

# Case of the Month Club

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# Roadmap

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# *SAGAM v. United States*

- Full Cite:
  - *SAGAM Securite Senegal v. United States*, No. 2021-2279, 2023 WL 6632915 (Fed. Cir. 2023)
- Brief Summary
  - The Department of State (Agency) initially awarded the contract to Torres after determining that the incumbent contractor (SAGAM) and Torres were the only offerors in the competitive range.
  - SAGAM protested the award before the Government Accountability Office (GAO), claiming that Torres proposed an unreasonably low and unrealistic price and employee compensation plan.
    - During corrective action in response to SAGAM's protest, the Agency discovered that it had violated the Procurement Integrity Act (PIA) by sharing SAGAM's pricing proposal information with Torres during discussions.
    - The Agency decided to cancel the procurement and issue a new solicitation.
  - SAGAM filed a pre-award protest arguing that the Agency's decision to cancel and resolicit the contract was arbitrary and capricious.
  - COFC sustained the protest and entered judgement for SAGAM, finding that the agency's corrective action was unreasonable. COFC directed the Agency to disqualify Torres as the "only remedy" for the Agency's PIA violation and to award the contract to SAGAM as the only remaining qualified offeror.
  - The Agency appealed to the Court of Appeals for the Federal Circuit.
  - The Federal Circuit affirmed COFC's judgement and held:
    - The Agency's decision to cancel and resolicit the contract was irrational, and COFC did not abuse its discretion in issuing an injunction to restore the competition to its pre-cancellation status and disqualify Torres.

# *SAGAM—Factual Background*

- State Department issued solicitation on April 19, 2019, for local guard services for the U.S. Embassy in Dakar, Senegal. Award was to be made on a lowest-price technically acceptable (LPTA) basis.
  - Offerors had to explain whether their “proposed wages and benefits comply with host-country Government or other official wage and benefit levels, such as union agreements, and common practices that might not be mandated by local law.”
  - The agency would also evaluate whether the offeror’s pro-posed employee compensation plan “is reasonable and realistic for the work being performed.”
- SAGAM was the 35-year incumbent for the services.
- In August 2019, the Agency determined that no proposals were acceptable as submitted and that only SAGAM and Torres were qualified for award; it established a competitive range and initiated discussions with only those two offerors.
- In December 2019, the Agency conducted a second round of discussions/request for final proposal revisions.
  - The Agency’s discussions letter to Torres included proprietary cost and pricing information taken from charts and footnotes on local labor laws in SAGAM’s proposal.

# *SAGAM—Factual Background cont.*

- In early March 2020, the Agency awarded the contract to Torres.
  - SAGAM protested, alleging that Torres proposed an “unreasonably low and unrealistic” price and employee compensation plan.
  - State took corrective action and planned to re-evaluate offerors’ compensation plans, conduct discussions (if necessary), and make a new award decision.
- During corrective action, the CO determined that the Agency violated the PIA, finding:
  - The CO “took information from SAGAM’s compensation plan to request additional clarifications regarding [Torres’s] compensation plan” during discussions, including sharing a “proprietary benefit.”
  - The discussions letter to Torres included information taken directly from charts and footnotes in SAGAM’s proposal that cited labor laws and agreements to explain specific cost categories in the proposal.
  - In discussions, Torres revised its proposal to add “references to several of the mandatory benefits to its compensation plan for the first time.” Thus, the improper disclosure induced Torres to make material price proposal changes,” and there was an impact on the procurement.
- The CO concluded the PIA violation could not be mitigated and that the Agency had to cancel the procurement and re-solicit the requirement. The Head of the Contracting Activity concurred.
- In December 2020, the Agency notified SAGAM and Torres that it intended to cancel the solicitation and issue a new solicitation due to a PIA violation. Both were invited to submit a response to the future solicitation.
- SAGAM filed a pre-award protest at COFC, arguing that the Agency’s corrective action was arbitrary and capricious.
  - SAGAM first filed a protest at GAO, which was dismissed as untimely.

# *SAGAM—COFC Decision*

- COFC found that the Agency’s corrective action was arbitrary and capricious and entered a permanent injunction directing the Agency to cancel its re-procurement, disqualify Torres, and award the contract directly to SAGAM.
- The Agency violated the PIA and fundamental fairness provisions in FAR 1.102-2, 1.602-2, and 3.101-1 when it provided information from SAGAM’s proposal to Torres during discussions.
- The corrective action did not address these errors because allowing Torres to re-compete—after obtaining SAGAM’s cost and pricing information—gave Torres an unfair competitive advantage and the corrective action did not mitigate that harm.
  - COFC found that the disclosed information constituted SAGAM’s cost and pricing data, concluding that “each of SAGAM’s citations to these laws and agreements was linked to specific aspects of contract performance and contract costs.”
  - The disclosed information “related to the exigencies of complying with local labor laws and labor agreements in Senegal and set forth SAGAM’s understanding of those local conditions. This understanding was essential to SAGAM’s plan for the compensation and benefits that would be provided to its guard force.”
- COFC thus determined that the awardee’s disqualification was the “only remedy” to address the CO’s “inequitable conduct.” COFC found that “any reasonable corrective action was required to address, in some substantive way, the fact that Torres now possesses competition-sensitive information that it has no right to possess.”

# *SAGAM—Federal Circuit’s Decision*

- On appeal by the Agency, the Federal Circuit affirmed COFC’s finding that the Agency’s disclosure of SAGAM’s pricing information to Torres was a PIA violation and rejected the Agency’s arguments that the disclosure contained public information on public laws that rendered the information unprotected under the PIA.
  - The CO’s own investigation concluded there was a PIA violation. The CO also found that “the disclosure of SAGAM’s proposal information induced Torres to make material price proposal changes that could have impacted the acceptability of its price proposal,” and “that there is an impact on the procurement.”
  - In light of these findings, the court found it “puzzling” that the Agency argued on appeal that “the disclosure was not problematic because the information disclosed constitutes only public laws.”
- The Federal Circuit affirmed COFC’s finding that the Agency’s decision to cancel and resolicit the contract was irrational, holding that COFC did not abuse its discretion in issuing an injunction directing the agency to disqualify Torres and award to the last remaining offeror.
  - “A mere redo of the procurement cannot erase the knowledge that Torres now has regarding how to comply with solicitation requirements, nor does it remedy SAGAM’s loss of its duly-earned competitive advantage,” based on its 35-year incumbency.

# *SAGAM—Federal Circuit’s Decision cont.*

- Because the Solicitation required offerors to know and apply local labor laws and compensation plans, the court determined that SAGAM’s pricing and compensation plan was proprietary “cost or pricing data” protected under the PIA, and the only remedy for mitigating the harm from disclosing the information to Torres was to disqualify Torres from competing.
  - The court found that “each offeror’s efforts to ascertain local law and structure its labor rates thereupon constitute sensitive proposal information related to that offeror’s strategy for pricing its proposal.”
  - “The problem with the agency’s re-solicitation is that it does nothing to address the fact that Torres has erroneously received information on how to improve its proposal that was taken directly from another offeror’s own efforts to understand and apply local laws—and, yet, the agency invited Torres to participate in a new solicitation.”
- The Federal Circuit recognized the severity of COFC’s remedy directing the Agency to award the contract directly to SAGAM but emphasized the unique facts of this case and suggested the outcome may have been different if SAGAM and Torres weren’t the only qualified offerors.
  - “In many ways, the court’s order is a product of the limited size of the competitive range. State has recognized that had there been additional offerors in the competitive range, its argument that the court directed award to SAGAM might shift. We find no abuse of discretion in the Claims Court’s instruction to return competition to its status pre-cancellation, notwithstanding that in this particular situation there was only one remaining eligible offeror.”



# *SAGAM—Key Takeaways & Questions*

- The Federal Circuit emphasized the broad definition of “cost and pricing information” that are protected under the PIA and rejected the Agency’s argument that disclosure of SAGAM’s pricing information was unproblematic because it related to local laws and rates that were publicly available.
- Would it have made a difference if Torres wasn’t the only other offeror?
  - The Federal Circuit suggested that had there been more than two qualified offerors, the outcome may have been different.
- Best practices for contractors:
  - Designate a non-essential member of proposal team to receive all agency communications and review them for potential PIA-covered material before passing to entire proposal team.
    - Reduces risk that essential proposal personnel must be firewalled based on agency error
  - Report any inadvertently-disclosed source selection or competitor bid/proposal information to the agency immediately!

# *ECC International Constructors, LLC v. Secretary of the Army*

- Full Cite
  - *ECC Intl. Constructors, LLC v. Sec. of Army*, 79 F. 4th 1364 (Fed. Cir. 2023)
- Brief Summary
  - ECC International Constructors, LLC (ECCI), timely submitted a claim for government delays relating to a construction project in Afghanistan. It divided its claimed amount into various categories and asserted different bases for delay and compensation.
  - The contracting officer did not issue a final decision, and ECCI appealed the deemed denial to the Armed Services Board of Contract Appeals (ASBCA or Board).
  - The Agency and ECCI engaged in six years of settlement discussions, discovery, ADR, and a nine-day hearing on the merits.
  - The Agency then moved to dismiss for lack of jurisdiction, arguing that ECCI failed to state a sum certain because portions of its claim were actually separate claims that required a separate sum certain.
  - The Board granted the government’s motion to dismiss. ECCI filed a motion for reconsideration, which the Board rejected.
  - ECCI appealed the Board’s decision, and CAFC considered *sua sponte* whether the “sum certain” requirement under the Contract Disputes Act (CDA) was a jurisdictional issue.
  - The Federal Circuit held that the sum certain requirement was not jurisdictional and remanded to the Board to determine whether the government had forfeited its opportunity to raise the issue.

# *ECCI—Factual Background*

- In September 2010, the Army Corps of Engineers awarded ECCI Contract No. W912ER-10-C-0054 to design and construct a Special Operations Forces Joint Operations Center compound at Mazar-e-Sharif, Afghanistan, for \$29,186,338.00. ECCI began experience delays shortly after work began.
- In February 2014, ECCI filed a claim seeking \$13.5 million for 329 days of delay attributable to the government. The claim included three categories of delay: approval of designs; additional or changed performance requirements; and changed security requirements.
  - The claim identified cost categories (labor, overhead, equipment, etc.) but did not assign amounts to each type of delay.
- The CO did not issue a final decision, and ECCI appealed the deemed denial in October 2014.
  - The parties engaged in informal settlement discussions before initiating discovery and partial summary judgment motions. In September and October 2019, they participated in two rounds of ADR with a Board judge. When that failed, the Board held a nine-day hearing in February-March 2020.
- Three months after the hearing, in post-hearing briefs, the government moved to dismiss ECCI’s claim for lack of subject matter jurisdiction for failure to state a “sum certain.” The government argued that two of ECCI’s claimed delays—design delays and additional work—“each relied on their own set of operative facts and therefore were separate claims requiring their own sum certain.”
  - The government argued the CDA’s sum certain requirement was a jurisdictional issue not subject to forfeiture.
  - ECCI argued that the amounts for each type of delay could be discerned by simple math from the information in the claim.
- In response, ECCI argued that the delay claim properly alleged a sum certain because it used “common and related operative facts for each delay event.”
- The Board granted the government’s motion to dismiss in a May 2021 decision; ECCI filed a motion for reconsideration, which the Board rejected.

# *ECCI—CAFC Decision*

- On appeal, CAFC considered *sua sponte* whether the “sum certain” requirement under the CDA was a non-jurisdictional issue subject to forfeiture.
- “[T]here 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.”
  - The court presumes that in most cases, claims without a sum certain will be promptly denied by the CO or dismissed on appeal and can then be refiled with a sum certain.
- CAFC concluded that the sum certain requirement was non-jurisdictional and thus subject to forfeiture if the government fails to raise a timely challenge.
  - Under recent Supreme Court precedent, courts should “treat a procedural requirement as jurisdictional only if Congress ‘clearly states’ that it is.”
  - Here, the Federal Circuit found no statutory language in the CDA indicating that Congress intended the “sum certain” requirement to be jurisdictional. In fact, the requirement is not even in the CDA; it appears only in the FAR’s definition of a claim.
  - Prior cases that the sum certain requirement was jurisdictional “no longer control in light of recent Supreme Court guidance.”

# *ECCI—CAFC Decision Cont.*

- CAFC reversed and remanded the case to the Board to consider whether the government forfeited its right to challenge whether ECCI’s claim stated an appropriate sum certain by waiting too long to raise the issue.
- CAFC also rejected the government’s argument that the CDA requires a specific monetary request for each sub-claim.
  - As long as a claim includes a “sum certain that advises the contracting officer of the nature and amount of the relief sought” for each distinct claim, it meets the sum certain requirement under the CDA.
  - The court held that “when a claimant presents a statutory valid CDA claim . . . the fact that the party got it wrong by organizing its subclaims in a manner different from how the Board would sub-divide the claims does not mean that the Board lacks authority to hear the case.”
- CAFC emphasized that the sum certain requirement is still mandatory to demand monetary relief under the CDA.
  - Claims found to be non-compliant could be resubmitted to the contracting officer.
  - CAFC found that its holding would only impact later challenges to the sum certain requirement—like the government’s challenge here—where the government objected only after six years of lengthy litigation on the merits.

# *EC CI—Key Takeaways*

- Continues Federal Circuit trend of declaring issues non-jurisdictional: CDA statute of limitations, interested party status for protesters.
- Another step toward leveling the playing field for contractors—the government can no longer move to dismiss for lack of jurisdiction at any point in the litigation.
- **BUT** the CDA's sum certain requirement still applies, and contractors must ensure they meet it to have a valid claim.
- Is the Federal Circuit naïve? Claims are often filed close to the 6-year statute of limitations; even a promptly-filed motion may not be decided for a year or longer after an appeal is filed.
  - Leaves little time for re-filing
  - Contractors should consider filing earlier in the statute of limitations window to leave time to address procedural issues.

# Presenters



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