CONSTRUCTION - USA

Contractors facing government claims may need to submit contractor claim to perfect defences

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Construction contractors working under government contracts need to understand the complexities of the claims process under the Contract Disputes Act.(1) Although it is more common for the contractor to make the claim against the government, contractors should be aware of the potential need to submit a contractor claim to perfect defences against a claim from the government.

Background

A brief review of the claims process under the Contract Disputes Act is instructive. The government is generally immune from suit except where it has consented to be sued. The act grants jurisdiction to the Court of Federal Claims (CFC) and the agency boards of contract appeals over claims between contractors and the government involving an express or implied contract for the procurement of property (other than real property).(2) The contractor must submit a written claim to the contracting officer for a decision.(3) If greater than $100,000, the claim must be certified by the contractor.(4) Within 60 days of receiving a certified claim, the contracting officer must either issue a decision or notify the contractor of the timeframe within which a decision will be issued.(5) The contracting officer shall issue the decision in writing, state the reasons for the decision and inform the contractor of its rights as provided in the Contract Disputes Act.(6) If the contracting officer does not issue a decision within 60 days, the claim will be deemed denied and this will authorise commencement of an appeal of the claim.(7)

A Contract Disputes Act claim must be submitted to the contracting officer for a final decision before it can be appealed. After the contracting officer issues a final decision on a claim, the contractor may appeal either to the board of contract appeals or to the CFC.(8) The CFC has jurisdiction over the claim if the appeal is made within 12 months of the contracting officer's final decision.(9) Appeals to the boards of contract appeals must be brought within 90 days of the contracting officer's decision.(10)

The contractor is not the only party that can bring a claim. A government claim against a contractor can take the form of a demand for liquidated damages, a termination for default, a demand for excess re-procurement costs or a demand to recoup indirect costs for a violation of the cost accounting standards. Although contractors may have claims of their own in these instances, the fact that the government strikes first does not excuse the contractor from following the proper procedures set forth in the Contract Disputes Act.

Decision

In the landmark decision of *M Maropakis Carpentry, Inc v United States*, 609 F 3d 1323 (Fed Cir 2010), the Federal Circuit ruled that a contractor's defence to a government claim for liquidated damages that alleged government caused delay had to be dismissed for lack of subject-matter jurisdiction because the contractor had never submitted the defence as an affirmative claim properly certified under the Contract Disputes Act.(11) The court analysed each communication between

Maropakis and the government, finding that "none of them, either alone or in combination, contained a clear and unequivocal statement sufficient to qualify as a claim". The court emphasised that a "claim cannot be based merely on intent to assert a claim without any communication by the contractor of a desire for a contracting officer decision". Maropakis stated that even if it was not in technical compliance with the Contract Disputes Act, the government still had actual knowledge of the amount and basis of its claim. The court maintained that "there is nothing in the CDA that excuses contractor compliance with the explicit CDA claim requirements".

The *Maropakis* decision illustrates the strict compliance requirements of the Contract Disputes Act. Later decisions have sought to clarify the limits of these requirements in situations where contractors are faced with defending against claims made by the government. In *Sikorsky v United States*, 102 Fed Cl 38 (2011), the CFC held that this rule does not apply to common law defences such as satisfaction, waiver, laches or the statute of limitations. However, in 2014, in *TPL, Inc v United States*, 2014 WL 4628311 (Fed Cl Sep 16 2014), the CFC held that the *Maropakis* rule applied to defences of impracticability, mutual mistake, unconscionability and defective specifications.

A slew of recently decided cases have placed even further limitations on the *Maropakis* decision. In *Total Engineering, Inc v United States*, 120 Fed Cl 10 (2015), the CFC held that a defence of defective specifications did not need to be separately filed as an affirmative claim. *Total Engineering* involved a contract for construction of the US Army Medical Research Institute of Chemical Defence Replacement Facility located at the Aberdeen Proving Grounds in Edgewood, Maryland. The contract required Total to perform a variety of work, including constructing a new steam-line system. Following a hydrostatic pressure test, cracking appeared in the piers, among other defects. Total alleged that the defects were due to the government's faulty pier design and drawings. Meanwhile, the government prepared a report which found that the cause of the construction failures was due to Total's deficient work. The contracting officer issued a cure letter to Total followed by a change order requiring them to cease construction of the steam line. The agency then issued a request for proposal for the amount of a deductive credit. After the parties failed to agree on the amount, the agency terminated the contract for default. In his final decision, the contracting officer demanded payment of $2,301,209, "representing the decrease in the contract amount that Total would have spent to render the Steam Line operable". Total filed suit and the government moved to dismiss on the grounds that Total's defective specifications defence to the government's claim for a deductive credit as an independent contractor claim that must have been submitted to the contracting officer. In denying the government's motion, the court held that a contractor is not required to submit its defence to the government's claim for a deductive credit to the contracting officer as a claim where it is not seeking any separate monetary relief or contract adjustment.

Palafox Street Associates, LP v United States, 122 Fed Cl 18 (2015) involved the construction and lease of a federal courthouse. The General Services Administration (GSA) attempted to collect on an alleged excess obligation of $824,416.01 that the government paid to cover Palafox's real estate taxes. After the contracting officer issued a final decision in which it found that the government was entitled to be reimbursed on the amounts sought, Palafox appealed the decision to the Civilian Board of Contract Appeals (CBCA). The GSA then moved to dismiss for Palafox's failure to submit a certified claim pursuant to the Contracts Disputes Act. The court ultimately held that, unlike the claim at issue in *Maropakis*:

> *"Palafox's 'claims' of estoppel, waiver, laches, and statute of limitations do not seek an adjustment of contract terms. Rather, the affirmative defenses of estoppel, waiver, laches, and the statute of limitations 'are traditional common law defenses that are independent of the means by which a party seeks equitable adjustment to a government contract*'."

Most recently, in *Jane Mobley Assocs, Inc v General Servs Admin*, CBCA 2878, 2016 WL 73878 (Jan 05 2016), the CBCA rejected the GSA's argument that the contractor's defences were in fact Contract Dispute Act claims that had not properly been submitted to the contracting officer for final decision. The CBCA held that "the rule of Maropakis is inapplicable where the contractor's defense does not seek an adjustment of contract terms". The CBCA instructed that where the contractor is defending against a government claim but not asserting its own claim for relief, or is asserting ordinary common law affirmative defences, the contractor is not seeking adjustment of contract terms and therefore is not asserting a Contract Dispute Act claim.

The CBCA cautioned against an expansive interpretation of *Maropakis*, stating:

> *"[i]n the CDA context, if we were to apply the rule of Maropakis to any defense raised by a contractor in response to a government claim that is not in the nature of an adjustment of contract terms or not seeking separate monetary relief, the 'drastic consequence' could well be that the contractor's appeal is never able to be heard on the merits. This is contrary to the intent and purpose of the CDA... 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."(12)*

Comment

This confusing and evolving area is full of risk for the unwary government contractor. A detailed review of all defences to a government claim should be made as soon as possible to determine whether the contractor needs to file a separate affirmative claim to protect existing defences against a government claim.

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Endnotes

(1) 41 USC §§ 7101–7109.

(2) 41 USC Section 602(a)(1).

(3) Section 605(a).

(4) Section 605(c)(1).

(5) 41 USC Section 605(c)(2).

(6) Section 605(a).

(7) Section 605(c)(5).

(8) 41 USC Sections 607(d) and 609(a)(1).

(9) Section 609(a).

(10) Section 606.

(11) 41 USC Section 7103 *et seq.*

(12) citing *Total Engineering*, 120 Fed Cl at 15
