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CLIENT ALERT

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Government Contractors Must Now Assert Some Defenses as Affirmative Claims Or Lose Them

The *Maropakis* Case Illustrates a Trap for the Unwary Government Contracts Lawyer

In a recently decided appeal, the United States Court of Appeals for the Federal Circuit held that a party could not assert a setoff defense to the government's claim when the party had not asserted a formal claim for the setoff amount under the Contract Disputes Act. *M. Maropakis Carpentry, Inc. v. United States*, _____ F.3d _____, No. 2009-5024, (Fed. Cir. June 17, 2010). This decision illustrates a potential trap where defenses are denied because they were not asserted as claims.

Facts

In 1999 the United States Navy awarded M. Maropakis Carpentry, Inc. ("Maropakis") a contract for roof repair at Naval Inventory Control Point in Mechanicsburg, Pennsylvania. The contract contained a liquidated damages clause in the form prescribed by 48 C.F.R. Section 52.211.12. That clause imposed liquidated damages of $650 per day for each day that the project was late. Maropakis was 467 days late in completing the project.

Thereafter the parties exchanged a series of letters about the project. On August 20, 2001, Maropakis sent a letter requesting that the contract completion deadline be extended 447 days. The letter was not certified by Maropakis, nor did it request a final decision by the contracting officer. Therefore, the letter did not meet the definition of a "claim" under the Contract Disputes Act, 41 U.S.C. Section 605 ("CDA").

On August 28, 2001, the contracting officer responded to Maropakis's letter. He denied the request for additional time and invited Maropakis to submit additional information in support of its request for extension. The letter expressly stated that it was not a final decision of the contracting officer on Maropakis's request. Despite this invitation, Maropakis did not submit any additional supporting information.

On June 28, 2002, the Navy sent another letter to Maropakis. This letter indicated that Maropakis owed $303,550 in liquidated damages (467 days x $650 per day). The Navy was holding $244,036 in contract proceeds, which it applied against the liquidated damages claim. The letter concluded by demanding payment from Maropakis in the remaining amount of $59,514.

Maropakis replied by letter dated July 22, 2002. This letter again requested a time extension and went on to state

that "we *will* dispute the liquidated damages amount of $303,550 and *will* indicate that Maropakis was not responsible for the delays." *Maropakis,* slip op. at 2 (emphasis added in Opinion). Again, this letter was not certified and did not request a final decision from the contracting officer.

On December 20, 2002, the Navy issued a final decision, which reiterated its demand for liquidated damages. The final decision made no mention of Maropakis's previous requests for a time extension.

Procedural Posture

On December 17, 2003, Maropakis filed a complaint in the United States Court of Federal Claims ("CFC"). The complaint alleged breach of contract by the government. It sought two remedies: (1) an extension of 447 days to the contract completion date and (2) remission of the liquidated damages assessment. In response, the government filed a counterclaim seeking $59,514, the balance it claimed was owed as liquidated damages. It also filed a motion to dismiss Maropakis's complaint for lack of subject matter jurisdiction, arguing that Maropakis had not submitted a "claim" for contract modification as required under the CDA. Maropakis answered the counterclaim and asserted it would prove at trial that the delays were caused by the government. The government moved for summary judgment on both its motion to dismiss and its counterclaim, and the issues were briefed by both sides.

Not surprisingly, the trial judge granted summary judgment on the government's motion to dismiss. It is black letter law that a contractor must file a valid "claim" and receive a final decision from a contracting officer before it can file a lawsuit in the CFC. *James M. Ellett Construction Co. v. United States,* 93 F. 3d 1537, 1541-42 (Fed. Cir. 1996). What makes *Maropakis* noteworthy, however, is that **the trial court also granted the government summary judgment on the counterclaim that sought liquidated damages**. The trial court reasoned as follows.

A valid claim must be filed and a final decision on the claim by a contracting officer must be issued before the CFC can exercise subject matter jurisdiction over a lawsuit. *Deponte Investments, Inc. v. United States,* 54 Fed. Cl. 112 (Fed. Cl. 2002). Maropakis did not submit a valid claim for contract modification seeking an extension of time based on government delays. The trial judge therefore ruled that the court did not have subject matter jurisdiction to consider a *defense* based on those same delays. Since that was the only defense to the counterclaim asserted by Maropakis, the trial court struck the defense and entered summary judgment in favor of the government. Maropakis appealed. The Federal Circuit affirmed, despite a spirited dissent.

Holding

Maropakis holds that the failure to file a valid claim seeking a time extension based on government delays will bar the contractor from asserting that defense to a claim for liquidated damages. The holding of the court was unambiguous.

> Thus, we hold that a contractor seeking an adjustment of contract terms must meet the jurisdictional requirements and procedural prerequisites of the CDA, whether asserting the claim against the government as an affirmative claim or as a defense to a government action.
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> Because the Court of Federal Claims correctly held that it did not have jurisdiction over Maropakis's claim for time extensions, and because Maropakis's extension claim was the only defense asserted against the government's counterclaim for liquidated damages, we affirm the grant of summary judgment to the government on its counterclaim for liquidated damages.

Maropakis, slip op. at 15.

Dissent

Judge Newman of the Federal Circuit vigorously dissented from this holding. His primary argument was that the majority confused the concepts of "defense" and "contract modification."

> The routine defense that the government contributed to delay is a defense, not a contract modification. Failure to meet the CDA requirements for certification, naming a sum certain, requesting a final decision, or modifying the contract, does not preclude defending against the government's claim.

Maropakis, slip op. at 6 (dissent).

The upshot of this decision, as Judge Newman correctly observed, is that

the Court of Federal Claims requires a separate jurisdictional basis for certain defenses to a claim by the government. Dissent, p. 4. Judge Newman believes *Maropakis* is a seismic shift in federal contract jurisprudence.

> The right to defend against an adverse claim is not a matter of "jurisdiction," nor of grace; it is a matter of right. The denial of that right, argued by the government on a theory of "jurisdiction" that was supported by the Court of Federal Claims and is now supported by this court, is contrary to the purposes of the CDA, contrary to precedent, and an affront to the principles upon which these courts were founded.

Maropakis, slip. op. at 7 (dissent).

Moral

Maropakis illustrates a gray area of government contracts law. Where does a defense end and a claim begin? On the one hand, it seems wrong that Maropakis was denied the ability to present factual defenses to the government's claim. On the other hand, had Maropakis's "defense" prevailed, the government might have been ordered to refund part of the retained contract balance, when a valid claim for those funds had never been submitted. What is clear, however, is that another level of analysis has been added to the evaluation of government contract disputes. The lawyer evaluating such disputes must now not only consider whether to file an offensive claim, but the lawyer must also consider possible defenses to claims made by the government, evaluate whether any of those defenses might be characterized as a "claim" for contract modification and file a formal claim seeking such a modification. Failure to file such an affirmative claim could well result in viable defenses to the government's claim being struck due to lack of subject matter jurisdiction. In the government contracts field, as well as football, the best defense is a good offense.

Hunton & Williams is well positioned to offer advice and counsel to government contractors and parties to construction contracts. With offices all over America, as well as locations in Europe and Asia, we can help with even the most difficult problems. Contact Kevin Cosgrove or his colleagues if we can be of service.