SEYFARTH SHAW

Project In(Site)

Legal Developments Impacting Construction & Government Contract Industries

Welcome to the second issue of Project In(Site), Seyfarth's Construction and Government Contracts practice groups' publication focusing on decisions or other items of interest for construction and government contract solutions. Each summary below is followed by key practice takeaways.

Supreme Court Expected to Clarify the Scope of the False Claims Act

By Joseph Dyer

"I meant what I said, and I said what I meant."[1] Or maybe not. Industry is eagerly awaiting the Supreme Court's decision in *Escobar*.[2] The Court is expected to clarify whether a person can be held liable, not for something that the person said, but for what the person implied. Or more accurately, for what it is assumed that the person implied.

The False Claims Act ("Act") was enacted in 1863 to attack fraud in the government's procurement of supplies and services for use in the Civil War. The Act prohibits persons from knowingly making a false claim for monies to the government, either directly or indirectly.[3] A "claim" can include any request for monies. The most typical claim is an invoice - either for payment due under a contract or for reimbursement of services rendered (*e.g.* Medicare reimbursements). "Indirectly" refers to a situation where one makes a false claim to a third party - for example, a subcontractor's invoice to a prime contractor - knowing that the third party will use that claim to make further claim against the Government.

Violators can be liable for triple damages and statutory fines per false claim from $5,500 to $11,500.[4]

The most typical false claim is where a contractor invoices the Government for work not performed. Liability has been imposed, however, where the invoice itself is accurate, but the person knowingly misrepresents some fact associated with the invoice - for example, where a contractor knowingly misrepresents that it has complied with a particular contract requirement.

More recently, a number of Federal Circuit Courts of Appeal have held persons liable on the theory that simply by submitting a claim for payment, the person is implicitly certifying that it has complied with all of the prerequisites to payment. If the person knows that it has not, the associated claim is false, and the person can be held liable under the False Claims Act.

To be sure, the courts have held that the prerequisite in question - a contract requirement, for example - must be material to the government's decision to pay the claim. That is, however, an ambiguous standard.

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[1] Horton Hatches the Egg, Dr. Suess.

[2] *Universal Health Services, Inc. v. United States and Commonwealth of Massachusetts, ex rel. Julio Escobar and Carmen Correa*, 780 F.3d 504 (1st Cir. 2015), cert. granted, 136 S.Ct. 582 (U.S. Dec. 12, 2015) (No. 15-7).

[3] 31 U.S.C. § 3729 *et seq.*

[4] 31 U.S.C. § 3729(a).

Industry's concern with the theory of implied certifications rests less with concern over the government's abuse of the theory and more with abuse by private persons. The Act allows private persons - employees, for example - to sue persons alleging violations of the Act - and to keep between 1/4 to 1/3 of any recovery.[5] Private persons, therefore, have an incentive to bring such suits.

Industry's concern is that given the complexity of government contracts it is an easy matter for a person, whether acting on good faith or not, to "see" something non-compliant in a company's performance, and to use the same to allege that the company, in submitting invoices under the contract, violated the Act. That is, industry is concerned that the theory of implied certifications has led, and will continue to lead, to a number of frivolous suits.

Most of the Federal Circuits that have considered the matter have adopted the theory of implied certification. A few have rejected it.

It is widely expected that the Supreme Court, in *Escobar*, will reject or endorse the theory - and if it endorses the theory, will attempt to give greater guidance regarding its proper application.

It is, of course, risky business to attempt to predict a Court's decision in any case. One strain of thought, however, is that the Court will follow the majority of the Circuit Courts of Appeal and endorse the theory. Another is that the Court will reject the theory viewing the question of what is material to the government's decision to pay as one best left to Congress or the agencies. That is, for example, if any agency wants to hold its contractors liable under the Act it is an easy matter for the agency to identify what requirements the agency considers material to its decision to pay, and to require the contractor to expressly certify that it is compliant with the same.

The Court is expected to issue its decision this summer. In the meantime, and with a nod to the Courts that have adopted the theory, I will end this note starting that I do not intend to imply anything that I have not said - and that nothing that I have said, or am assumed to have implied, is, in any case, material to anything.

Owner Forfeiture of Default Termination Rights

By Anthony J. LaPlaca

Introduction

For construction contractors, default termination is the worst case scenario from both a financial and reputational perspective. Lost profits, sunk costs, broken relationships, and diminished business prospects are all symptoms of default termination, regardless of whether the facts justify the owner's decision to terminate. Reflecting on the gravity of the default remedy, Bruner and O'Connor counsel that "a valid termination of a contract for cause requires a termination decision made independently and in good faith by those authorized by the contract to make that decision."[6] In the same vein, federal courts require the federal government to prove that termination of a public contractor was reasonable and justified under the circumstances. As admonished in *J.D. Hedin Construction Co.*, "a default-termination is a drastic sanction which should be imposed (or sustained) only for good grounds and on solid evidence."[7]

Despite the requirement to use discretion, many owners operate as though default termination were an absolute remedy and, for that matter, a tool for leveraging the contractor when the relationship gets testy. While an owner may have the ultimate burden of showing that termination is justifiable, the prospects of withheld retainage, prolonged litigation, and a blemished record are too much to bear for many contractors. Better to capitulate to the owner's demands than engage in a lengthy and expensive legal challenge on principle.[8]

[5] 31 U.S.C. § 3729(a).

[6] 5 Bruner & O'Connor, *Construction Law* § 18:42.

[7] 187 Ct. Cl 45, 57 (1968); accord BearingPoint, Inc. v. United States, 82 Fed. Cl. 181, 183 (2008) ("A default termination is a drastic sanction, and the Government is held strictly accountable for its actions in enforcing this sanction.")

[8] In most construction contracts, the remedy for a wrongful default termination is a "conversion" to a termination for the convenience of the owner. While a converted termination for default improves the financial remedy available to the contractor, it very rarely includes recovery of court costs, consultants fees, interest or attorneys' fees incurred in the contractor's defense.

What the aggressive owner may not know, however, is that its right to terminate for default can be forfeited. Whether intentionally or unwittingly, owners forego their default termination rights in a variety of circumstances. This Article explains the different ways that courts have declared an owner to have forfeited its termination rights, with focus on: (1) the owner's failure to meet a condition precedent; (2) unreasonable delay in termination; (3) express or implied waiver of contract requirement; and (4) substantial completion and acceptance. Assuming a contractor can sufficiently establish the two key elements of a forfeiture argument—owner forbearance and contractor reliance—it can significantly diminish the threat of default termination.

Contractual Authority for Default Termination and Process for Review

Standard Termination Language

Default termination is a fairly intuitive concept; the owner may dismiss the contractor that has not performed its obligations in a timely or contract-compliant manner.[9] The standard default clause generally permits termination for failure to "properly" or "diligently" prosecute the work. Without citing specific examples, there are three observations worth noting about the typical termination clause.

First, contract drafters, usually attorneys, are at liberty to include or omit language creating an express condition precedent to the termination decision. The typical "cure notice" requirement compels the owner to provide the contractor with formal notice and opportunity to remedy any ongoing defects in performance. However, the parties are free to include or omit more stringent conditions.[10]

Second, despite referencing specific causes of default (such as failure to pay subcontractors), termination language more often than not includes a catch-all provision for any "material breach of the agreement." This caveat appears to preserve the owner's right to end the contract immediately where the contractor violates a critical term not listed in the clause. In this context, the propriety of termination can hinge on the contractual, statutory, or other definition of what constitutes a "material" breach.[11]

Finally, while virtually every form termination clause references the right to terminate for default, none expressly mentions the possibility that that right can be waived. This should not come as a shock. At least in commercial construction (where owners typically have primary drafting responsibility), one would be hard-pressed to find language providing the circumstances in which the owner expressly *surrenders* the right to terminate for default. Compare this to the contractor's right to additional money for changes to the scope of work. Most construction agreements expressly provide that the contractor waives its claim, forever, absent timely written notice of the condition giving rise to the claim. In short, termination language usually outlines the causes for termination by the owner, omitting entirely any reference to possible forfeiture.

Forfeiture of the Owner's Default Termination Right

Failure to Meet Conditions Precedent

To safeguard against hasty or unfair terminations, the termination clause often compels the owner to meet conditions precedent to termination. Contract drafters have adopted a variety of prerequisites to termination, notice and opportunity to cure being standard in most construction agreements. If an owner fails to fulfill any condition precedent, a reviewing court is likely to reject the termination as null. Bruner and O'Connor explain that in order "to encourage the exercise of the

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[9] While termination is a mutual right, most contracts require contractors to proceed diligently with the work, notwithstanding a dispute with the owner. As such, contractor-initiated termination is a rare phenomenon. *But see Kiewit-Turner, A Joint Venture v. U.S. Dep't of Veterans Affairs*, CBCA No. 3450, 15-1 BCA 35820 (Dec. 9, 2014) (granting declaratory relief permitting contractor to stop work and terminate the contract where owner materially breached contract by failing to provide feasible design concept).

[10] For example, under the standard AIA "General Conditions of Contract for Construction," the owner may not terminate until it receives written certification from a neutral initial decision maker that good cause exists to terminate. AIA Document A201 (2007) § 14.2.2.

[11] See Restat. (2d) of Contracts § 241.

right of termination for default only upon independent discretion and only for fair and proper reasons, courts have rigorously enforced the procedural requirements of the termination clause."[12]

While conditions precedent are important, failure to fulfill preconditions is not a forfeiture in every case. Whether a forfeiture occurred depends on the governing jurisdiction. By means of example, compare the holding of *Ingrassia Construction*[13] with the holding of *Town of Plainfield v. Paden Engineering Company*.[14] In both cases, the prime contract included the AIA form requirement that the owner's termination right was contingent on the architect certifying that termination is warranted. In both cases, the owner terminated the contract without first obtaining adequate certification from the architect. In *Ingrassia*, the Superior Court of New Jersey held that, although the architect's certificate was a condition precedent to termination, a defective certificate did not annul the owner's common-law right to terminate the contract "subject to the normal and traditional burden of proof of material breach."[15] In *Plainfield*, the Indiana Court of Appeals held the opposite, finding that the common law right to terminate in Indiana is "constrained by compliance with certain conditions precedent—notice and architect's certification."[16] These disparate holdings reflect a disconnect between the states regarding whether missing conditions precedent equates to forfeiture of termination rights.

Failure to Terminate within a Reasonable Time

Once an owner issues a notice of default or notice to cure, it has a duty to execute a termination within a reasonable time period. Because the "reasonableness" of timing is a factual inquiry that depends on the specific issues in play, there is no fixed period by which the owner *must* commit to termination. In any event, the delayed-termination argument is unlikely to succeed unless the contractor can demonstrate that it reasonably inferred a termination would not occur, and was deprived of the opportunity to mitigate its ongoing costs. Thus, in *Westinghouse Elec. Corp.*, the Armed Services Board of Contract Appeals held that termination was unreasonably delayed when the Government waited to terminate for 57 days following receipt of a letter indicating the contractor had cured alleged defects in performance.[17] The Board stated:

> [The owner's] delay, for which it has furnished no explanation, deprived [the contractor] of the opportunity to stop work and to reduce the loss which it will sustain if the termination for default is permitted to stand. The unexplained delay was unreasonably long . . . [The owner] may not, in light of continued efforts to perform, be heard to argue that such silence and inaction does not constitute an election to permit continued performance.[18]

The two key considerations for the contractor arguing unreasonable delay are: (1) whether the owner failed to terminate under circumstances indicating forbearance of termination and; (2) whether the contractor suffered prejudice attributable to the owner's apparent forbearance.

Waiver of Contract Requirements

Construction projects often evolve based on the owner's changed preferences and/or the contractor's proposal to perform part of the work in a more cost-efficient manner. Under the right circumstances, changes to contract requirements or duration for performance may divest the owner of its right to terminate.

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[12] 4A Bruner & O'Connor, *Construction Law* § 12:41.

[13] 345 N.J. Super. 130 (2001).

[14] 943 N.E.2d 904 (Ind. Ct. App. 2011).

[15] 345 N.J. Super. at 141; *see also MCK Bldg. Associates, Inc. v. St. Lawrence Univ.,* 301 A.D.2d 726, 727-28 (N.Y. 2003) (holding that termination of subcontractor without requisite prior notice violated an express condition precedent of the agreement).

[16] 943 N.E.2d at 914.

[17] ASBCA No. 20306, 76-1 BCA, 11,883 (Apr. 26, 1976).

[18] *Id.; see also Ryste & Ricas, Inc.*, ASBCA No. 51841, 02-2 BCA, 31,883 (May 29, 2002) (owner's ambiguous and open-ended communications regarding intent to default or grant a time extension warranted overturn of default termination); *Baker Marine Corp. v. Weatherby Eng'g Co.*, 710 S.W.2d 690, 694 (Tex. App. 1986) ("The span of three months between notice of default and termination coupled with the continuing efforts to complete the project constitute sufficient evidence of waiver.")

Waiver can occur "when [the owner's] words or conduct express an intent not to exercise a known contractual right and [the contractor] was misled and prejudiced by this behavior."[19] In construction, waiver may occur where the owner terminates based on failure to meet amended performance deadlines. For example, an owner may waive its right to terminate where it nullifies the contractual completion date and fails to establish a new one.[20] The owner may also waive its right to terminate where the parties mutually agree to an extension of the completion date of the contract and the contractor continues working thereon.[21] Even where there is no formal agreement to extend the time for performance, some cases have found waiver based on the owner's encouragement to continue work after the contractor's original deadline passed.[22]

Madden Phillips Construction, Inc. v. GGAT Development Corp. is a good example of waiver in the construction context.[23] In that case, the site work contractor wrongfully suspended its performance two months into a residential construction project, but returned to the site a month and a half later. The owner-developer allowed work to continue for an additional eight months and complete 90% of the work before it terminated the contract.[24] The Tennessee Court of Appeals held that the developer waived its right to terminate the general contractor because the developer's "decision to modify the contract and continue performance under these circumstances waived its right to assert [the contractor's] suspension of performance as the first uncured material breach."[25] The Court also held that the parties had waived the original completion deadline by oral modification of the delivery date for fill material and subsequent acceptance.[26] While the owner could not terminate the contract due to missed deadlines, it retained its right to demand complete performance within a reasonable time.[27]

Madden notwithstanding, the doctrine of waiver is fairly uncommon in construction contracts. The waiver argument is complicated by the fact that virtually every construction contract provides for liquidated damages in the event of contractor delay. The contractor asserting waiver must prove that it reasonably believed the owner elected to forego the original completion date or some other milestone. If the owner notifies the contractor of its intent to claim liquidated damages (which it almost always does in practice), the contractor will likely be unable to assert waiver with any success.[28] In other words, the ongoing potential for liquidated damages often serves to bar the contractor from claiming that time is no longer of the essence under the contract.

Substantial Completion and Acceptance

An owner may not terminate work that is substantially complete. A construction project is considered substantially complete when it is capable of being used for its intended purpose.[29] "Under the doctrine of substantial completion, the harsh penalty of default termination does not lie if the project as built has only minor deviations from the project as described in the specifications."[30] Put differently, if the architect has certified that a project is substantially complete, the owner may

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[19] *LBL Skysystems (USA), Inc. v. APG-Am., Inc.,* No. CIV.A.02-5379, 2006 WL 2590497, at *16 (E.D. Pa. 2006).

[20] *Am. Sheet Metal Corp. v. Gen. Servs. Admin.,* GSBCA No. 14068, 99-1 BCA, 30,329 (Mar. 31, 1999); *Envt'l Safety Consultants, Inc.*, ASBCA No. 51722, 11-2 BCA, 34,848 (Sep. 28, 2011) ("[I]t was incumbent on the government to issue a new and reasonable completion date before terminating the contract for default."); *Sun Cal, Inc. v. United States,* 21 Cl. Ct. 31, 37-8 (1990) (holding that owner forfeited termination right because it waived original completion date and failed to follow procedures for establishing new completion date); *but see District of Columbia. v. Kora & Williams Corp.*, 743 A.2d 682, 694, n. 19 (D.C. 1999) (finding that owner properly established new completion date, precluding waiver argument).

[21] *R.W. Granger & Sons, Inc. v. Cty. Sch. Dist. Of Albany,* 296 A.D.2d at 637 ("[T]he parties mutually agreed to an extension of the completion date of the contract and plaintiff continued working thereon. Under the circumstances, defendant waived any complaint as to that 15-day delay.")

[22] *See Corway, Inc.,* ASBCA No,. 20683, 77-1 BCA, 12,357 (Feb. 8, 1977) (When the Government permits a completion date to pass and thereafter its action or inaction may reasonably be interpreted as encouragement to continue with the work and the contractor does so, the contract cannot be terminated for default without the Government establishing a reasonable new completion date.")

[23] 315 S.W.3d 800 (Tenn. 2009).

[24] *Id.* at 816.

[25] *Id.*

[26] *Id.* at 819.

[27] *Id.* at 821.

[28] *See Olson Plumbing & Heating Co. v. United States*, 221 Ct. Cl. 197 (1979).

[29] *Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307, 1315 (Fed. Cir. 2000).

[30] *R.M. Crum Constr. Co.,* VABCA No. 2143, 85-2 BCA, 8132 (May 10, 1985).

not subsequently terminate any part of the finished work. Notably, however, substantial completion does not outright prohibit the owner from terminating unfinished punch list work.[31] Rather, substantial completion prevents the owner from terminating the contract without giving the contractor reasonable time to correct deficiencies.[32]

Conclusion

Default termination is ordinarily appropriate if the owner has a reasonable basis for the termination and the contractor has no valid excuse for its underperformance or other deviations from the contract terms and conditions. The reasonableness of a termination involves a hindsight determination of fault — a "judicial autopsy" of the circumstances surrounding the owner's decision to end the contract. The typical defenses available to the contractor challenging a default termination are that either: (1) the owner's evaluation of performance was erroneous, or; (2) there was a valid justification for the contractor's underperformance.

In certain scenarios discussed above, there is a third argument available to the contractor. Specifically, the owner's conduct may constitute a forfeiture of the termination right, entitling the contractor to damages as though the owner terminated the contract for its convenience. As a general matter, forfeiture has two elements: (1) owner conduct indicating forbearance of a termination right and; (2) detrimental contractor reliance on the owner's conduct.

Accordingly, contractors and owners alike must ask the threshold question whether the right to terminate still exists when tensions reach their apex. The owner contemplating default termination should first consider whether it has, by its affirmative conduct, waived its right to default termination. The contractor challenging a termination should explore whether there is any basis for arguing forfeiture, as a well-articulated forfeiture argument may compel the owner to rethink its ultimate decision. A well-crafted argument for forfeiture may compel the owner to reconsider whether default termination is a good idea, perhaps in favor of a less exacting resolution of the dispute.

Contractors Facing Government Claims Need To Be Aware of the Potential Need To Submit A Contractor Claim to Perfect Defenses Against the Government's Claim

By Donald G. Featherstun and Edward (Teddie) V. Arnold

Construction contractors working under Government contracts need to understand the complexities of the claims process under the Contract Disputes Act ("CDA"), 41 U.S.C. §§ 7101–7109. Although more commonly it is the contractor making the claim against the Government, Contractors that face government claims need to be aware of the potential need to submit a contractor claim to perfect defenses against the government's claim.

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 Contract Disputes Act, which grants jurisdiction to the Court of Federal Claims ("COFC") 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). 41 USC Section 602(a)(1). The contractor must submit a written claim to the contracting officer for a decision. Section 605(a). If greater than $100,000, the claim must be certified by the contractor. Section 605(c)(1). Within 60 days of receiving a certified claim, the contracting officer must either issue a decision or notify the contractor of the time within which a decision will be issued. 41 USC Section 605(c)(2). The contracting officer shall issue his decision in writing, shall state the reasons for the decision and inform the contractor of its rights as provided in the CDA. Section 605 (a). If the contracting officer does not issue a decision within the required 60 days, the claim will be deemed denied and this will authorize commencement of an appeal of the claim. Section 605(c)(5).

[31] *Al Khudhairy Group*, ASBCA No. 56131, 10-2 BCA, 34530 (Aug. 5, 2010)

[32] *Keith Crawford & Associates,* ASBCA No. 46893, 95-1 BCA, 27388 (Dec. 20, 1994) (upholding default termination where contractor did not finish punch lists for almost four months); *Southland Constr. Co.*, VABCA No. 2543, 89-1 BCA, 21548 (Jan. 4, 1989) (holding that contractor was properly terminated for failing to complete punch list items within a reasonable time).

A CDA 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. 41 USC Sections 607(d) and 609(a)(1). The CFC has jurisdiction over the claim if the appeal is made within twelve months of the contracting officer's final decision. Section 609(a). Appeals to the boards of contract appeals must be brought within 90 days of the contracting officer's decision. Section 606.

The contractor is not the only party who can bring a claim. A government claim against a contractor can come in the form of a demand for liquidated damages, a termination for default, a demand for excess re-procurement costs, and/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.

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 defense 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 defense as an affirmative claim properly certified under the Contract Disputes Act, 41 U.S.C. Section 7103 *et. seq.* The Court analyzed each communication between Maropakis and the government, finding "none of them, either alone or in combination, contained a clear and unequivocal statement sufficient to qualify as a claim." *Id.* The Court emphasized 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." (citations omitted). Maropakis stated that even if it was not in technical compliance with the CDA, 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." *Id.*

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 Court of Federal Claims held that this rule did not apply to common law defenses such as satisfaction, waiver, laches or the statute of limitations. However, in 2014, in *TPL, Inc. v. U.S.*, 2014 WL 4628311 (Fed. Cl. Sept. 16, 2014) the Court of Federal Claims held that the *Maropakis* rule applied to defenses 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. U.S.,* 120 Fed. Cl. 10 (2015) the Court of Federal Claims held that a defense of defective specifications did not need to be separately filed as an affirmative claim. *Total Engineering* involved a contract for construction of the United States Army Medical Research Institute of Chemical Defense 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 the result of 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 CO issued a cure letter to Total followed by a change order requiring Total to cease construction of the steam line. The Agency then issued an RFP for the amount of a deductive credit. After the parties could not agree on the amount of the deductive credit, the Agency terminated the contract for default. In his Final Decision, the CO demanded payment in the amount 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 defense 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 contractor was not required to submit its defense to the Government's claim for a deductive credit to the CO as a "claim" where it is not seeking any separate monetary relief or contract adjustment.

Palafox Street Associates, L.P. v. United States, 122 Fed.Cl. 18 (2015) involves the construction and lease of a federal courthouse. The 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 issues 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 CBCA, after which the GSA 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.'" (citations omitted).

Most recently, in *Jane Mobley Assocs., Inc. v. General Servs. Admin.*, CBCA 2878, 2016 WL 73878 (Jan. 5, 2016), the Civilian Board of Contract Appeals rejected the GSA's argument that the contractor's defenses were in fact CDA claims that had not properly been submitted to the contracting officer for final decision, holding that "the rule of *Maropakis* is inapplicable where the contractor's defense does not seek an adjustment of contract terms." The CBCA instruceted 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 defenses, the contractor is not seeking adjustment of contract terms and therefore is not asserting a CDA claim.

The CBCA cautioned against an expansive interpretation of *Maropakis*, staing "[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." (citing *Total Engineering,* 120 Fed. Cl. at 15).

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

California Requires Payments of Prevailing Wages to Drivers Delivering Ready-Mixed Concrete to Publics Works Projects

By Patty H. Lee

Late last year, California expanded the definition of "public works" requiring the payment of prevailing wages to include the hauling or delivery of ready-mixed concrete for a public works project. The new law marks a significant departure from the laws that govern the construction industry, which have distinguished between the performance of construction work and the supply of construction materials, and supersedes the California Department of Industrial Relations' prior decision that held the delivery of ready-mix concrete to a public works project did not constitute work subject to prevailing wages.

The new law, codified at California Labor Code Section 1720.9, applies to all public work contracts awarded on or after July 1, 2016. It provides that the delivery of ready-mix concrete, defined as "concrete that is manufactured in a factory or a batching plant, according to a set recipe, and then delivered in a liquefied state by mixer truck for immediate incorporation into a project," from a commercial plant to a public works job will be subject to prevailing wages. The prevailing wage rate is based on the geographic area in which the batch plant is located. The law requires the company that hauls or delivers ready-mixed concrete to enter into a written subcontract agreement with the contractor that engaged it to supply the ready-mixed concrete. This means that a ready-mix supplier may not exclusively rely on purchase orders. Companies that haul or deliver ready-mixed concrete will also be required to submit certified payroll records to the contractor it contracts with and the project's prime contractor within three working days after the driver has been paid, accompanied by a written time record certified by each driver.

The law is significant as it blurs the distinction between contractors and suppliers for prevailing wage purposes and shows an attempt to expand the number of employees entitled to prevailing wages which are, as a general rule, significantly higher than regular wages. Undoubtedly, the new law will increase the costs of public works projects and increase the administrative burdens on ready-mix concrete suppliers.

Tips for Litigating Construction Disputes in Delaware

By Rebecca Woods

Delaware is arguably the premier venue for litigating all matters corporate, and its judges are very familiar with a panoply of corporate disputes. There are far fewer construction disputes that are venued in Delaware, but if you find yourself there, here are some considerations and quick facts:

Be aware that Delaware is one of the few jurisdictions that retains a division between courts of equity and of law. The Court of Chancery has exclusive jurisdiction over equitable claims, but it can exercise jurisdiction over legal claims so long as there is at least one equitable claim in the lawsuit. The Superior Court has jurisdiction over legal claims only. Because many construction lawsuits involve contract claims only, such claims will likely be venued in Superior Court (absent diversity to get into federal court). If your dispute exceeds $1 million, then your matter will be adjudicated before a judge assigned to the Complex Commercial Litigation Division (CCLD) for Superior Court. The CCLD was designed to streamline commercial litigation in Superior Court. The judges tend to be savvy on e-discovery issues and will be amenable to arguments that discovery is overly broad or unduly burdensome in comparison to its relevance. Note that your Superior Court judge has a quarterly civil and criminal rotation, which affects scheduling of various matters, including trial.

The bar in Delaware, federal and state, is high-caliber, active, and close-knit. Judges and lawyers attend Inns of Court and other legal functions regularly, so expect that your local counsel knows the judge and opposing counsel well, has litigated with them before, and expects to do so again in the future when your case is over. This means the bar is highly civil. If you're looking for local counsel with a brass-knuckles approach, file your suit elsewhere.

Judges in Delaware have an expectation that your local counsel be active in your matter. While Delaware is certainly not inhospitable to pro hac'ed counsel, using your local counsel as a drop-box generally does not play well there. Expect to involve your local counsel so that they can, for example, argue meaningful motions and be involved at trial. You will find a number of very able litigators, but it is harder to find someone who specializes in construction litigation matters, particularly in the larger firms based in Wilmington.

Both the Court of Chancery and the Superior Court have active judges who move matters along quickly. The Court of Chancery typically moves cases faster than the Superior Court, but neither court is a laggard when it comes to hearing and ruling on motions.

Delaware has no intermediate court of appeals. Appeals go straight from the Court of Chancery or the Superior Court to the Delaware Supreme Court. Generally speaking, the Supreme Court has broad mandatory review so an appeal from a lower court in a construction dispute is likely to be had.

Recognition for our Legal Excellence & National Scope

Our firm has been routinely recognized for the strength of our construction and government contracts practices and practitioners, including:

***The Legal 500* — 2015 Construction Practice Group of the Year:**

Seyfarth's Construction Practice, part of our Litigation Department, won *The Legal 500* 2015 United States Award in the Real Estate: Construction category. The group was also ranked nationally in 2015 by *The Legal 500*, an independent guide to lawyers in the U.S. In the guide, clients said Seyfarth is "excellent on all levels" and "provides a prompt, thorough, and resourceful service. [Seyfarth] covers a lot of ground, not only in construction and construction litigation, but contracts in general, including issues of insurance coverage and other matters."

***Chambers USA* — Awards for Excellence:**

Seyfarth is consistently ranked by Chambers as a preeminent construction group both nationally and regionally. Seyfarth received the national *Chambers USA* 2012 Award for Excellence in the Construction team category, and we were nominated for the same honor in 2011, 2013, and 2014. This award reflects a law firm's national presence in key practice areas. It also reflects notable achievements over the past 12 months including outstanding work, impressive strategic growth and excellence in client service.

***Chambers USA* — Firm USA & Individual USA Honors:**

In the 2016 edition of *Chambers USA: America's Leading Lawyers for Business,* Seyfarth's Construction Practice received Firm USA Honors nationwide (Band 2) and District of Columbia (Band 1) in the Construction Law category. Several Seyfarth Construction attorneys earned Individual USA honors in California and the District of Columbia.

***U.S. News & Best Lawyers* — National Recognition:**

In *U.S. News & Best Lawyers* 2014-2016 "Best Law Firms" rankings, Seyfarth's Litigation Department received recognition in multiple national and regional practice areas. Tier 1 rankings were awarded to us in the National Litigation – Construction; National Construction Law category.

U.S. News & Best Lawyers — Regional Recognitions:

In *U.S. News & Best Lawyers* 2016 "Best Law Firms" rankings, Seyfarth's Construction Practice received recognition in multiple metropolitan markets: Washington D.C. (Tier 1), Atlanta (Tier 2) and Chicago (Tier 2).

Construction & Government Contracts Attorneys

Eric Barton
Atlanta
ebarton@seyfarth.com

C. Walker (Chip) Ingraham
Atlanta
cingraham@seyfarth.com

Sara M. LeClerc
Atlanta
sleclerc@seyfarth.com

C. Leanne Prybylski
Atlanta
lprybylski@seyfarth.com

Stephanie A. Stewart
Atlanta
sastewart@seyfarth.com

Rebecca Woods
Atlanta
rwoods@seyfarth.com

Anne V. Dunne
Boston
adunne@seyfarth.com

Todd M. McGrath
Boston
tmcgrath@seyfarth.com

Leah A. Rochwarg, LEED AP
Boston
lrochwarg@seyfarth.com

John R. Skelton
Boston
jskelton@seyfarth.com

Jerome F. Buch
Chicago
jbuch@seyfarth.com

Jeffrey Jahns
Chicago
jjahns@seyfarth.com

Mark L. Johnson
Chicago
majohnson@seyfarth.com

Mark A. Lies, II
Chicago
mlies@seyfarth.com

Anita J. Ponder
Chicago
aponder@seyfarth.com

Jesse M. Coleman
Houston
jmcoleman@seyfarth.com

Aaron Belzer
Los Angeles
abelzer@seyfarth.com

T. Larry Watts
Los Angeles
lwatts@seyfarth.com

Daniel P. Wierzba
Los Angeles
dwierzba@seyfarth.com

Alison Ashford
New York
aashford@seyfarth.com

Dennis H. Greenstein
New York
dgreenstein@seyfarth.com

Jerry A. Montag
New York
jmontag@seyfarth.com

Donald G. Featherstun
San Francisco
dfeatherstun@seyfarth.com

Giovanna A. Ferrari
San Francisco
gferrari@seyfarth.com

Patty H. Lee
San Francisco
plee@seyfarth.com

Michael T. McKeeman
San Francisco
mmckeeman@seyfarth.com

Edward (Teddie) V. Arnold
Washington, D.C.
earnold@seyfarth.com

Marcantonio W. Barnes
Washington, D.C.
mwbarnes@seyfarth.com

Alan Baron
Washington, D.C.
abaron@seyfarth.com

David A. Blake, LEED AP
Washington, D.C.
dblake@seyfarth.com

Justin M. DiBlassio
Washington, D.C.
jdiblassio@seyfarth.com

Joseph J. Dyer
Washington, D.C.
jdyer@seyfarth.com

Sara Beiro Farabow
Washington, D.C.
sfarabow@seyfarth.com

Bennett D. Greenberg
Washington, D.C.
bgreenberg@seyfarth.com

Jeffrey M. Hummel
Washington, D.C.
jhummel@seyfarth.com

Anthony J. LaPlaca
Washington, D.C.
alaplaca@seyfarth.com

James R. Newland, Jr., AIA
Washington, D.C.
jnewland@seyfarth.com

Richard McKim Preston
Washginton, D.C.
rpreston@seyfarth.com

Jason N. Smith
Washington, D.C.
jnsmith@seyfarth.com

Wendy T. Wendrowski
Washington, D.C.
wwendrowski@seyfarth.com

www.seyfarth.com