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When to Assert a Claim as a Defense: Reflecting on the Application of *Maropakis* Through Its Progeny

By Elizabeth Ferrell, Justin Ganderson, and Sandeep Nandivada, McKenna Long & Aldridge LLP

It has been approximately four and a half years since the United States Court of Appeals for the Federal Circuit issued *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010) – a decision which caught the attention of many in the government contracts bar. In *Maropakis*, the Federal Circuit seemingly expanded the Contract Disputes Act's ("CDA")[1], 41 U.S.C. § 7101 et seq., jurisdictional requirements to cover not only affirmative claims asserted by the contractor, but also defenses raised against the government's affirmative claims.[2] Although many in the government contracts bar have raised concerns with the holding, rationale, and scope of this decision,[3] *Maropakis* will remain as binding precedent until either the United States Supreme Court or a Federal Circuit panel reverses its course.

Despite this lament, over the last several years, the Boards of Contract Appeals and Courts have issued a handful of decisions which generally have helped to (a) flesh out the Federal Circuit's rationale in *Maropakis* and (b) place boundaries on its application despite attempts to expand its scope. As a result of these decisions, claimants should now have a better understanding of the CDA jurisdictional requirements flowing from *Maropakis*.

I. Brief Overview of The Federal Circuit's Maropakis Decision

In *Maropakis*, the U.S. Navy awarded a construction contractor a contract to perform various maintenance works at a warehouse building at the Naval Inventory Control Point in Pennsylvania. 609 F.3d at 1325. The contract was to be completed by February 4, 2000, and contained a liquidated damages provision that would hold the contractor liable to the government for $650 per day for each day of delay beyond the February 4, 2000 completion date. *Id.* When the contractor failed to complete the project on time and the Navy assessed liq-

Elizabeth Ferrell is a partner, Justin Ganderson is of counsel, and Sandeep Nandivada is an associate in McKenna Long & Aldridge LLP's Government Contracts practice in Washington, D.C.

[1] Under the CDA, a contracting officer's final decision is a jurisdictional prerequisite to any subsequent legal action before the Boards or Courts. 41 U.S.C. § 7103(a); *Raytheon Co. v. United States*, 747 F.3d 1341, 1355 (Fed. Cir. 2014). To obtain a Contracting Officer's ("CO") final decision, the contracting party seeking to commence a legal action must submit a "claim" to the CO. *See* 41 U.S.C. § 7103(a); FAR 2.101 ("Claim means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract."). This requirement was intended "to create opportunities for informal dispute resolution at the contracting officer level and to provide contractors with clear notice as to the government's position regarding contract claims." *Raytheon*, 747 F.3d at 1354 (quoting *Applied Cos. v. United States*, 144 F.3d 1470, 1478 (Fed. Cir. 1998)).

[2] *E.g.*, Steven L. Schooner & Pamela Kovacs, *Affirmatively Inefficient Jurisprudence?: Confusing Contractors' Rights to Raise Affirmative Defenses with Sovereign Immunity*, 21 Federal Circuit Bar Journal 686, 691 (2012) *available at* http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1126&context=faculty_publications [hereinafter Schooner & Kovacs] ("Therefore, Federal Circuit precedent prior to *Maropakis* established that (1) a contractor can appeal a CO's decision on a government claim without submitting a claim of its own and (2) the court's or board's jurisdiction in such cases is based solely on the government claim.") (citation omitted).

[3] *E.g.*, Raymond S.E. Pushkar & Justin M. Ganderson, *Federal Circuit Contravenes Purposes of CDA In Holding on Government Liquidated Damages Assessments*, BNA Federal Contracts Report, 94 FCR 81 (2010), *available at* http://news.bna.com/fcln/FCLNWB/split_display.adp?fedfid=17509427&vname=fcrnotallissues&split=0 [hereinafter Pushkar & Ganderson]; Schooner & Kovacs, 21 Federal Circuit Bar Journal 686.

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uidated damages, the contractor alleged excusable delay as a defense. *Id.* at 1326. Notably, however, the contractor never submitted an excusable delay claim to the contracting officer (''CO'') for a final decision. *Id.*

On appeal, the Federal Circuit held that the contractor's failure to secure a final decision on its excusable delay claim precluded it from raising excusable delay as a defense to the government's claim for liquidated damages. *Id.* at 1330-32. Specifically, the Federal Circuit found 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.'' *Id.* at 1331.[4]

II. Maropakis Applied

As the Courts and Boards have had opportunities to interpret and apply the Federal Circuit's holding in *Maropakis*, the contours of that decision have become better defined. ***First***, *Maropakis* applies only to defenses seeking contract modification. ***Second***, in determining whether *Maropakis* applies, Courts and Boards focus on the substance, not the label, of the asserted defense. ***Third***, *Maropakis* applies equally to both contractors and the government.

A. Maropakis Applies Only to Defenses Seeking Contract Modification

For better or for worse, the *Maropakis* decision itself seemingly recognized one central limitation of its own reach: only those defenses seeking *contract modification*[5] must be presented to the CO in the form of a claim to meet the CDA's jurisdictional requirements. *Id.* (''[A] contractor seeking an *adjustment of contract terms* must meet the jurisdictional requirements and procedural prerequisites of the CDA.'' (emphasis added)). In *Maropakis*, this meant that the contractor was required to submit its excusable delay defense, which sought a contract modification in the form of a time extension, to the CO for a final decision before the defense properly could be raised before the Court. *Id.*

Nevertheless, the government has attempted to extend *Maropakis* to contractor claims and defenses not originally contemplated by the Federal Circuit. The Boards and Courts, however, have avoided an overly expansive reading of *Maropakis* in favor of a more limited jurisdictional doctrine.

For example, in *Sikorsky Aircraft Corp. v. United States*, 102 Fed. Cl. 38 (2011), the Court of Federal Claims recognized that not *all* claims and defenses seek contract modification. In *Sikorsky*, the government claimed that the contractor had improperly allocated overhead costs, and sought the remission of $80 million. *Id.* at 40. In response, the contractor raised statute of limitations, waiver, laches, and accord and satisfaction affirmative defenses. *Id.* at 44. The government argued that the contractor was required to submit its affirmative defenses to the CO for a final decision before they could be asserted as defenses to the government's claim for payment. *Id.* at 47. In deciding that it had jurisdiction over the contractor's affirmative defenses, the Court noted in a footnote that *Maropakis* was distinguishable from the present case because *Maropakis* involved a defense seeking contract modification and not a ''traditional common law defense that [is] independent of the means by which a party seeks equitable adjustment to a government contract.'' *Id.* at 48 n.14; *see alsoErka Constr. Co., Ltd.*, ASBCA No. 57618, 12-2 BCA ¶ 35,129 at 172,473 (noting that the *Maropakis* analysis hinges upon ''whether the challenged allegations constitute a CDA claim that seeks a contract modification, or allege a common law defense that requires no such modification'' (citations omitted)).

The Armed Services Board of Contract Appeals (''ASBCA'') similarly distinguished *Maropakis* in *Asfa International Construction Industry and Trade, Inc.*, ASBCA No. 57880, 14-1 BCA ¶ 35,736. In *Asfa*, the government assessed liquidated damages against the contractor for the contractor's late completion of the construction of three environmental facilities at a Turkish Air Force installation. *Id.* at 174,908. As a defense, the contractor argued that the government waived the scheduled completion dates for each facility. *Id.* In finding that it had jurisdiction to entertain the contractor's waiver defense, the Board emphasized that *Maropakis* applies only to defenses seeking contract modification and that the contractor's waiver defense sought no such modification. *Id.* at 174,912. Rather, the contractor was merely arguing that the government had waived rights already granted by the contract such that the government did not have the right to assess liquidated damages. *Id.*

Most recently, in *Total Engineering, Inc. v. United States*, No. 13-881C, slip op. at 6 (Fed. Cl. Jan. 26, 2015), the Court of Federal Claims held, in part, that *Maropakis* did not apply to a contractor's ''defective specifications'' defense to a government claim for payment. In *Total Engineering*, the contractor appealed the government's affirmative claim seeking payment of approximately $2.3 million due to the contractor's allegedly defective work, disputing that its work was defective and arguing that the government's design specifications were flawed. *Id.* at 1. The government countered that *Maropakis* required the contractor to obtain a contracting officer's final decision on its defective specifications defense before that defense could be asserted against the government. *Id.* at 5. The Court held that the ''CDA does not require the contractor to jump through such an extra hoop and refile its defense to a Government claim as a so-called contractor's 'claim' where it is not seeking any separate monetary relief or contract adjustment.'' *Id.* In so holding, the Court rejected the government's attempt to characterize the contractor's defective specifications defense as an impracticability defense requiring contract interpretation or modification. *Id.* at 6. Instead, the Court emphasized that the defense, even if successful, would not result in any contract adjustment or monetary relief to the contractor, and that the contractor was ''simply defending against a Government claim by arguing the Government's design – not [the contractor's] work – caused any problem.'' *Id.*

B. Maropakis's Applicability Depends on the Substance, Not the Label, of the Asserted Defense

[4] For a more complete discussion of the Federal Circuit's *Maropakis* decision, *see* Pushkar & Ganderson, 94 FCR 81 (2010).

[5] Although there was not a breach of contract defense presented in *Maropakis*, based on subsequent case law, it appears that defenses seeking ''contract modification'' would include breach of contract. *See TPL, Inc. v. United States*, 118 Fed. Cl. 434, 441 (2014) (holding that the Court lacked jurisdiction to consider the contractor's antecedent breach defense because it never secured a final decision on that defense).

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Subsequent interpretations of *Maropakis* have limited its applicability to defenses seeking an adjustment or modification of contract terms, but the ASBCA and the Court of Federal Claims have emphasized that it is ultimately the substance, rather than the label, of a particular claim or defense that dictates *Maropakis*' applicability.

In *TPL, Inc. v. United States*, the contractor argued that the government's antecedent breach precluded the government from recovering under its own breach of contract claim. 118 Fed. Cl. at 441. Additionally, the contractor raised three common law defenses – impracticability, mutual mistake of fact, and unconscionability – to the government's breach claim. *Id.* at 441-45. The Court, however, held that the contractor's failure to obtain the CO's final decision on the asserted defenses precluded the Court from considering them. *Id.* The Court stated that all breach of contract claims or defenses must satisfy the CDA's jurisdictional requirements, and that the contractor's other defenses were different from those raised by the contractor in *Sikorsky* because, here, the contractor's defenses were essentially constructive change claims seeking a reformation of contract terms due to unforeseen costs. *See id.* at 441-45. In so holding, the Court disregarded the ''common law'' label typically appended to impracticability, mutual mistake of fact, and unconscionability defenses and, instead, focused on the substance of those defenses.

Similarly, in *Erka Construction Co., LTD.*, ASBCA No. 57618, 12-2 BCA ¶ 35,129, the contractor defended against government allegations that it stole fuel by arguing that the government had directed a change in contract performance that caused excess fuel consumption. Looking at the substance of the contractor's defense, the ASBCA stated that the contractor's defense was essentially one of constructive change, which, if successful, would entitle the contractor to a contract adjustment. *Id.* at 172,474. As such, *Maropakis* applied and the contractor's failure to secure a CO's final decision was dispositive. *Id.*

C. Maropakis Applies Equally to Contractors and the Government

Although *Maropakis*' holding states only that ''a *contractor* seeking an adjustment of contract terms must meet the jurisdictional requirements and procedural prerequisites of the CDA,'' *Maropakis*, 609 F.3d at 1331 (emphasis added), as the Federal Circuit held in *Raytheon*, 747 F.3d at 1355, *Maropakis* applies equally to contractors and the government.

In *Raytheon*, the contractor sought the payment of pension fund adjustments pursuant to Cost Accounting Standard 413 following the sale of three business segments. *Id.* As a defense to the contractor's claim for payment, the government argued that it was entitled to a downward equitable adjustment to account for certain previously paid pension costs. *Id.* at 1347. The government, however, did not obtain a CO's final decision on its equitable adjustment defense, and the Federal Circuit held that this failure prohibited the Court from considering the government's defense. *Id.* at 1354. In arriving at this conclusion, the Federal Circuit noted that ''[i]t is a bedrock principle of government contract law that contract claims, whether asserted by the contractor or the Government, must be the subject of a contracting officer's final decision,'' and that, pursuant to *Maropakis*, ''[t]his jurisdictional prerequisite applies even when a claim is asserted as a defense.'' *Id.* (citing 41 U.S.C. § 7103(a)(3); *Maropakis*, 609 F.3d at 1331).

III. Practice Pointers

Understanding what *Maropakis* requires and does not require is a critical step in the contract disputes process. Because *Maropakis*, at its core, concerns CDA jurisdiction, a misstep in understanding its requirements could result in a missed opportunity to have the government's defense dismissed or, worse, the dismissal of an otherwise meritorious contractor defense.

Accordingly, contractors must carefully consider the applicability of *Maropakis* starting at the outset of the claims process. Contractors should try to not only identify potential defenses to government claims as early as possible, but also consider asserting protective claims – which often can be simple filings if no certification of damages is required – to preserve those defenses and avoid jurisdictional issues down the road.[6] Ultimately, despite the boundaries that have been placed on *Maropakis* over the years, this doctrine remains alive and well and still plays a central role in the contract disputes process. *Maropakis* could be the sword or shield that the contractor or the government needs to prevail in a dispute.

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[6] Notably, the Court of Federal Claims in *Structural Concepts, Inc. v. United States* determined that *Maropakis* did not require the contractor to disclose the precise nature of damages or other relief sought. *See* 103 Fed. Cl. 84 (2012) (holding that *Maropakis* did ''not directly address the question of whether a contractor who has already filed a valid CDA claim for damages caused by government delay must necessarily then file a *separate* claim once it has learned the full extent of the government's liquidated damages assessment''). ''Although the court in *Structural Concepts* provided much leeway to the contractor and did not require that the contractor's defense rigidly adhere to the exact language of the contractor's administrative claim, contractors should not necessarily expect to receive the same treatment in other cases, as this decision is not binding upon other COFC judges or the boards of contract appeals.'' Elizabeth A. Ferrell & Justin M. Ganderson, *COFC Rejects Government's Attempt to Extend Holding in M. Maropakis Carpentry v. United States*, Federal Contracts Report, 97 FCR 227 (2012), *available at* http://www.mckennalong.com/media/site_files/1768_Federal%20Contracts%20Report.pdf.