



FEDERAL CONTRACTS



REPORT

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Jurisdiction

Maropakis: The Federal Circuit Imposes Forfeiture of Defenses to Government Claims When Contractor Fails to Certify Them as Contractor Claims



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It is a time-honored maxim that the law abhors a forfeiture unless it is expressly required by the legislature.² Not so for the United States Court of Appeals for the Federal Circuit, which has unapologetically stripped a contractor of its defenses to a government claim, and in effect entered a default judgment in favor of the government, because the contractor did not certify its defenses as “claims” under the Contract Dis-

² For a recent iteration of this legal maxim, see *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999).

putes Act (CDA) (*M. Maropakis Carpentry Inc. v. United States*, Fed. Cir., No. 2009-5024, 6/17/10).

The court in *Maropakis* imposed forfeiture of the contractor's defenses without explaining how a non-monetary defense could even be considered a CDA claim requiring certification, given the clear language of the CDA that only monetary claims exceeding \$100,000 must be certified. The Contract Disputes Act makes a clear distinction between contractor claims and government claims. For contractor claims, the Act states: "All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 USC 605(a). A contractor claim that exceeds \$100,000 must be certified. 41 USC 605(c)(1).³ For government claims the Act simply states: "All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer."

The Act does not mention contractor defenses to government claims, thus implying that contractors may raise defenses to government claims responsively, in the traditional manner. Indeed, apart from the decision in *Maropakis*, there has been virtually no suggestion to the contrary in the thirty-two year history of the Contract Disputes Act, nor in the preceding Report of the Commission on Government Procurement, which provided the impetus for the legislation.⁴ The Act does not equate contractor claims with contractor defenses to government claims. Nor does the Act suggest any requirement to certify a non-monetary claim; to the contrary, there is no requirement to certify even *monetary* claims that do not exceed \$100,000. *Maropakis* is the latest in a series of decisions by the Federal Circuit in the government contracts area that have subjected that court to increasing criticism.⁵

The sad odyssey of *M. Maropakis Carpentry, Inc.* involves confused contractor management, a blizzard of assertions, retractions and re-assertions of contract responsibility, the draconian imposition of liquidated damages, a puzzling and contradictory decision by the Court of Federal Claims,⁶ and an egregiously erroneous government contract decision by the Federal Circuit.⁷ In this respect, the *Maropakis* decision is in serious competition with the hyper-formalistic rulings of the Federal Circuit in the 1980s that misinterpreted the cer-

tification requirement of the Contract Disputes Act as jurisdictional. Those decisions, as *Maropakis* is bound to do, generated substantial needless litigation that the Act itself, in seeking expeditious resolution of government contract disputes, was designed to avoid.⁸ In both *Maropakis* and the earlier cases on certification, the court confused jurisdiction with substantive rights. In *Maropakis*, however, the court went further and imposed a requirement to certify non-monetary defenses to a government claim, a requirement that does not exist in the Contract Disputes Act.

The opinions in *Maropakis* in the COFC and Federal Circuit involve misapplication of several previous decisions. We begin with the contract dispute and its fate in the COFC.

In April 1999, the Navy awarded *Maropakis* a contract for repairs totaling \$1.3 million on a building at the Mechanicsburg Naval Inventory Control Point, with a performance period of approximately nine months. *Maropakis* completed the work to the Navy's satisfaction, but it took about twenty four months. The reasons for the delay were many and complex.⁹

The long and convoluted correspondence between *Maropakis* and the Navy over two years sets the stage for the outcome in court. Here is a capsule overview:

- July 2000: *Maropakis* letter requesting extensions of time.

- November 2000: CO letter warning *Maropakis* of the liquidated damages clause.\

- August 2001: *Maropakis* letter requesting extensions of time.

- August 2001: CO letter disagreeing with the extension request.

- June 2002: CO letter – but not a final decision – assessing liquidated damages and offsetting them against the contract balance.¹⁰

- July 2002: *Maropakis* letter reiterating its request for time extensions and asserting that it would contest liquidated damages.

On December 20, 2002, the CO issued a final decision assessing liquidated damages for 467 days at \$650 per day, a total of \$303,550. This was offset against outstanding contract payments of \$244,305, leaving a balance of \$59,514 owed by *Maropakis* to the Navy.¹¹

³ "For claims of more than \$100,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor."

⁴ *But see* *Elgin Builders v. United States*, 10 Cl. Ct. 40 (1986).

⁵ *See, e.g.*, Richard C. Johnson, Stephen D. Knight, John S. Pachter & D. Joe Smith, *Geren v. Tecom Inc.: The Federal Circuit Creates a New FAR Cost Principle*, 4 GOV'T CONTRACT COSTS, PRICING & ACCOUNTING REPORT, Issue 4 (2009); Karen L. Manos, *Estoppel Against the Government: What Does 'Affirmative Misconduct' Have to do With It?*, 1 GOV'T CONTRACT COSTS, PRICING & ACCOUNTING REPORT, Issue 1 (2006); Stephen D. Knight, *Federal Circuit Costs Decisions Bode Ill for Contractors*, 39 THE PROCUREMENT LAWYER, No. 2 (2004).

⁶ *M. Maropakis Carpentry, Inc. v. United States*, 84 Fed. Cl. 182 (2008).

⁷ *M. Maropakis Carpentry, Inc. v. United States*, 2010 U.S. App. LEXIS 12376 (Fed. Cir. June 17, 2010).

⁸ *United Sales v. Turner Constr.*, 827 F.2d 1554 (1987); *United States v. Johnson Controls* 713 F.2d 1541 (1983); *W.M. Schlosser Co. v. United States*, 705 F.2d 1336 (1983). Those decisions continued to work their mischief until Congress in 1992 legislatively overruled them, making clear that defects in claim certifications do not affect the jurisdiction of board of contract appeals or the court. 41 USC 605(c)(6) ("The contracting officer shall have no obligation to render a final decision on any claim of more than \$100,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why any attempted certification was found to be defective. A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency board of contract appeals, the court or agency board shall require a defective certification to be corrected.")

⁹ *Maropakis*, 84 Fed. Cl. at 182-88. The COFC expended six pages on the history of contract performance, a history that reflects little credit to either side.

¹⁰ *Id.* at 192-93.

¹¹ *Id.* at 193.

The COFC Lawsuit. In a complaint filed with the COFC almost one year later,¹² Maropakakis claimed \$244,036 for the outstanding contract balance, citing all of the delays discussed in correspondence. Almost two years later, Maropakakis filed additional claims based on defective specifications, and added new allegations of government delay.¹³ Maropakakis also sought remission of the liquidated damages assessment. The government counterclaimed for the unpaid \$59,514 in liquidated damages. Maropakakis responded that it was not responsible for the delay and alleged unnamed “affirmative defenses to the demand”¹⁴

The parties filed cross motions for summary judgment, and the government moved to dismiss all of Maropakakis’ claims for lack of jurisdiction. The government’s summary judgment motion related only to the liquidated damages counterclaim.¹⁵

The COFC first addressed CDA jurisdiction of the allegations Maropakakis raised in its initial and amended complaints, and the court correctly summarized the applicable law.¹⁶ However, rather than focus on the limited number of written communications from Maropakakis that could have constituted CDA claims, the COFC instead turned to the merits, discussed at length each of Maropakakis’ allegations of excusable delay and, with one exception, effectively refuted them.¹⁷

A summary of the ruling follows:

Window Specifications. The COFC held the government was entitled to insist upon compliance with the specifications even where they exceeded standards in the industry.¹⁸

Sequence of Performance. The Court stated “there is no evidence that Maropakakis ever limited its request [for an altered sequence] to only one portion of the roof.”

Asphalt Roofing Materials. The Court noted “the plaintiff sought to perform contrary to the express terms of the solicitation without any legal justification . . . there is no dispute that Maropakakis understood and agreed to the Navy’s prohibition against the use of asphalt materials.”¹⁹

Lead-Based Paint. The Court stated “Maropakakis wanted to seize this opportunity to raise a number of its other delay matters which were completely unrelated to the abatement procedures. . . . [T]here is some question as to when the windows *could have been delivered* were it not for the stop work directive.”²⁰

The Court concluded that “Maropakakis never intended to pursue its complaints at the contracting officer level until confronted with the immediate threat of liability [for liquidated damages].”²¹ The Court then held that in any event none of Maropakakis’ communications rose to the level of a CDA claim, and thus “with the exception of the liquidated damages issue, there is no jurisdiction over the plaintiff’s claims.”²²

If there were no properly presented CDA claims, there would be no need to discuss those claims, leaving the government’s imposition of liquidated damages as the only issue before the court. Nevertheless, the COFC proceeded to decide the issue of Maropakakis’ asserted obligation to certify its non-claims, and held that “the plaintiff has not submitted a certified claim with respect to its assignment of responsibility for delay”²³ Since an assignment of responsibility for delay is not in itself a money claim, the CDA does not require that it be the subject of a certified claim. The Court overlooked the plain terms of the CDA.

The COFC Decision on the Liquidated Damages Counterclaim. The COFC concluded that it only had jurisdiction over the government’s counterclaim for liquidated damages, noting that the government “has no objection, at least not one based on jurisdictional grounds, to Maropakakis’ appeal of the Navy’s \$303,550 assessment of liquidated damages.”²⁴ Accordingly, the court stated: “The Navy’s demand for liquidated damages under the contract – and the plaintiff’s objection to that demand – resulted in a final decision by the contracting officer, and is properly before us.”²⁵ However, the court’s treatment of this issue is even more mystifying than its treatment of jurisdiction.

First, a significant segment of the court’s opinion on liquidated damages is included at the end but as part of the jurisdictional discussion. The Court stated that, at oral argument, the court had asked Maropakakis’ counsel to support its position that “the CDA claim requirements do not apply when those claims [sic] arise in the context of a government claim for liquidated damages.”²⁶ The Court attempted to distinguish *Placeway Construction v. United States*²⁷ and *Roxco Ltd v. United States*²⁸, cited by Maropakakis, and concluded with the astonishing statement that “any CDA requirements that apply to the relief sought by Maropakakis still apply regardless of the fact that the same issues are subsequently raised in the context of a government counterclaim.”²⁹ In other words, issues that relate to non-perfected CDA claims, whatever that means, may not be asserted in defense of an affirmative government claim.

The COFC did not elaborate on this remarkable assertion but decided the issue on a different basis altogether. First, however, the court misstated the law of liquidated damages by suggesting that the only substantive defense to liquidated damages is “an approved extension,”³⁰ and that since Maropakakis had not per-

²³ *Id.* at 204. Maropakakis would have been obligated only to certify a **money** claim but not a claim for adjustment of the contract completion date. See 41 U.S.C. § 605.

²⁴ *Maropakakis*, 84 Fed. Cl. at 205.

²⁵ *Id.* at 206.

²⁶ *Id.* at 204.

²⁷ 920 F.2d 903 (Fed. Cir. 1990).

²⁸ 77 Fed. Cl. 138 (2007). This article addresses these decisions in a later section.

²⁹ *Maropakakis*, 84 Fed. Cl. at 205 (emphasis added).

³⁰ *Id.* at 206. This statement is especially puzzling. If there were an ‘approved extension,’ the CO would not assess liquidated damages. As we note later, there are numerous potential defenses to the assessment of liquidated damages, including all of those that Maropakakis should have asserted.

¹² *Id.* at 194.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 195-96.

¹⁷ *Id.* at 196-202.

¹⁸ *Id.* at 202.

¹⁹ *Id.* at 203.

²⁰ *Id.* at 201 (emphasis in original).

²¹ *Id.* at 202.

²² *Id.* at 203.

fecting any CDA claim for an extension, “Maropakis is entitled to no such extension.”³¹

Next, the court declined to consider Maropakis’ other potential defenses, stating that Maropakis had raised only one defense to the liquidated damages assessment “that the damages imposed in this case constitute a penalty.”³² In this regard, and despite its earlier statement that Maropakis could not assert any defense that was the subject of an unperfected CDA claim, the COFC curiously stated: “Nor does the plaintiff rely on its earlier unsuccessful attempts to persuade the Navy to extend the contract.”³³ The Court then analyzed the “penalty” defense and rejected it, concluding that Maropakis “has not met its burden in opposing the defendant’s summary judgment motion.” The Court then granted judgment on the counterclaim.³⁴

The Federal Circuit Decision. In the Federal Circuit, Maropakis asserted that its July 2002 letter was sufficient to constitute a CDA claim. Maropakis further argued “that it was not required to comply with the jurisdictional prerequisites of the CDA to assert its claim for a time extension as a defense to the government’s counterclaim for liquidated damages.”³⁵

The Court’s Decision on Maropakis’ Affirmative Claim. The CAFC first addressed what it referred to as Maropakis’ assertion that it had “submitted a valid claim for time extensions” sufficient to create CDA jurisdiction. The Court correctly recited the conditions necessary for a valid CDA claim, concluding that Maropakis’ letter was not a valid claim “because it did not provide the Contracting Officer adequate notice of the total number of days actually requested in its extension, it did not state a sum certain, and it did not request a final decision.”³⁶ However, the court erroneously added that “Maropakis’s letter was not certified.” As noted above, there was no requirement for certification, since the letter was not a claim for a sum certain.³⁷

The Court’s Decision on the Government’s Liquidated Damages Counterclaim. Here the court began by discussing *Placeway Construction*³⁸ a principal decision relied on by Maropakis in support of its position that it could assert, as defenses to the liquidated damages claim, its entitlement to time extensions, regardless of whether it had previously presented such matters as CDA claims. The Court noted that in *Placeway* it had not reached the issue whether the Claims Court “had jurisdiction over any of Placeway’s defenses.”³⁹

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 208.

³⁵ *M. Maropakis Carpentry, Inc. v. United States*, No. 2009-5024, 2010 U.S. App. LEXIS 12376, at *6 (Fed. Cir. June 17, 2010).

³⁶ *Id.* at *13. The Court’s reference to “sum certain” is curious, since Maropakis never asserted that it had submitted a money claim.

³⁷ *Id.* at *14. Again, the court misread the CDA certification requirement, which only applies to money claims in excess of \$100,000. 41 U.S.C. § 605(c)(1).

³⁸ 920 F.2d 903 (Fed. Cir. 1983). We discuss *Placeway* below, as well as *Garrett v. Gen. Elec. Co.*, 987 F.2d 747 (Fed. Cir. 1983), cited by the dissent.

³⁹ *Maropakis*, 2010 U.S. App. LEXIS at *16. The notion of “jurisdiction over defenses” is a curious one.

The Court next stated its principal tenet – “even when used as a defense to a government claim, a contractor’s claim for contract modification must adhere to the jurisdictional requirements of the CDA.”⁴⁰ In support, the court cited *Sun Eagle Corp. v. United States*,⁴¹ and *Elgin Builders, Inc. v. United States*.⁴² The court concluded:

Maropakis does not point to any authority that provides an exception to the CDA claim requirements when a contractor’s claim for contract modification is made in defense to a government claim. And we see no reason to create such an exception. 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 claim.⁴³

In closing, the court noted erroneously that “Maropakis’s extension claim was the only defense asserted against the government’s counterclaim”⁴⁴ As previously stated, the COFC had based its decision exclusively on another defense, Maropakis’ assertion that the liquidated damages constituted a “penalty”, and its failure to offer evidence in support of that defense. In fact, the COFC explicitly stated that, in asserting its defense against the liquidated damages, Maropakis did not “rely on its earlier unsuccessful attempts to persuade the Navy to extend the contract.”⁴⁵

Judge Newman’s Dissent. Judge Newman filed a comprehensive and powerful dissenting opinion. She first noted that as a general rule of jurisprudence “[w]hen a claim is within a tribunal’s jurisdiction . . . the tribunal routinely has jurisdiction to consider defenses to the claim” and that the CDA has “not negated” that rule in any respect.⁴⁶

She then characterized the majority opinion as a “curious theory . . . devoid of support”⁴⁷ and discussed *Garrett v. General Electric*,⁴⁸ *Placeway Construction*,⁴⁹ and *Sun Eagle Corp.*⁵⁰, noting that “[p]recedent respects the distinction between a claim and a defense.”⁵¹ Judge Newman’s dissenting opinion concluded:

The issue here is not whether Maropakis perfected a monetary claim of its own, but whether Maropakis is to be permitted to defend against the government’s claim. No rule or precedent holds that a contractor forfeits its right of defense if it does not file its own claim. And the court is misguided in its ruling that the government’s claim for damages cannot be defended against unless the contractor first undertakes the formal procedures of contract modification. . . .

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 govern-

⁴⁰ *Id.* at *18.

⁴¹ 23 Cl. Ct. 465 (1991).

⁴² 10 Cl. Ct. 40 (1986). We discuss both decisions below.

⁴³ *Maropakis*, 2010 U.S. App. LEXIS at *21. (emphasis added).

⁴⁴ *Id.* at *21, 22.

⁴⁵ *M. Maropakis Carpentry, Inc. v. United States*, 84 Fed. Cl. 182, 206 (2008).

⁴⁶ *Maropakis*, 2010 U.S. App. LEXIS at *24-25.

⁴⁷ *Id.* at * 25.

⁴⁸ 987 F.2d 747 (Fed. Cir. 1983).

⁴⁹ 920 F.2d 903 (Fed. Cir. 1990).

⁵⁰ 23 Cl. Ct. 465 (1991).

⁵¹ *Maropakis*, 2010 U.S. App. LEXIS at *28.

ment on a theory of “jurisdiction” . . . supported by this court, is contrary to the purpose of the CDA, contrary to precedent, and an affront to the principles upon which these courts were founded.⁵²

The Cases Cited by the Federal Circuit in *Maropakis*. The decisions cited by both the majority and the dissent in *Maropakis* present a fragmented and disordered landscape.

*Placeway Construction*⁵³ The contractor in *Placeway* filed a number of claims but failed to certify any of them. One claim, for \$297,226, was for the balance of the contract price, which the CO withheld and offset against the government’s delay damages. Although this claim, which became Count II in the appeal, was clearly defective for lack of certification, the Circuit vacated the Claims Court’s dismissal and remanded it “for further proceedings” on the grounds that the setoff was a government claim and the action of the government in taking the setoff served the purpose of a CO’s final decision on the government claim.⁵⁴ In so doing, the court overlooked that Count II was a defective affirmative contractor claim for a sum certain, distinct and separate from the government’s claim.

The majority in *Maropakis* correctly noted that *Placeway* was silent as to defenses the contractor would be able to assert on remand, although the opinion suggested no limit on defenses. The dissent in *Maropakis* was incorrect in positing a conflict with *Placeway* as the issues were not the same. The dissent also erroneously stated that the contractor in *Placeway* “raised the defense that the government had caused some of the delay.”⁵⁵ There was no discussion in *Placeway* as to any defenses the contractor might attempt to raise on remand. *Placeway*, in short, casts no light on the issue.

*Garrett v. General Electric Co.*⁵⁶ Following delivery of aircraft engines under numerous contracts stretching back to 1977, the Navy revoked acceptance on grounds of latent defects, and demanded that GE make corrections at its expense. GE refused, and the CO issued a final appealable decision directing the work. GE appealed to the ASBCA, which held in a divided Senior Deciding Group decision that the CO’s directive constituted a government claim from which an appeal could be taken.⁵⁷ A divided panel of the Federal Circuit affirmed, holding that the Navy’s directive constituted a non-monetary government claim cognizable under the CDA.⁵⁸

Judge Newman’s dissent in *Maropakis* correctly cited *GE* for the proposition that the contractor could appeal the government claim directly, without the necessity of filing a claim of its own.⁵⁹ However, the court in *GE* was not concerned with contractor defenses to a govern-

ment claim and did not discuss the subject.⁶⁰ Judge Newman correctly observed, nevertheless, that the majority in *Maropakis* effectively overruled *GE* by requiring that a contractor in *GE*’s shoes must “perfect” its defenses to a government warranty claim by filing its own CDA-compliant claim, or lose the right to defend altogether.

*Elgin Builders*⁶¹ This little noticed 1986 case in the Claims Court⁶² was cited by the majority in *Maropakis* but was not mentioned in the dissent. *Elgin* filed a series of claims under a Postal Service contract and apparently received final decisions on all of them.⁶³ *Elgin* certified some but not all of the money claims. In return, the CO assessed liquidated damages, but it is unclear whether the CO issued a final decision on this government claim.⁶⁴ *Elgin* then filed suit in federal district court under the Postal Reorganization Act.⁶⁵ The district court transferred the case to the Claims Court on ground that the CDA pre-empted the Postal statute. The Claims Court accepted jurisdiction and addressed the liquidated damages claim.

The Claims Court held that the government’s liquidated damages claim was properly before it, but added that *Elgin*’s “defense . . . would be limited to the nature of, and the issues presented in, the assessment itself – that is, for example, to contest that there was any delay in contract completion.”⁶⁶ The court then added this curious coda:

Where, however, the contractor seeks to contest the assessment of liquidated damages by claiming entitlement to time extensions or other relief, the court is presented with a claim by the contractor against the government and that must first be presented to the CO. . . . [I]f plaintiff intends – in connection with its contest of the assessment – to raise any issue of relief to which it might be entitled, such as the contractor’s claim of entitlement to time extensions, such claims must first be presented to the CO for his decision and this court will not consider such claims until that has been accomplished.⁶⁷

While at first blush *Elgin* appears to presage the Federal Circuit’s opinion in *Maropakis*, upon closer analysis this may not be the case. *Elgin* would foreclose as a defense to liquidated damages any “claim of entitlement to time extensions.” However, *Elgin* would appear not to foreclose a defense of “excusable delay” that is not coupled with a claim for time extension. Such excusable delay might be due to acts of God or of the government and otherwise without the fault or negligence

⁶⁰ The majority in *Maropakis* correctly noted that *GE* “did not discuss *GE*’s defenses to the government claim at issue or whether those defenses themselves involved contractor claims that must adhere to the requirements of the CDA.” *Id.* at *17.

⁶¹ 10 Cl. Ct. 40 (1986).

⁶² *E.g.*, *Swagger Tower Corp. vs. United States*, 12 Cl. Ct. 499 (1987) (noting that filing a claim against the government has different filing requirements than when appealing an assessment of damages by decision of the contracting officer).

⁶³ *Elgin*, 10 Cl. Ct. at 41.

⁶⁴ *Id.* at 44

⁶⁵ *Seeld.* at 43-44; *see also* 39 U.S.C. § 409.

⁶⁶ The reference to delay is enigmatic. Does it mean pure physical passage of days? Or does it refer to contractor-responsible delay? It can be argued that where the physical passage of days is not the contractor’s responsibility, there is no “delay.”

⁶⁷ *Elgin*, 10 Cl. Ct. at 41.

⁵² *Id.* at *29-30.

⁵³ 920 F.2d 903 (Fed. Cir. 1990).

⁵⁴ *Id.* at *906-07.

⁵⁵ *Maropakis*, U.S. App. LEXIS at *26-27. The dissent’s citation to 18 Cl. Ct. at 162 contains no support for this statement.

⁵⁶ 987 F.2d 747 (Fed. Cir. 1993).

⁵⁷ *Gen. Elec. Co.*, ASBCA No. 36005, 91-2 BCA ¶ 23,958 (1991). Since the CO had issued a final appealable decision, one wonders what the result would have been had *GE* not appealed.

⁵⁸ *Gen. Elec.*, 987 F.2d at 750-51.

⁵⁹ *Maropakis*, 2010 U.S. App. LEXIS at *26.

of the contractor.⁶⁸ Where such excusable delay is established, liquidated damages cannot be imposed.⁶⁹ It is axiomatic that these same excuses would entitle Elgin to time extensions under the contract. *Elgin* provides no guidance on this point, however, and for that reason must be regarded with caution. The *Maropakis* court's citation to *Elgin* without analysis sheds no light on the issue.⁷⁰

*Roxco*⁷¹ Roxco, in performance of a military base housing project, raised a number of disputes regarding differing site conditions, constructive changes, government delays and contract breaches. Roxco failed to complete the project and was terminated for default. Its surety took over the project and completed it.⁷² Roxco did not appeal the default termination. However, after completion of the project, Roxco filed an extensive Request for Equitable Adjustment (REA) based on various alleged government actions and inactions.⁷³ The CO rejected the REA, stating it was foreclosed by Roxco's failure to appeal the intervening default termination.

Over a year later, the CO issued a final decision asserting liquidated damages and a demand letter offsetting the liquidated damages against the outstanding contract balance. Roxco filed an amended complaint in the COFC demanding, *inter alia*, reversal of the liquidated damages claim and payment of the contract balance, notwithstanding that Roxco had never filed a certified claim with the CO for the contract balance.⁷⁴ The court, purporting to follow the lead of the Federal Circuit in *Placeway*, upheld Roxco's demand for return of the contract balance against the government's motion to dismiss. In so doing, the court held that the CO's final decision on liquidated damages and simultaneous demand and offset "constitute one document granting a government claim against Roxco."⁷⁵

The COFC in *Maropakis* cited *Roxco* but the Circuit did not, possibly reflecting doubt as to that decision's viability. Moreover, the COFC in addressing *Roxco* offered only the Delphic pronouncement that "[a] close review of that decision indicates that it has only limited application to the issue at hand."⁷⁶

*Sun Eagle*⁷⁷ In this case, cited by both the majority and the dissent, the contractor had filed an uncertified claim for various items and requested a CO final decision.⁷⁸ The total of all claim elements exceeded \$50,000 and thus would have required certification. However,

⁶⁸ FAR 52.249-10.

⁶⁹ *Morganti Nat'l Inc. v. United States*, 49 Fed. Cl. 110, 140 (2001), *aff'd* 36 Fed. Appx. 452 (Fed. Cir. 2002).

⁷⁰ *M. Maropakis Carpentry, Inc. v. United States*, 2010 U.S. App. LEXIS 12376, *18-19 (Fed. Cir. June 17, 2010).

⁷¹ 77 Fed. Cl. 138 (2007).

⁷² *Id.* at 139.

⁷³ *Id.* at 140. REAs are typically not certified CDA claims, but the decision is silent on this point.

⁷⁴ *Id.*

⁷⁵ *Id.* at 148. The decision is almost certainly incorrect, as Roxco's demand for the contract balance was distinguishable from the CO's assessment of liquidated damages and resulting offset, and constituted an affirmative claim for the payment of a sum certain. As noted earlier, the loose language of *Placeway* seems to have been at fault.

⁷⁶ *M. Maropakis Carpentry, Inc. v. United States*, 84 Fed. Cl. 182, 205 (2008).

⁷⁷ 23 Cl. Ct. 465 (1991).

⁷⁸ The plaintiff had filed an earlier document to which the CO had replied with a final decision of denial. *Id.* at 468. However, the COFC held that the earlier document was not a

the COFC held initially that one of the claim elements – demand for recovery of a withholding of \$18,400 in liquidated damages – was, under *Placeway*, a government claim and not a contractor claim, even though the contractor made a demand for payment of money. As a result, the total of contractor claims fell below the \$50,000 certification threshold.⁷⁹

On reconsideration, the COFC reversed its position that the contractor's demand for return of the withheld liquidated damages was a government claim, and redesignated it as a contractor claim.⁸⁰

This court holds that plaintiff is challenging a government claim to liquidated damages and making its own contractor claim to recover amounts withheld for liquidated damages. The latter must be certified.⁸¹

The majority in *Maropakis* cited *Sun Eagle* as support for its holding that contractors cannot assert defenses to government claims unless the contractors have perfected the defenses as contractor claims for adjustment of contract terms.⁸² However, *Sun Eagle* provides no such support. The contractor in *Sun Eagle* made an affirmative claim for return of the liquidated damages, and the COFC held that this was a contractor claim that had to be properly certified.⁸³ *Sun Eagle* did not decide what defenses to liquidated damages a contractor could or could not assert in the absence of a contractor claim for money. The dissent in *Maropakis* correctly noted that the *Sun Eagle* court "did not hold that a contractor raising a defense to a government claim 'must meet the jurisdictional requirements and procedural prerequisites of the CDA.'"⁸⁴

The Unsettling Impact of *Maropakis* on Settled Contractor Defenses Against Government Claims. *Maropakis*, although it concerned only defenses to liquidated damages claims by the government, will likely affect a wide variety of cases involving contractor defenses against government claims.

Government Liquidated Damages Claims

Maropakis bars certain defenses to government liquidated damages claims. In so doing, it runs counter to more than 150 years of Supreme Court precedent. As early as 1853, the court announced the right of a defendant to oppose a liquidated damages claim by asserting a defense of delay caused by the other party.⁸⁵ The Court extended this ruling to government contracts in 1914 by barring liquidated damages when government action caused the delay.⁸⁶ Two years later the court decided a case in which it apportioned responsibility for the delay between the contractor and the government.⁸⁷

"claim" and thus that the final decision was a nullity. *Id.* at 474.

⁷⁹ *Id.* at 474, 476.

⁸⁰ *Id.* at 477, 482.

⁸¹ *Id.* at 477.

⁸² *M. Maropakis Carpentry, Inc. v. United States*, 2010 U.S. App. LEXIS 12376, *20 (Fed. Cir. June 17, 2010).

⁸³ *Sun Eagle*, 23 Cl. Ct. at 477.

⁸⁴ *Maropakis*, 2010 U.S. App. LEXIS at *28 (emphasis in original)

⁸⁵ *Winder v. Caldwell*, 55 U.S. (14 How.) 434, 444 (1853).

⁸⁶ *United States v. United Eng'g & Contracting Co.*, 234 U.S. 236, 241-42 (1914).

⁸⁷ *Carnegie Steel Co. v. United States*, 240 U.S. 156, 163-64 (1916); see also *Robinson v. United States*, 261 U.S. 486 (1932); *J.E. Hathaway & Co. v. United States*, 249 U.S. 460 (1919) (apportioning the delay between the contractor and

Other defenses to these government claims also emerged in Supreme Court and circuit court rulings, including waiver⁸⁸ and substantial completion,⁸⁹ and these precedents continued to be followed after enactment of the CDA.⁹⁰

*Maropak*s, however, would require that any such defense first be raised as a perfected claim against the government – an absurdity when measured against the settled precedent of the federal courts and the practicality of contract delay situations. For example, in an apportioned delay situation, what would happen if a contractor’s affirmative claim asserted an apportionment later determined to be erroneous?⁹¹ Would the contractor’s defense against the assessment of liquidated damages be barred because its affirmative claim, although “perfected” when submitted, was in need of modification because the ultimate apportionment of delay turned out to be different?

government based on their respective causes in a liquidated damages analysis).

⁸⁸ See *Chi., Milwaukee & St. Paul Ry. Co. v. Clark*, 178 U.S. 353 (1900); see also *Peirce v. United States*, 50 Ct. Cl. 371, 381 (Ct. Cl. 1915).

⁸⁹ See *Chipman Decorative Co. v. Security Mut. Life Ins. Co.*, 145 F. 434, 435 (C.C.S.E.D. Penn. 1906) (upholding a jury instruction which allowed substantial completion/acceptance of the premise as a defense against the assessment of liquidated damages); see also *Bosch Magneto Co. v. Rushmore*, 255 F. 465 (2d Cir. 1918).

⁹⁰ *Vern W. Johnson*, ENGBCA No. 5554, 90-1 B.C.A. ¶ 22,571 (1990); *Polote Corp.*, PSBCA Nos. 1297 & 1428, 87-1 B.C.A. ¶ 19,490 (1986).

⁹¹ See *PCL Constr. Servs., Inc v. United States*, 84 Fed. Cl. 601, 603-05 (2008), where the court overturned a contract withhold because of “the inability of the parties to establish a clear apportionment of delays and responsibility for incomplete work” The contractor in that case successfully asserted defenses that could have taken the form of affirmative claims. The court not only upheld the contractor’s right to do so, but also imposed on the government the burden of proof that the withhold was proper, including the burden of refuting the contractor’s defenses.

Default Terminations

Default terminations are a species of forfeiture and courts hold the government to a strict standard of proof in enforcing them.⁹² Contractors routinely assert, as defenses, the government’s material breach,⁹³ government-caused delay or interference,⁹⁴ defective specifications,⁹⁵ breach of the duty of good faith and fair dealing,⁹⁶ impossibility or commercial impracticability,⁹⁷ constructive changes,⁹⁸ differing site conditions,⁹⁹ waiver or election,¹⁰⁰ or superior knowledge.¹⁰¹ Each of these defenses may also constitute an affirmative contractor claim and, under *Maropak*s, would seemingly be barred should the contractor fail to perfect the claim by submitting it to a contracting officer for decision.

Loss Adjustments in Convenience Terminations

A contractor’s settlement costs in a convenience termination claim may be reduced if the government can show that the contract was in a loss position.¹⁰² To defend against this assertion, contractors are entitled to

⁹² See generally *Lisbon Contractors v. United States*, 828 F.2d 759 (Fed. Cir. 1987); *J.D. Hedin Constr. Co. v. United States*, 187 Ct. Cl. 45, 57 (1969) (“[D]efault-termination is a drastic sanction. . .”) (citing *Schlesinger v. United States*, 182 Ct. Cl. 571, 584 (1968)).

⁹³ See, e.g., *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988).

⁹⁴ See, e.g., *Sipco Servs. v. United States*, 41 Fed. Cl. 196, 223 (1998).

⁹⁵ See, e.g., *Logics, Inc.*, ASBCA Nos. 46914 et al., 97-2 B.C.A. ¶ 29,125 (1997); *Sprayberry Constr.*, 87-1 B.C.A. ¶ 19,645 (1987).

⁹⁶ See, e.g., *Abcon Assoc. Inc. v. United States*, 49 Fed. Cl. 678, 691 (2001).

⁹⁷ See, e.g. *Int’l Electronics Corp. v. United States*, 227 Ct. Cl. 208, 231 (1981); see also *Astro Dynamics, Inc.*, ASBCA No. 28320, 83-2 B.C.A. ¶ 16,900 (Oct. 24, 1983).

⁹⁸ See, e.g., *Sipco Servs.* 41 Fed. Cl. at 223.

⁹⁹ See, e.g., *Soletanche Rodio Nicholson (JV)*, ENG BCA No. 5796 et al., 94-1 B.C.A. ¶ 26,472 (1993).

¹⁰⁰ See e.g., *DeVito v. United States*, 188 Ct. Cl. 979(1969); *S. T. Research Corp.*, ASBCA No. 39600, 92-2 B.C.A. ¶ 24,838 (1992).

¹⁰¹ See, e.g., *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1329 (Fed. Cir. 1999).

establish that, had the contract been completed rather than terminated, they were entitled to contract price increases for constructive changes or other compensable acts that would have reduced the projected loss or resulted in a profit.¹⁰³

Under *Maropakis* this well recognized defense against loss adjustment would be forfeited unless the contractor first “perfected” a claim for contract price increase. Yet, because the contract is in terminated status, the equitable adjustment “claims” involve a hypothetically completed contract. For that reason, the “claims” do not constitute demands for a sum certain as such, but instead only relate to the calculation of the amount due the contractor in the termination settlement. The claim evaluation exercise, accordingly, would have no meaning except for the potential loss adjustment issue. *Maropakis* could deprive the contractor of its right to defend against a government loss adjustment assertion where the contractor had not submitted “claims” for price adjustment based on a hypothetically completed contract.

Warranty Claims

Contractors typically interpose numerous defenses to government claims of breach of warranty.¹⁰⁴ These may include faulty government inspection methods, misinterpretation of specifications, government misuse of the product involved, and the like. Most of these defenses can also form the basis of affirmative contractor claims for constructive changes, defective specifications, or breach. Contractors may not want to bring such affirmative claims against an important customer, just as *Maropakis* itself did not plan to bring a claim for contract extension until it was faced with the government’s liquidated damages assertion.¹⁰⁵ Under the Federal Circuit’s ruling, however, a prudent contractor must timely assert and perfect all such claims or risk loss of the defense later, even at the risk of alienating an important customer.

Defective Pricing

In defective pricing cases,¹⁰⁶ contractors may assert as defenses that the contract was competitively awarded or that the contract meets the commerciality test, with the result that the Price Adjustment clauses are inoperative and should not have been included in the contract.¹⁰⁷ Both defenses are matters that could be addressed as affirmative CDA claims for adjustment of contract terms. *Maropakis* could bar those defenses, absent perfected affirmative claims by the contractor for adjustment of the contract, even where the contractor has no interest in changing the contract terms except to defend against the government’s claim.

Form 1 Cost Disallowances

DCAA’s Form 1 cost disallowances are government claims.¹⁰⁸ Among possible defenses to such a claim are assertions that the contractor and the government reached an advance agreement with respect to the cost in question. The agreement may not have been reduced to writing, and thus could have been asserted by the contractor as the basis for an affirmative claim for adjustment of contract terms. Under *Maropakis*, the viability of such a defense must now be questioned.

Practical Considerations. Here we discuss the practical consequences of the *Maropakis* decision and how contractors and their counsel might cope with them. We will also consider how *Maropakis* could affect government contracting officers and their counsel.

Suppose, as in *Maropakis*, the government asserts a right to liquidated damages (or any other money claim) and withholds money to collect the claim. Under *Maropakis*, the contractor must file an affirmative claim with the contracting officer asserting the contractor’s defenses. However, even apart from the holding in *Maropakis*, the contractor would be well advised to demand return of the withheld sums by filing a claim. If the amount exceeds \$100,000, it would require certification under the CDA. By filing such a claim, the contractor would not only preserve its right to assert its defense under *Maropakis* but also be entitled to collect interest on the withheld sums in the event the defense turns out to be successful.

Now suppose the government asserts a right to some relief but does not withhold money. Under *Maropakis*, the contractor would still need to perfect any defense as a “claim” by submitting it to the contracting officer and certifying it under the CDA. In light of the *Maropakis* ruling, the contractor would be well advised to identify all possible defenses, then submit them to the CO as a “claim” and “certify” them, even though the CDA itself does not require certification of non-monetary claims. This may apply to a wide variety of defenses to government claims, as discussed above. Upon receipt of a certified non-monetary claim (which, again, the CDA does not contemplate), contracting officers who are not familiar with *Maropakis* may properly conclude that the contractor had bad legal advice or had not read the statute. For clarification, the contractor should consider inserting explanatory language such as the following in a letter accompanying the certification:

The contractor is certifying its non-monetary defenses to the government’s claim because of the ruling of the United States Court of Appeals for the Federal Circuit in *M. Maropakis Carpentry Inc. v. United States*, Fed. Cir. No. 2009-5024, 6/17/10, even though the Contract Disputes Act requires certification only in the case of affirmative contractor monetary claims that exceed \$100,000.

What then happens to contractor defenses that are discovered after the initial “claim” submission outlining the contractor’s defenses? For example, defenses may become apparent for the first time in discovery or even in trial as the facts unfold. Under *Maropakis*, the contractor would need to submit new or revised “certified claims” to the contracting officer and seek leave to amend its complaint to include those defenses each time one of them came to light. If the trial has begun, the contractor may need to request a stay or continu-

¹⁰² See FAR 49.203; Systems & Computer Info., Inc., ASBCA 18458, 78-1 BCA ¶ 12,946 at 63,138.

¹⁰³ See Douglas Corp., ASBCA 8566, 69-1 B.C.A. ¶ 7578 at 35,157 (1969) (entitling contractor to adjustment due to defect in government provided specifications); see also John Cibinic, Jr., Ralph C. Nash, Jr., James F. Nagle, *Administration of Government Contracts* 1118-20 (4th Ed. 2006).

¹⁰⁴ E.g., *Garrett v. Gen. Elec. Co.*, 987 F.2d 747 (Fed. Cir. 1983).

¹⁰⁵ *M. Maropakis Carpentry, Inc. v. United States*, 84 Fed. Cl. 182, 202 (2008).

¹⁰⁶ 10 USC § 2306a; 41 USC § 254A.

¹⁰⁷ FAR 15.403-1(b).

¹⁰⁸ *Gen. Dynamics Corp., Elec. Boat Division*, ASBCA No. 25919, 82-1 B.C.A. ¶ 15,616, at 77,105-06 (1982).

ance. Otherwise, the contractor runs the risk of being stripped of its right to rely on a defense that is manifested for the first time in the government's own documents produced in discovery or through the testimony of government witnesses.

For these reasons, the contractor must be vigilant in pursuing possible defenses in document discovery, interrogatories and depositions. The contractor must also be prepared to file a new or amended "certified claim" once information relating to any potential defenses becomes apparent.

Could *Maropakis* also apply to limit the presentation of government claims? Specifically, if the government asserts a claim, must it also render a contracting officer final decision on all of its theories at the outset on pain of forfeiture later? For example, cases have held that a termination for default can be upheld even if the original basis asserted by the government turns out to be defective but a new, different and valid basis is presented for the first time at trial.¹⁰⁹ Under *Maropakis* would the government be precluded from asserting any grounds of recovery not stated in the contracting officer decision? Will the contractor be able to defeat an otherwise valid termination for default because the government did not "perfect" its termination for default claim by rendering a contracting officer decision?

Whether or not *Maropakis* applies to limit government claims, contractors would be well advised to assume that *Maropakis* would apply to *them* and for that reason submit a "claim" to the contracting officer stating all envisioned defenses to the government's new claim theories as soon as they become evident. The contracting officer in that case would then be obligated to

¹⁰⁹ See *Shields Enters., Inc. v. United States* 28 Fed. Cl. 615 (1993); *Am. Photographic Indus., Inc.*, ASBCA No. 29272, 90-1 B.C.A. ¶ 22,491 (1990).

issue a new decision, and the contractor would have to amend the pleadings to ensure that the issues were joined.

Suppose, however, the new basis for default is not clear from the evidence but the government asserts the ground for the first time in its post-hearing briefs without requesting a new contracting officer decision. It is possible that *Maropakis* in that instance would preclude the government from relying on the new ground because it did not "perfect" that ground in a contracting officer decision.

These are just some of the problems that will face contractor and government counsel as they struggle to understand and develop strategies to cope with the implications of *Maropakis*. In summary, *Maropakis* is the latest in a series of decisions in which, as Professor Ralph Nash has observed, the Federal Circuit has departed from the legacy of the former Court of Claims as the "conscience of the government."¹¹⁰ *Maropakis* is a seriously flawed decision that, unless corrected by the Federal Circuit, has the potential for causing substantial mischief.

¹¹⁰ Ralph C. Nash, Jr., *The Government Contract Decisions of the Federal Circuit*, THE NASH & CIBINIC REPORT ROUNDTABLE 6-17 (2009); see also John S. Pachter, *The Incredible Shrinking Contracting Officer*, 39 PUB. CONT. L.J. ____ (forthcoming Summer 2010) (paper submitted to the 16th Annual Federal Procurement Institute, sponsored by the American Bar Association Section of Public Contract Law, the National Contract Management Association and the Federal Bar Association Government Contracts Section on March 4-5, 2010 in Annapolis, Maryland); Richard C. Johnson, Stephen D. Knight, John S. Pachter & D. Joe Smith, *Geren v. Tecom Inc.: The Federal Circuit Creates a New FAR Cost Principle*, 4 GOV'T CONTRACT COSTS, PRINCIPLE & ACCOUNTING REPORT, Issue 4 (2009); Stephen D. Knight, *Federal Circuit Costs Decisions Bode Ill for Contractors*, 39 THE PROCUREMENT LAWYER, No. 2 (2004).