UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS GRANTED IN PART: October 10, 2008

CBCA 97

WHEELER LOGGING, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Alan I. Saltman and Eric Pohlner of Saltman & Stevens, P.C., Washington, DC, counsel for Appellant.

James L. Rosen, Office of the General Counsel, Department of Agriculture, San Francisco, CA, counsel for Respondent.

Before Board Judges **SOMERS**, **STERN**, and **POLLACK**.

Opinion for the Board by Board Judge **STERN**. Board Judge **POLLACK** dissents in part.

STERN, Board Judge.

This case arises from the denial by the Department of Agriculture (USDA or respondent) of Wheeler Logging, Inc.'s (Wheeler or appellant) claim for damages as a result of USDA's alleged breach of a timber sale contract between USDA and Wheeler. Wheeler claims that USDA breached the contract when it suspended Wheeler's work for approximately three months. USDA moves to dismiss the appeal for lack of jurisdiction based upon appellant's failure to properly certify its claim.

Background

In 2001, appellant submitted a claim for $492,057.95 to USDA for the damages incurred as a result of the alleged breach. This claim was submitted to USDA's contracting officer and certified by appellant on November 3, 2002, in accordance with the requirements of the Contract Disputes Act (41 U.S.C. § 605). Wheeler claimed $381,019.95 for lost profits, $21,038 for interest on equipment loans and a line of credit, and $90,000 representing the amount of a loan that Wheeler needed to restart operations. The claim was supported by Wheeler with figures for equipment rates, salaries and hours worked for certain employees, interest payments, and the cost of operating during the suspension period. The claim was denied by USDA on August 12, 2004. The appeal was filed November 9, 2004.[1]

On December 28, 2004, appellant's counsel forwarded a revision of appellant's claim to respondent's counsel. This claim was much more extensive than the original. In this submission, appellant presented a new damages claim, on the basis that the first claim was not "properly calculated." Appeal File, Exhibit E at 530. The new claimed amount was $482,429.28.[2] Revisions were as follows:

- Idle equipment costs, not previously claimed, were now claimed at $192,480.
- Lost profits of $381,019.95 were originally claimed. Appellant said that this amount was overstated. The new claim revised this amount to $220,897. Numerous calculations were revised to arrive at this figure, including those involving anticipated revenue and total expenses.
- Unabsorbed overhead, not previously claimed, was now submitted at $62,581.
- Interest expenses on the deposit on the timber sale were calculated at $1553. This amount was not previously claimed.

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[1] The appeal was brought before the Department of Agriculture Board of Contract Appeals (AGBCA). Pursuant to statute, all the cases pending before the AGBCA were transferred to the Civilian Board of Contract Appeals on January 6, 2007. Pub. L. No. 109-163, § 847, 119 Stat. 3136 (2006).

[2] On April 24, 2008, as part of settlement discussions, Wheeler's claim was again revised, to a total of $311,624.63. Most of the claim elements of the second claim were included, though the amounts were reduced. Because of the similarity between the claim elements in the third and the second claim, and because this claim was submitted as part of settlement discussions, we do not address it here.

- Other interest payments of $4895 were claimed.

- The original claim of $90,000, for the amount of the loan required to restart operations, was dropped. Appellant stated that this claim should have been solely for the interest on the loan.

Thus, though the underlying assertion of breach of contract remained the same and the total claim amount did not increase, entirely new claim elements were added. A significant amount of new supporting data was presented with this claim, in approximately twenty pages of printed schedules. The dollar amounts of the new claims and the supporting data were not certified or presented to the contracting officer. USDA asserts that the Board lacks jurisdiction over this appeal due to appellant's failure to certify and present this revised claim to the contracting officer for decision.

Discussion

The Contract Disputes Act (CDA) requires that a contractor make its claim in writing, submit it to the contracting officer, and provide a certification of the claim if it is more than $100,000.[3] 41 U.S.C. § 605 (2000). Lack of a proper certification deprives the Board of jurisdiction to proceed on the claim. *Tecom, Inc. v. United States*, 732 F.2d 935, 937 (Fed. Cir. 1984); *W.M. Schlosser Co. v. United States*, 705 F.2d 1336, 1338-39 (Fed. Cir. 1983). A "clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim" is required. *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). We find that Wheeler's initial claim to the contracting officer was properly presented and certified.

The legislative history of the CDA demonstrates Congress' intent to hold contractors accountable for amounts claimed from the Government. "An important objective of Congress was to 'discourag(e) the submission of unwarranted contractor claims.'" *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 354 (Ct. Cl. 1982) (citing S. Rep. No. 1118, 95th Cong., 2d Sec. 5, reprinted in 1978 U.S.C.C.A.N. 5235, 5239). "The purposes of the certification requirement are to discourage the submission of unwarranted contractor claims and to

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[3] The certification shall state "that the claim is made in good faith, that the supporting data are accurate and complete to the best of [the certifier's] knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor." 41 U.S.C. § 605(c)(1).

encourage settlements." *Lehman,* 673 F.2d at 354 (citing *Folk Construction Co. v. United States*, 226 Ct. Cl. 602 (1981)). *See also Newell Clothing Co.*, ASBCA 24482, 80-2 BCA ¶ 14,774, discussing the intent of Congress to encourage fair settlements through the requirement of certification. The certification provision of the legislation sought to establish accountability on the part of the contractor and provide assurance to the contracting officer that he or she could resolve the claim, if merited, with some confidence that the contractor had vouched for the accuracy of the amounts and data submitted. Congress also desired to prevent the submission of fraudulent claims. *Ingalls Shipbuilding, Inc. v. O'Keefe*, 986 F.2d 486 (Fed. Cir. 1993). That intent would be thwarted if a contractor is permitted to fundamentally revise a certified claim by changing the claim elements and the amounts requested without recertification, especially where the changes are based on facts that were known to the contractor at the time of the submission of the original claim.

The courts and boards of contract appeals have permitted amendments or changes to claims without recertification and resubmission to the contracting officer in certain limited instances. The case before us does not fall within one of these exceptions. As long as the claim continues to arise from the same operative facts and requests essentially the same relief, then a mere change in legal theory for recovery does not necessitate resubmission to the contracting officer. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003).[4] However, the matter before us does not involve a change of legal theory.

In another line of cases permitting revisions of claims without resubmission and recertification, it has been recognized that during the course of litigation, facts may be developed that cause changes in the amount of a contractor's claim. It would be disruptive to the flow of litigation if any such change required a re-submission and new certification of the claim. Thus, the amount of a claim may be changed during the course of litigation if reasonably based on further information. *See Tecom*, 732 F.2d 935, 938. However, even if

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[4] Unlike the case before us, in *Scott*, after a significant amount of litigation had occurred, the United States Court of Federal Claims permitted the plaintiff to assert a slightly different legal argument from the one presented to the contracting officer. *Scott Timber Co. v. United States*, 40 Fed. Cl. 492, 499 (1998). The plaintiff continued to seek the same relief presented to the contracting officer. *Id*. at 500. The court permitted the plaintiff to file an amended complaint since that version only added an additional theory of recovery. *Scott Timber Co. v. United States*, 44 Fed. Cl. 170, 182 (1999). *See also Cerberonics, Inc. v. United States*, 13 Cl. Ct. 415 (1987), in which the court also permitted the plaintiff to file a complaint augmenting the legal theory that had been presented to the contracting officer. The court permitted the amendment where the action in the court was for the "identical sum" presented to the contracting officer. *Id*. at 418-19.

the change is based on facts developed during litigation, if the fundamental character of the claim is changed, recertification and resubmission to the contracting officer would be required. *Contract Cleaning Maintenance, Inc.*, 811 F.2d 586, 591. "On appeal to the Board or in a direct access action in the Claims Court, a contractor may increase the amount of his claim . . . but may not raise any *new* claims not presented and certified to the contracting officer." *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987) (citations omitted, emphasis in original).

Based on this rationale, the boards and courts have not permitted changes to a claim, without a new certification and presentation to the contracting officer, where the revised claim is based on facts and data that existed at the time that the initial claim was filed.

In *GAP Instrument Corp.*, ASBCA 55041, 07-1 BCA ¶ 33,567, the board dismissed the increased portion of a contractor's claim amount that had not been presented to the contracting officer since the facts upon which that portion of the claim amount were based were known or reasonably available to the appellant when the original claim was certified.

In *E. C. Morris & Son, Inc.*, ASBCA 30385, 86-2 BCA ¶ 18,785, the board contrasted *Tecom* with the situation before it, where the facts upon which the increase in claim amount was based were "available at the time of the original claim submission." *See also Consolidated Defense Corp.*, ASBCA 52315, 03-1 BCA ¶ 32,112.

Similarly, the Court of Federal Claims has rejected an attempt by a contractor to add a previously unasserted claim for home office overhead to its claim before the court, even though the claim arose from the same operative facts as those underlying the claim presented to the contracting officer. *Kunz Construction Co. v. United States*, 12 Cl. Ct. 74, 79 (1987). The court stated,

> The case law permits the Claims Court to exercise jurisdiction over a claim the dollar amount of which has been enlarged in this court over the amount presented to the contracting officer: (1) if the increase in the amount of the claim is based on the same set of operative facts previously presented to the contracting officer . . . and (2) the court finds that the contractor neither knew nor reasonably should have known, at the time when the claim was presented to the contracting officer, of the factors justifying an increase in the amount of the claim.

Id. (citations omitted). *See also Modeer v. United States*, 68 Fed. Cl. 131 (2005).[5]

Here, appellant's certified claim, submitted in 2002, was mainly composed of a claim for lost profits (about $380,000) and a claim for the amount of a loan allegedly required to restart operations (about $90,000). The revised claim submitted in 2004 cut almost in half the lost profit claim and totally eliminated the loan claim. Instead, the revised claim added new elements not previously submitted to USDA -- a claim for idle equipment (about $192,000) and an unabsorbed overhead claim of about $62,000. There were also changes in the amount and basis for the claim of interest. Thus, both the type and amounts of much of the claim were substantially revised. The revised claim also included a significant amount of supporting data never presented to the contracting officer. The new claims and supporting data for idle equipment costs (about forty percent of the total claim), unabsorbed overhead (about thirteen percent of the total claim), and interest were not certified or presented to the contracting officer in compliance with the CDA.

Of further significance is the timing of the claim resubmission. The appeal from the original claim submission was filed on November 9, 2004. The claim was significantly revised on December 28, 2004, prior to the onset of discovery or other litigation activity before the board. Thus, the rationale used by the courts and boards in giving leeway in claim amount resubmissions so as not to disrupt ongoing litigation is largely inapplicable here.

Finally, all of the changes were made based on information available to Wheeler at the time it filed its initial claim. No new information had come into Wheeler's possession from litigation or otherwise. According to Wheeler, the sole basis for the resubmission was its own error in determining the type and amount of damages due. If we were to permit this new claim to be filed without certification, we would thwart the intent of the CDA to create accountability on the part of the contractors that submit claims to the government. We might

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[5] The dissent relies on *Tecom* for the determination that Wheeler's second claim need not be certified. The dissent ignores the very important fact that the change in the claim amount in *Tecom* was based on "new information on damages." *Tecom*, 732 F.2d at 937. The court permitted the claim to be revised because of this new information that was not available at the time that the initial claim was submitted. Based on this holding, board and court decisions after *Tecom* have required claims to be recertified and resubmitted to the contracting officer where revisions to the initial claim amount were based on information that existed and was available for the contractor's use at the time the original claim was filed. Cases involving claim amount changes based on new facts which have come to light after the filing of the initial claim are not on point.

also encourage the careless preparation of claims. The majority of the claim elements now asserted were never certified and presented to the contracting officer. The contracting officer did not have the benefit of considering these claim elements when he issued the decision from which this appeal is taken. These new claims must be certified and presented to the contracting officer to comply with the requirements of the CDA.

In summary, three important factors mandate our conclusion that the new elements of the claim must be certified and presented to the contracting officer: 1) there was a significant change to the claim elements, amounts, and supporting data, 2) the changes occurred prior to the onset of active litigation, and 3) the changes were based on facts that were in appellant's possession at the time it filed the certified claim.

Conclusion

The Board has jurisdiction only over the lost profits claim, in the amount of $220,089, that was presented to the contracting officer and certified in accordance with the CDA. The remainder of the current claim is new and must be certified and presented to the contracting officer before those elements of the claim can be appealed to the Board.

The motion is **GRANTED IN PART**. The Board lacks jurisdiction over appellant's claim for idle equipment costs, unabsorbed overhead, and interest. Those parts of the claim are dismissed.

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JAMES L. STERN
Board Judge

I concur:

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JERI KAYLENE SOMERS
Board Judge

POLLACK, Board Judge, concurring in part and dissenting in part.

Wheeler initially certified its claim under the Contract Disputes Act (CDA or Act) in the sum of $492,057.95 to the contracting officer (CO) on November 3, 2002. The certification was to a claim initially filed on August 20, 2001. Wheeler sought compensation due to the claimed improper suspension of its contract by the Forest Service (FS or Government). The $492,057.95 was broken down into three elements, $381,019.95 designated as lost profits, $21,038 in interest on equipment that Wheeler was unable to utilize during the suspension, and $90,000 for a loan needed to restart operations. The claim covered the period of December 11, 2000, to March 16, 2001. Appellant calculated its lost profits by coming up with the net income it expected per day and multiplying that by eighty-one lost operating days. Along with the claim, appellant provided as support various listings and calculations, among which were a list of equipment used on the project, job hours, days, rates, and weekly income. Appellant also provided a list of lost wages, with monthly salary numbers for various home office officials. The CO did not immediately act on the claim, but rather asked Wheeler, in April and October 2002, to provide the FS with more information to support Wheeler's claim. Specifically the CO sought additional supporting information as to equipment invoices, lease agreements, general administrative costs, and other items. Wheeler, through counsel, provided additional information under cover letter of November 3, 2002, along with a certification of the claim.

Some time after the certified claim and the additional supporting information was filed, Wheeler changed counsel. On August 12, 2004, the CO issued his final decision on the November 2002 certified claim. On November 9, 2004, Wheeler filed a timely appeal at the Department of Agriculture Board of Contract Appeals (AGBCA). On December 28, 2004, Wheeler, through counsel, submitted a letter to the CO, along with a summary wherein it revised its claim downward to $482,429.28. The revision changed a number of damage elements. In essence, it revised the lost profits to $220,897, dropped the loan to restart operations, and added idle equipment of $192,480, unabsorbed overhead of $62,581, and two interest items of $1553 and $4895, respectively. Thereafter, when appellant filed its complaint at the AGBCA, the complaint reflected the revised numbers and damage elements.

Subsequently, the Government wrote to Wheeler demanding that Wheeler provide a certification of the revised claim, citing as the basis the changes that Wheeler had made as to amount and categories. Wheeler, through counsel, wrote back and asserted that the claim did not need to be recertified, contending that the revision arose from the same operative facts as those underlying the claim submitted to and considered by the CO. Counsel for Wheeler stated that the revision was solely a recalculation of the initial claim. The parties then proceeded with processing of the appeal, engaging in discovery and filing multiple motions

on various procedural disputes. In January 2007, the appeal was transferred to the Civilian Board of Contract Appeals (CBCA), as part of the board consolidation legislation.

On May 27, 2008, the FS filed a motion to dismiss. In that motion, the FS charges that the Board does not have jurisdiction over the matter, because the claim had so changed as to mandate recertification. Appellant resists, contending that the claim arises out of the same operative facts and that under law it is simply a recalculation and revision and not a new claim.

The Board is not unanimous in our decision on the FS motion. I concur as to the decision to retain jurisdiction over the lost profits. I dissent, however, to the remainder of the majority ruling.

The majority asserts that since this claim (which it agrees arises from the same operative facts) is revised in significant dollars and categories from the dollars and categories of damages set out in the certified claim, the revision must be newly certified. It cites case law holding that to avoid certification, appellant would have to show that the information used to make the revisions was from information that appellant did not have available to it at the time of the initial certification and was new. It further states that the facts that form the basis for the revised claim were available to Wheeler at the time Wheeler submitted its certification to the claim and that according to Wheeler, the sole basis for re-submission was Wheeler's own error in calculation of the type of damages due. Therefore, the majority concludes that if the Board permitted the "new claim" to be filed without certification, it would thwart the intent of the CDA to create accountability on the part of contractors to submit claims to the Government. Under the majority, if a contractor reconsiders or reassesses data that it did or could have had available (the majority finding that the facts used in the reassessment were available) at the time of the submission of the disputed certification, then it must recertify the matter as a new claim. In contrast, I find that under the controlling case precedent from the Court of Appeals for the Federal Circuit (Court of Appeals) and as reflected in the CDA, as long as the operative facts of the claim remain the same (the claim itself is not fundamentally changed) and all that changes is dollar amounts and damage categories, no new certification is required to a previously properly certified claim.

Discussion

Respondent contends that when Wheeler revised its claim as to categories of damages, it created a new claim that requires independent certification. It contends that a claim is to be considered as new, if the contractor adds or asserts new categories of damages, even if the changes in categories and dollars arise out of the same operative facts as the claim that had been originally certified and presented to the CO. According to the FS, the only time a

change in dollars and damage elements does not require a new certification is where the amended dollars or damage elements can be shown by the contractor to have been based on new information or upon data that arose or was not available until after the initial claim's certification. The majority essentially agrees with the FS and finds that where facts that form the basis of the revision to the certified claim were available to the contractor at the time the contractor submitted its initial certification, the revision must be considered a new claim and certified as such. Applying that to this case, they conclude that where a contractor reassesses or reworks its numbers or damage categories, the contractor will have to file a new certification, unless the contractor can show that the information used for the reassessment was newly found or not available to the contractor at the time of certification.

The position of the FS and majority is incorrect. The case law developed under the CDA provides otherwise. Where the operative facts upon which an initial certification are based stay the same, a party can modify and revise dollars and damage elements, without having to recertify the claim. Absent a change in operative facts, one has the same claim. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003); *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987); *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 591 (Fed. Cir. 1987) (revision did not change fundamental character of claim); *Tecom, Inc. v. United States*, 732 F. 2d 935, 937-38 (Fed. Cir. 1984); *J.F. Shea Co. v. United States*, 4 Cl. Ct. 46, 54-55 (1983).

The CDA requires that a CO shall issue a decision on any submitted claim within a specified time window, and for claims over $100,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of the contractor's knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable. Finally, the certifier must be duly authorized to certify the claim on behalf of the contractor. The Act does not specifically address how an increase or revision to the damages calculation of a claim (based on the same operative facts as the initial claim) affects the status of the initial certification to the CO and how it affects the ensuing jurisdiction of a board or court over such certified claim. The CDA does not address revisions to a certified claim. The Act has no direction saying that revisions of dollars or claim elements create a new claim that requires a new certification. In response to the silence of the CDA, the appellate court in *Tecom* addressed the matter of revision of certified claims and concluded that a new claim is not created simply because of a change in dollar amount, or implicitly, a change in damage elements.

In *Tecom*, the court directly addressed the standard to be applied when a contractor changes or revises damages or damage elements on a claim that had been properly certified to the CO. The contractor's contract was for one year with the possibility of the contract

being extended for two option years. The base year of the contract was to run from 1 October 1980 to 30 September 1981, and if exercised, the first option would begin on 1 October 1981. Sometime during the base year, Tecom encountered additional costs which it claimed were due to a change in the manner it was required to perform the contract. As such it presented a claim to the CO for $11,000. Because this claim was under $50,000, Tecom did not certify it to the CO, nor was certification requested by the Government. The Government issued a final decision denying the $11,000 claim. We do not have the date on which Tecom filed the initial claim, but do know that the initial claim reflected an estimate of the difference between what Tecom expected to expend and what it actually expended. Additionally, at the time the claim was submitted, it covered costs and damages associated with a single contract year. The CO issued his decision denying the claim in January 1982, thus after the start of the first option period. Accordingly, Tecom knew, prior to the CO decision, but after certification, that it would be performing a three-year rather than one-year contract, and, because it had completed the first year of work, it had real numbers rather than an estimate upon which to seek recovery.

Tecom appealed the CO decision to the ASBCA. Soon thereafter (again no specific date provided), Tecom, in pleadings, increased the dollar value of the claim to $72,752.10. (See *Tecom*, ASBCA 26022, 82-2 BCA ¶ 16,121, at 80,028). The Court of Appeals decision references "final complaint" but provides no further amplification. The change to Tecom's claim was an approximate seven fold increase. In its decision (*Tecom*, 732 F. 2d, at 937), the Court of Appeals stated that Tecom had explained that changes in the amount of its claim were due to "an improved evaluation of the original estimate on the basis of the first year's experience [of the contract] and due to a projection that increased the sum for the expected three-year term of the contract." We have no specific breakdown (but for the two-year increase in time) as to the damage elements or categories that took the claim from $11,000 to $72,752.10. Nevertheless, I note that it is likely that along with the dollar change, there were also changes in some of the damage elements.

Because the increase in Tecom's claim exceeded $50,000 and the claim addressed by the CO had not been certified, the Government moved for dismissal, asserting that the claim for $72,752.10 required certification before Tecom could proceed further. It is not clear from the Court of Appeals decision whether or not the Government had moved for dismissal at the ASBCA or whether the Government first raised the re-certification issue at the appellate level. However, since the matter of jurisdiction is a matter of law, it is not crucial for my analysis here, at what level the Government first raised the issue. In responding to the motion, the Court of Appeals ruled in favor of Tecom, finding that no further certification was required.

In deciding, the Court explained:

> Where no certification of the claim was earlier compelled because the amount asked was properly less than $50,000 at the time, the contractor could legally increase its monetary demand before the ASBCA in view of the intervening prolongation of the contract and the experience of actual operation. There is no violation of either the letter or the purpose of the certification requirement 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. This case is comparable in that respect to *J. F. Shea Company, Inc. v. United States*, 4 Cl. Ct. 46, 54-55 (1983), in which the Claims Court upheld the right of a "direct access" contractor-plaintiff in that court to increase his monetary demand, without further certification on the basis of new information on damages. We agree with that decision that "it would be most disruptive of normal litigation procedure if any increase in the amount of a claim based upon matters developed in litigation before the court [or board] had to be submitted to the contracting officer before the court [or board] could continue to a final resolution on the claim." Id. at 54. There the claim had originally been certified and was later enlarged, but that difference is irrelevant to the general principle that a monetary claim properly considered by the contracting officer (here, because it was less than $50,000 and covered only one year) need not be certified or recertified if that very same claim (but in an increased amount reasonably based on further information) comes before a board of contract appeals or a court. FN2
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> > FN2. Of course, we do not mean to countenance an evasion of the certification requirement, for instance, a deliberate understatement of amount in the original claim with the intent to raise it on appeal (on the basis of information readily available at the earlier time), or a careless initial appraisal failing to satisfy the criteria of 41 U.S.C. 605(c)(1).

In the wording above, the *Tecom* court clearly provides that one can increase (and thereby modify the damages of a claim) and still have the "very same claim." There is nothing in *Tecom* which says that an enlargement of the same claim or changing or modifying damage elements mandates a new certification or creates a new claim. In fact, the only instance cited in *Tecom*, which requires a new certification, is where evidence shows that a contractor withheld information so as to intentionally evade the certification requirement or submitted the claim with such a careless appraisal that it defeats the purpose of the certification. Beyond those identified elements, *Tecom* describes an enlargement of a claim as being "irrelevant" to the need to newly certify a claim which was validly certified when made. To constitute a new claim, the nature of the claim must change. A change in damages

must arise from issues that are different from the issues which formed the basis of the claim presented to the CO. I do recognize that the Court of Appeals in *Tecom* referenced the fact that the increase in the claim in that case was derived from the intervening prolongation of the contract and experience of actual operation. As such, I concede that the information used in *Tecom* can be properly characterized as "new information." However, that said, I do not find that *Tecom's* holding is limited to only the specific facts of the case or that the Court of Appeals' choice of the wording "further information" was intended to be limited to only the specific fact pattern of *Tecom*. The scope of *Tecom* is not that narrow, particularly when the wording "further information" is read in the context of the *Tecom* footnote and read in conjunction with the facts in *Shea* (facts more expansive then simply prolongation and experience of actual operations). As I discuss below, the facts in *Shea*, as is the case in Wheeler, involve reassessing old information.

Wheeler's claim for wrongful suspension has not changed. The dollars for the idle equipment and unabsorbed overhead arise from the same actions that were presented to the CO as the basis of the claim. All that has changed is that Wheeler has reallocated the dollars it seeks and instead of seeking to make itself whole through lost profits, has reduced that figure and has sought compensation for other claimed losses. The revisions cover the same time period and ask for relief for the same reasons. As to the change to the dollar total, the new sum in Wheeler has in fact been reduced from the sum certified. When I compare the *Tecom* changes (from $11,000 to $72,000 and the change from one year of damages to three) to Wheeler's augmentation of its claim, I am hard pressed to find how Wheeler should require a new certification.

Any analysis as to *Tecom's* holding on recertification requires us to look at the Claims Court decision in *Shea,* 4 Cl. Ct. 46 (1983). *Tecom* cited *Shea* as an example of when a new certification is not required, *Tecom*, at 937-38. In citing *Shea* with approval, *Tecom* clearly shows that an increase or change in a claim, based on a reassessment of information, does not require new certification, absent a change in the facts upon which the claim is to be based.

Shea certified its claim for close to four million dollars in June 1980. The CO denied the claim in May 1981 and Shea took a direct access suit to the court in May 1982. Upon filing its complaint, Shea increased its claim by over $1.6 million from what had been presented to the CO. It claimed that the increase was due to a computational error in calculating the original claim and due to the need for adjustment to reflect findings of a Department of Interior (DOI) audit. *Shea,* at 937-38. It is significant that by Shea's own description, the revisions it made were revisions to information that Shea had at the time of the initial certification. In fact, what Shea did was reassess the information which it had used to come up with its initial claim number. An increase due to a computational error, as well

as a change due to challenges from a Government audit, by definition involve the reworking of the data and information that Shea had at the time of the certification, but had used and then viewed differently. *Tecom*, in favorably citing *Shea*, implicitly acknowledges that a reassessment and reworking of existing numbers and elements (such as in *Shea*) would qualify under the *Tecom* standard of "further information." The phrase "further information," does not exclude reassessment of existing information. For me to interpret "further information" more narrowly would require me to conclude that *Shea* was decided incorrectly. That, of course, is not the case, given *Tecom's* approval of that decision. I find it very difficult to make any material distinction between the facts in *Shea* and those before us in Wheeler.

In supporting its decision, the court in *Shea,* at 54, relied upon earlier ASBCA authority, particularly *Newell Clothing Co.* ASBCA 24482, 80-2 BCA ¶ 14,774. In *Newell*, the ASBCA stated (and it remains good law) that once a certification is complete, a contractor is not precluded from changing the amount of damages or producing additional data in support of the damages, absent the damages or data being about a new claim, one which has different operative facts and not simply a different damage result. *Newell* at 72,916. *Newell* focused purely on the operative facts and whether a contractor was presenting the same or introducing a new claim. Nothing in *Newell* carved out a separate category for damage adjustments. As noted at the outset of this discussion, the operative facts test remains good law.

Before leaving *Shea*, I note that the court in *Shea* provided language regarding the need to balance recertification with disruption to the litigation process and that language was thereafter cited in *Tecom*, at 937. I do not doubt that disruption is a factor to be considered. However, *Shea* did not turn on disruption to the litigation process. Although the court addressed disruption in dicta, the fact is that the increase in *Shea* was first presented to the Government in *Shea's* complaint. Accordingly, and as with Wheeler (and in *Tecom*), the increase to the claim was made early in the tribunal proceedings and as such, a new certification would not have been unduly disruptive. Therefore, notwithstanding little likelihood of disruption, the courts in *Tecom* and *Shea* each nevertheless determined that no new certification was needed.

In *Santa Fe Engineers, Inc. v. United States,* the claim that had been certified changed from a delay and impact claim due to three specific change orders to a claim for total disruption of the contract caused not only by the three changes, but also due to collective nature of all problems, changes, and directives issued on the project. There were a multiplicity of changes issued during the project and the revision to the claim was based upon those added items. But for damages due to the three changes, none of what Santa Fe was adding had previously been addressed or submitted to the CO. The court concluded that the

revision, because it added numerous additional issues, constituted a profound alteration to Santa Fe's claim, changed the scope, and as such, required a new certification. In discussing the law, the court stated:

> On appeal to the Board or in a direct access action in the Claims Court, a contractor may increase the amount of his claim, *Tecom*, 732 F.2d at 937-38, but may not raise any new claims not presented and certified to the contracting officer. *J.F. Shea Co. v. United States*, 4 Cl. Ct. 46, 54 (1983) (cited with approval in *Tecom,* supra).

818 F.2d at 858.

Once again, the court affirmed that new claims, which require new certification, arise out of new and added claims for entitlement and not revisions or augmentations in dollars and elements. In order to constitute a new claim, one must have a change in scope, and not simply a revision of damages.

In both *Tecom* and *Shea* there were substantially greater dollar changes than in Wheeler, yet in each instance, the tribunal focused on an operative facts test. Similarly in *Contract Cleaning Maintenance*, 811 F.2d 586, 588-90 (Fed. Cir. 1987), dollar comparisons were also substantially greater than the ones in Wheeler. There, the initial claim was filed in May 1976 for $23,232.98. In 1979, appellant sought an additional $66,606.45, bringing the total claim to $99,000, with all claims arising out of unpaid invoices. In 1983, the Government issued a final decision (which appeared to include an affirmative claim). Contract Cleaning Maintenance appealed the decision and then, through a direct access suit at the COFC, sought $99,609.69, a sum well above the threshold for certification at that time. The Government moved to dismiss on the basis of lack of certification. The lower court agreed with the Government, holding that the appellant's March 1979 letter for $99,609.69 constituted a claim under the Act which needed to be certified. The Court of Appeals, however, overturned that decision. In ruling as it did, the Court once again established that an increase in costs, if derived from the same operative facts, does not require a re-certification. It said that the increase in the claim to $99,265.43 did not change the fundamental character of the claim, which was based upon invoices the appellant had submitted, but which the Government had refused to pay.

This Board is bound by the precedent of the Court of Appeals for the Federal Circuit, which as demonstrated in *Tecom*, *Contract Cleaning Maintenance,* and other cases cited above, continues to follow the operative facts test, even where dollar values and damage elements are substantially amended. Dollar changes or damage changes do not create a new claim, absent a fundamental change in the operative facts. The appellate court has not created

an additional or separate test, solely based on dollars and damage elements. The majority provides no appellate decision which states (in an instance with no change in operative facts) that board jurisdiction does not extend to consideration (without a new certification) of claims for damages of different types and amounts from the specific claims certified to the CO. Similarly the majority provides no appellate decision holding that a new certification is required, absent the contractor showing that a revision to the certified claim arose solely from new information or information that was not available at the time of the initial presentment. Lacking citations to such authority, I conclude that where the claim arises out of the same operative facts (as in Wheeler) and where the increase was due to a re-assessment by new counsel (or appellant), no new certification is required. The fact that the contractor and its attorney revisited information that was available at the time of the initial presentment is not a legal basis to require a new certification of a previously properly certified claim, based on the same operative facts.

I recognize that the *Tecom* wording "reasonably based on further information," 732 F.2d at 938, is not specifically defined in the body of that decision (except in the footnote, which I address below). However, the *Tecom* wording does not say "reasonably based on new information," nor does it state, "information not previously available." Rather, the language in *Tecom* is clearly broader and more inclusive than what the majority contends. The broader nature of the wording is even more evident, when the sentence and wording "further information" are read in conjunction with footnote 2 (which appears at the end of the phrase), The footnote specifies what will not qualify as "further information." It makes clear that an increase or damage adjustment that is shown to be based upon information that was intentionally withheld so as to defeat the certification requirement, or was so carelessly appraised that it would have the same result will not be allowed and will require new certification. Applying that standard, it follows that as long as the dollars and elements chosen and presented for submission in the initial certification were the result of a good faith effort and decision to accurately present the claim for which the contractor believed it was entitled, then a later damage revision (absent a change in operative facts) is not a change so as to require new certification. The *Tecom* court, as well as the drafters of the CDA, were concerned with the situation where a contractor purposefully sandbagged a claim to avoid certification and then used the withheld information to increase the claim without having to go through the process. There is no suggestion that Wheeler has done that.

Claims are commonly not stagnant. In initially presenting a claim for certification, a contractor and its attorney look at various data and decide what best sets out the claim. Decisions are made as to what damages and what categories should be sought, and that typically is based upon perceptions as to ability to prove the item and legal authority for the cost. It is not uncommon for a contractor to consider alternative approaches to damages. At a given point, the contractor chooses what it believes it can best properly certify. Thereafter,

as the process moves forward, it is the norm for contractors and their attorneys to rework, retest, and refine dollar claims, as they continue to pursue potential settlement or simply proceed in preparation for ultimate litigation. Often, after a second or third look at numbers or categories, a contractor reassesses and revises aspects of the damage claim. In the reassessment, the contractor may conclude that one of the potential quantum witnesses is more convincing or credible than initially thought. It may conclude that a damage element initially rejected is stronger than initially thought. Under the FS and the majority positions, an addition or change in damage categories which was arrived at through the above process would require a new certification. The majority would require new certification, because it reads "further information" to exclude any reassessment of existing information. That is unwarranted.

Finally, the drafters of the CDA called for only one certification for a claim. The drafters did not specify that adjustments or revisions to a properly certified claim would restart the process, even though amendment of dollars and damage elements have been common in the claims process and in court and board proceedings. If the drafters intended that a new certification would be required, whenever a contractor adjusted or changed damage amounts or elements, then one would think they would have so specified.

Wheeler started with a claim of $492,057.95. It later reduced its claim, but in doing that reallocated costs and added damage categories that had not previously been certified. While the damages were revised, the basic claim for improper suspension stayed the same. Nothing in the damage revisions alters the basic facts and claim that Wheeler will have to prove to secure entitlement. Based on my reading of the CDA and the Court of Appeals' precedent, I do not find that Wheeler's adjusted claim requires a new certification.

Existing Case Law

In its briefing, the FS cites a number of board and court cases which have held that even where the operative facts remain the same, a revision to damage elements of a claim will require a new certification, absent the contractor showing that the revision was due to new information on damages that was not reasonably available to the appellant at the time it submitted its original claim.

While none of the cited cases specifically discusses whether a re-assessment such as that here qualifies as "further information" under *Tecom*, I recognize that there is a line of cases, cited by both the FS and the majority, that supports the position that if information supporting an increase or change in elements existed at the time of the certification, then the claim must be recertified. Those cases purport to follow the direction of *Tecom.* As I have

explained above, I find that *Tecom* provides no such standard and the cases are incorrect in their interpretation and application of the law.

However, because there are cases which support the majority position, I will briefly discuss why I find them to be in error. It is pertinent that none of the cases cited by the majority involves a situation where the total claim amount actually decreased. That said, I understand that the FS and majority consider a change in damage categories to be sufficient to trigger the need for a new certification, regardless of whether the overall dollars increase or not.

My review finds that the cases relied on by the FS and majority find their genesis in three principal decisions, *Toombs & Company,* ASBCA 35085, et. al., 89-3 BCA ¶ 21,997; *D.E.W., Inc.*, ASBCA 35173, 89-3 BCA ¶ 22,008; and *LDG Timber Enterprises, Inc. v. United States*, 8 Cl. Ct. 445, 454 (1985). Each, in my view, has deviated from the *Tecom* standard in interpreting the wording "further information." Each has substituted a more stringent test than that required by *Tecom* and the CDA. Citing *Tecom* as authority*, Toombs* introduces a requirement that the information on which the increase is based cannot be information that was available at the time of the certification. *D.E.W*. followed and adopted the same standard. The problem with the above is that while the cases claim to rely on *Tecom* for the "new information" standard*,* nowhere is that language or limitation reflected in *Tecom*, either implicitly or directly. *Tecom* uses the wording "further information," which on its face is much more expansive than simply "new information" or "information not then available." Moreover, "further information" has to be read in the context of the footnote dealing with intentional understatement or carelessness. The significance of intentional withholding is in fact supported by one of the cases cited by the majority. In *E.C. Morris & Son, Inc.*, ASBCA 30385, 86-2 BCA ¶ 18,785 at 94,653, the ruling turned on a factual finding by the board as to a deliberate understatement of the claim by appellant at the time of the certification. There, appellant's president had advised the board that the data upon which the disputed added amount was based was available at the time of the original submission and that it was not utilized, because he hoped that his original claim could be settled for a lower number. In deciding that a new certification was required, on a knew or should have known basis, the board specifically found that while there was not a blatant evasion of the certification requirement, there was a deliberate understatement of the original claim with an apparent intent to raise the dollar claim on appeal. The discussion as to deliberate withholding is consistent with my reading of *Tecom*. We have no similar fact situation to *E.C. Morris* in this case.

As to *LDG,* which has been liberally cited by the Claims Court and Court of Federal Claims, that case turned on the court's finding that there had been a difference in operative facts (not based on dollars). As the court there noted, *LDG* at 454, the revision was not

merely an aspect of a claim that had already been submitted to the CO. Notwithstanding, the basis of the decision, the court in dicta identified and set out an additional and in my view new test for recertification, and that test has been followed in subsequent cases, Under the *LDG* new test, before a revision could avoid recertification, a contractor was required to show that it neither knew nor reasonably should have known of the additional aspects of the claim at the time of the claim's initial presentment to the contracting officer. As with *Toombs* and *D.E.W.,* the court in *LDG* created new law. I have no problem with finding that a new certification would be required if the contractor intentionally withheld information as to the dollar amount or intended change in elements in making the certification, and did so to avoid the certification requirement. In fact, that is what *Tecom* specifically provides. However, that is far different from a contractor having information or data and choosing at the time of certification to present an alternative or what he/she considered a stronger case to the CO for certification. A contractor is entitled to submit what it thinks at the time is its best claim and if it does that and certifies that claim, without the intention to game the system and the adjustment does not change the operative facts, that initial certification is the only one required.

In reviewing the case law, while the majority of ASBCA cases have relied on the "new information" or "should have known test," there are a number of cases in which the panel addressed the matter of re-certification without citing to or applying those standards as a prerequisite. In *Morgan & Son Earthmoving, Inc*., ASBCA 53524, 02-2 BCA ¶ 31,874, at 157,483, the board stated that as long as a new claim was not being asserted, revision or refinement of the certified amount claimed while on appeal and /or proof of greater amount would be permitted without further certification, citing to *D. J. Barclay Co.*, ASBCA 28908, 85-1 BCA ¶ 17,922.

In *Trepte Construction Co.*, ASBCA 38555, 90-1 BCA ¶ 22,595, at 113,385, decided on the basis that the amended claim presented a new set of operative facts, the board stated:

> A recurring issue is whether allegations raised in pleadings or otherwise before the Board constitute new claims or are merely extensions of claims which the contracting officer had the opportunity to consider. That determination turns on whether the matter raised before the Board differs from the essential nature or the basic operative facts of the original claim. *Bay Decking Company*, ASBCA 33868, 89-2 BCA ¶ 21,834, *Cerebonics, Inc. v. United States*, 13 Cl. Ct. 415 (1987); *Stencel Aero Engineering Corp*., ASBCA 28654, 84-1 BCA ¶ 16,951. The introduction of additional facts which do not alter the nature of the original claim, a dollar increase in the amount claimed before the Board, or the assertion of a new legal theory of recovery, when based upon the same operative facts as included in the original claim, do not constitute new claims.

Three other ASBCA cases merit comment and support the conclusion that dollar and accompanying damage element revisions do not equate to a new claim. *Bick-Com Corp.*, ASBCA 24782, et. al., 84-1 BCA ¶ 16,957 (1983) (which was cited in *Barclay),* a decision with both a concurrence and dissent, contains a good discussion of the impact of increasing a claim and shows how the ASBCA (without reference to *Tecom*) understood the CDA. In *Bick-Com* the contractor increased its claim from approximately $300,000 to $450,000, a 50% increase. In the principal opinion, the board stated at 84,321:

> We have held in *Harnischfeger Corporation*, ASBCA No. 23130, 24556, 80-2 BCA ¶ 14,541 that:
>
> > The certification is a statement made in good faith to the best of the contractor's knowledge and belief. It does not preclude proof of a higher amount at the hearing . . . .
>
> At 71,679. In short, then, revision of the amount claimed and/or proof of a greater amount is permitted without further certification. See *Newell Clothing Company*, ASBCA No. 24482, 80-2 BCA ¶ 14,774; *Computer Sciences Corporation*, ASBCA No. 27275, 83-1 BCA ¶ 16,452; *Continental Drilling-U. S.*, AGBCA No. 81-182-1, 82-1 BCA ¶ 15,545.

The board then continued that the Government had failed to demonstrate that the increase in the added amount contained in appellant's second amended complaint changed the character of the claim. The board therefore concluded that the contractor need not submit for certification.

In the concurring opinion, Judge Andrews reviewed the legislative history surrounding certification and noted that at one point there was a proposal to limit the evidence presented to the board and courts to that evidence presented to the CO. That was not adopted. But in setting out his view, Judge Andrews stated:

> The ASBCA is not limited to consideration of evidence presented to the contracting officer. Once a claim has been presented and certified, there is no basis in the Contract Disputes Act to prohibit changes in the requested recovery or to limit the evidence. The fact that more money is requested of the board, does not make it a new claim.

84-1 BCA at 84,323. The dissent in *Bick-Com* saw matters differently. It asserted that the matter should be re-certified, stating, as a policy basis, that failure to allow such an increase

without requiring the party to re-certify would undermine the Act's objective of deterring inflated claims. I find the principal opinion and concurrence more convincing.

E.C. Schleyer Pump Co., ASBCA 33900, 87-3 BCA ¶ 19,986, and *Batteast Construction Co.,* ASBCA 30452, et. al., 89-3 BCA ¶ 21,933, do not involve certification, but do address what additions to a claim are augmentation and which create a new claim that must be submitted for an independent CO decision. In *Schleyer*, the board found that the fact a contractor did not include delay costs in his original claim to the CO for the costs of a change, did not preclude him from including delay costs in his amended complaint. It was considered part of the same claim. In *Batteast*, the board similarly allowed a contractor to adjust its claim without having to seek a new decision. There the board concluded that the added allegations of delay arose out of the same operative facts as the claim for equitable adjustment due to a constructive change. As the board stated in *Schleyer,* 87-3 BCA at 101,264:

> Appellant is not precluded here from seeking delay costs associated with such an equitable adjustment merely because it failed to request them in the claim submitted to the contracting officer. "Delay costs are merely additional areas of alleged damages all of which arose from the complaint which formed the basis of appellant's claims to the contracting officer . . . ." *Spradlin Corporation*, ASBCA No. 23974, 81-2 BCA ¶ 15,423. No new claim is being raised.

Of the cases cited by the FS and majority, none involves an analysis of solely a change in claim elements. In each case, there was an accompanying increase in the dollar value of the claim. Whether the tribunal would have ruled as it did, without an accompanying increase in dollars, is simply unknown.

Finally, the majority references a statement by counsel for Wheeler which the majority quotes as saying that the basis of Wheeler's December 2004 revision was Wheeler's "error in calculation of the type and amount of damages." The cited statement was a single line in a multi-page summary of appellant's revised claim. Based on my reading of *Tecom* and the CDA, a finding of error in the initial certified claim is irrelevant to whether or not a new certification must be provided (absent a finding carelessness or intentional withholding, for which there is no evidence). In fact, the statement as to an "error in calculation" very closely tracks the explanation that had been provided by the contractor in *Shea* and found by the court not to trigger a new certification. That said, even if the presence of the "error in calculation" is relevant to the majority granting the motion, then in my view, that makes a favorable ruling on the FS motion to dismiss inappropriate at this juncture. That is because granting the motion would implicitly rely upon factual findings relating to the significance

of the statement and would draw adverse inferences against appellant as to the meaning, scope, and intention of the wording, as used in the revised claim summary. Of particular concern is that the wording has not been in issue in the motion, is being highlighted for the first time in the majority ruling; and as such, appellant has had no opportunity to comment or address the point.

Conclusion

Our obligation is to correctly apply the law. Notwithstanding respect for precedent (even if not binding from the ASBCA), I cannot agree with a result that continues to perpetuate an unwarranted modification of the *Tecom* holding and is contrary to what I find the CDA to require. There may be a case where the changes to dollars and elements are so distinct and expansive as to constitute a fundamental change and as such require a new certification. I do not find that here. As to the majority's decision regarding the lost profits, I concur that the motion on that matter should be denied.

HOWARD A. POLLACK
Board Judge