Business Law

New Federal Circuit Court Decision Requires Contractors To Go On Offense To Preserve Their Defense

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Contractors working for the federal government will need to be more vigilant to protect their rights after a recent decision from the United States Court of Appeals for the Federal Circuit. The Federal Circuit, which is the appellate court that hears appeals from the United States Court of Federal Claims, recently ruled in *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010), that in order for a contractor to assert certain types of defenses to a government claim in the Court of Federal Claims, the contractor must have previously submitted those defenses as formal claims to the federal contracting officer. This represents a sharp change from prior case law, which had distinguished between contractor claims for affirmative relief (which required a formal claim) and contractor defenses to government claims (which did not), and means that contractors will need to file more formal claims earlier in the process to ensure preservation of all potential defenses.

The Contract Disputes Act's Claim Requirement

As background, *Maropakis* arose under the Contract Disputes Act, ("CDA"), 41 U.S.C. §§ 601-613, the statutory scheme giving the Court of Federal Claims jurisdiction to decide federal contracting disputes that are filed within twelve months of a contracting officer's final decision on a "claim."[1] For purposes of the CDA, a "claim" is "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract."[2] While a claim does not have to be submitted in any particular form, it does have to contain a "'clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.'"[3] The claim must also "indicate to the contracting officer that the contractor is requesting a final decision."[4]

Thus, in order for the Court of Federal Claims to have jurisdiction under the CDA, the contractor: (1) must submit a proper claim – a written demand that includes adequate notice of the basis and amount of the claim, as well as a request for a final decision; and (2) must receive the contracting officer's final decision on the claim.[5] If those requirements are not met, the Court of Federal Claims will not have jurisdiction to hear and decide the claim, leaving the contractor without a remedy in the Court of Federal Claims.[6] *Maropakis* is noteworthy because it represents the first time the Federal Circuit has applied these CDA requirements not only to a contractor's claim for affirmative relief from the government, but also to a contractor's defense to a government claim against the contractor.

Maropakis' Dispute with the Navy

Factually, the case involved a dispute between the Navy and M. Maropakis Carpentry, Inc., ("Maropakis"), over a contract to replace windows and a roof at a Navy building.[7] Due to various delays, the contract, which contained a liquidated damages clause, was completed 467 days late.[8] It was undisputed the Navy played a role in at least some of the delay, since it had ordered cessation of all work for 107 days after discovery of lead paint, and because it had refused to change its contract specifications after it was discovered the windows specified in the contract did not exist and had to be specially fabricated.[9]

Shortly after the project was completed, Maropakis submitted a letter to the Navy on August 20, 2001, requesting a time extension to the contract. On August 28, 2001, the Navy replied to Maropakis denying the claim, but also stating that the decision was not a final decision of the contracting officer, and inviting Maropakis to submit additional information to support its request.[10] After receiving no response from Maropakis,

(continued on page 73)

the Navy sent another letter ten months later informing Maropakis that it was assessing liquidated damages of $303,550 which, after deducting the remaining contract balance of $244,036, left a total due from Maropakis to the Navy of $59,514 for liquidated damages.[11] On July 22, 2002, Maropakis replied, advising that it planned to challenge the liquidated damages because the Navy was responsible for the delay. However, Maropakis never filed a separate formal claim regarding the time extension.[12] Six months later, the Navy contracting officer issued a final decision assessing liquidated damages.[13]

Approximately a year later, Maropakis filed a complaint with the Court of Federal Claims alleging (1) breach of contract due to the Navy's delay and seeking resulting time extensions, and (2) breach of contract due to the government's assessment of liquidated damages and seeking dismissal of the liquidated damages.[14] The Navy responded by asserting a counterclaim against Maropakis for the $59,514 balance the Navy contended was still owed after applying the remaining contract balance against the $303,550 in liquidated damages.[15]

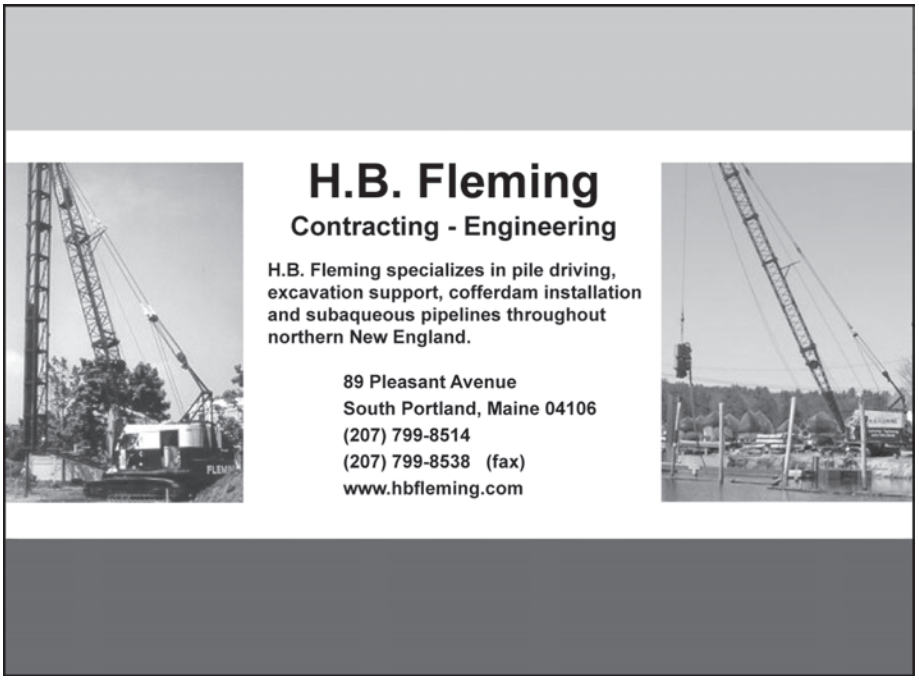
The Court of Federal Claims dismissed Maropakis' claims for lack of jurisdiction under the CDA because it found that Maropakis had failed to submit a formal "claim" for contract modification as required by the CDA.[16] For the same reason, the Court of Federal Claims also granted the Navy summary judgment on its liquidated damages claim.[17]

The Federal Circuit Changes Course Regarding Contractor Defenses

Maropakis appealed to the Federal Circuit, which affirmed both rulings in favor of the Navy. The Federal Circuit first held that Maropakis' July 22, 2002 letter requesting time extensions was not a valid "claim" under the CDA because it did not provide the contracting officer adequate notice of the total number of days actually requested and it did not request a final decision from the contracting officer.[18] Because of this, the Court held that Maropakis had never made a valid "claim" as required by the CDA to give the Court of Federal Claims jurisdiction to hear Maropakis' affirmative claim against the Navy.[19]

In addition, however, the *Maropakis* Court went a step further, and also held that these same CDA jurisdictional requirements applied to Maropakis' right to assert a defense to the Navy's claim for liquidated damages, and that by failing to make a formal "claim" under the CDA for a contract extension due to the delay caused by the Navy, Maropakis had also lost the right to defend against the liquidated damages on that basis as well.[20] The Court based its decision on the fact that the CDA defines a "claim" to included any time a contractor seeks an "adjustment or interpretation of contract terms."[21] The Court reasoned that since Maropakis' defense of excusable delay caused by the Navy necessarily depended on an adjustment of the contract terms, i.e., additional contract time, it was a "claim" which "must meet the jurisdictional requirements and procedural requirements of the CDA," even if asserted as a "defense to a government action."[22] Because Maropakis had not complied with the CDA claim requirements on its affirmative claim for time extensions due to Navy delay, Maropakis also could not assert the Navy's delay as a defense to the Navy's liquidated damages claim, leaving Maropakis with no defense and requiring entry of judgment in favor of the Navy.[23]

The Court's decision prompted a strong dissent from Judge Pauline Newman, who argued that the majority's decision was "contrary to precedent" from prior case law which had "respect[ed] the distinction between a claim and a defense," and that "[n]o rule or precedent holds that a contractor forfeits its right of defense if it does not file its own claim" on the defense.[24] Instead, Judge Newman argued that the "right to defend against an adverse claim is not a matter of 'jurisdiction,' nor of grace; it is a matter of right."[25] However, the majority in Maropakis rejected this reading of the prior case law, and instead focused on what it contended the CDA's



plain statutory language required, namely that any "contractor seeking an adjustment of the contract terms," whether asserted as "a claim against the government ... or as a defense," must "meet the jurisdictional requirements and procedural requirements of the CDA."[26]

Contractors Must Be Careful to Assert Their Defenses as Formal Claims Going Forward

The *Maropakis* decision has significant implications for contractors working for the federal government. No longer can a contractor simply assert a defense informally to the contracting officer or wait until after the contracting officer issues his or her final decision to assert a defense, but instead, if the defense could even arguably be considered to implicate a modification of the contract, the contractor must assert the defense as a formal certified claim against the government and seek a final decision on the claim in accordance with the CDA. In other words, contractors must now make their own formal mirror image claim asserting any possible defenses in response to a government claim against them in order to best ensure that those defenses are preserved and available in the Court of Federal Claims. As in *Maropakis*, unwary contractors who fail to take this formalized claims-first approach risk losing the ability to defend themselves in court, even if they have an otherwise valid defense to the government's claim. ▽

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1. *M. Maropakis Carpentry, Inc. v. United States, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (citing 41 U.S.C. § 609(a)).*
2. *48 C.F.R. § 33.201*
3. *Maropakis, 609 F.3d at 1327 (quoting Contract Cleaning Maint., Inc. v. United States, 811 F.2d 586, 592 (Fed. Cir. 1997)).*
4. *Id.*
5. *Id. at 1327-28.*
6. *This is because the CDA is a waiver of sovereign immunity, without which the government is immune from suit. See Maropakis, 609 F.3d at 1329 (citing Winter v. FloorPro, Inc., 570 F.3d 1367, 1370 (Fed. Cir. 2009)).*
7. *Maropakis, 609 F.3d at 1325.*
8. *Id.*
9. *Id. at 1332 n.1.*
10. *Id. at 1325-26.*
11. *Id. at 1326.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id. at 1327.*
18. *Id. at 1329.*
19. *Id.*
20. *Id. at 1330.*
21. *Id. at 1327 (quoting 48 C.F.R. § 33.201).*
22. *Id. at 1331.*
23. *Id. at 1331-32.*
24. *Id. at 1334, 1335.*
25. *Id. at 1334-35.*
26. *Id. at 1330, 1331.*