, the board of contract appeals, or the Claims Court may permit certification to be made or amended at any point up to the issuance of their respective final decisions on the claim; and

(c) this revised certification requirement should apply to all claims, not just those over $50,000.

2. The certification requirement contained in section 813 of the Department of Defense Appropriation Authorization Act of 1979, Pub. L. 95-485, should be either eliminated or conformed to the requirement recommended in paragraph 1.

Citations:

48 FR 31179 (July 7, 1983) as amended at 57 FR 61768 (December 29, 1992)

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Note:

Congress corrected the problem identified by this recommendation in the Court of Federal Claims Technical and Procedural Improvement Act of 1992, Pub. L. 102-572, Title IX.