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Default terminations – ASBCA lacks jurisdiction over excusable delay, constructive change defenses not presented to contracting officer for final decision

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PilieroMazza previously explained[1] that a termination for default is considered a contracting officer's final decision, which may then be appealed.

While this is still the case, a recent decision from the Armed Services Board of Contract Appeals (ASBCA) highlights the importance for prime contractors — especially those who anticipate that their contract may be (or already has been) terminated for default — to preserve all relevant defenses to termination in advance of an appeal to the Board of Contract Appeals or Court of Federal Claims.

Back in 2010, the Federal Circuit issued a decision in *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010), a decision that has been widely criticized among Government Contract attorneys and contractors alike.

> Prime contractors that are considering challenging a termination for cause need to first review any and all defenses to termination to sufficiently determine whether or not they need to file certified claims with the contracting officer in conjunction with an appeal.

In *Maropakis*, Maropakis challenged the government's liquidated damages claims by asserting an excusable delay defense. However, the Federal Circuit held that Maropakis's excusable delay defense was actually an affirmative claim.

And, because this claim had not been presented to the contracting officer, the Federal Circuit affirmed that the Court of Federal Claims lacked jurisdiction to entertain such a "defense."

Since *Maropakis*, there has been a growing trend of decisions that limit the *Maropakis* doctrine to defenses that seek payment of money or the adjustment/interpretation of contract terms.

However, more recently, the Board has become more inclined to rely on *Maropakis* to reject defenses of excusable delay or constructive change on termination for default appeals in a more blanket attempt to reject the defense, even if being used as a non-monetary claim for lack of jurisdiction.

For instance, in *DCX-CHOL Enterprises, Inc.*, ASBCA No. 61636 (July 11, 2019), *affirmed* (Dec. 9. 2019), the ASBCA determined that just filing an appeal of the termination for default decision may not be enough if a contractor wants to assert excusable delay or constructive changes defenses.

In *DCX*, the contractor filed an appeal challenging the termination for cause, and raised defenses of excusable delay, constructive change to the contract, and government waiver of the schedule.

The government moved to strike the constructive change and excusable delay defenses, claiming that the ASBCA lacked jurisdiction because the contractor never filed constructive change or excusable delay claims with the contracting officer.

The ASBCA ultimately held that DCX-CHOL's excusable delay and constructive change defenses were claims that had to be submitted to the contracting officer for a final decision because the defenses seek to change the terms of the contract.

Since the contractor had not submitted these claims to the contracting officer, the ASBCA held it lacked jurisdiction to decide the merits of these claims.

Prime contractors that are considering challenging a termination for cause need to first review any and all defenses to termination to sufficiently determine whether or not they need to file certified claims with the contracting officer in conjunction with an appeal.

Please contact a member of PilieroMazza's[2] Claims and Appeals Team[3] for assistance.

This is just one of the many nuances to consider when filing a claim or appeal.

Notes

1 https://bit.ly/2HX89l3

2 https://bit.ly/3c3QndY

3 https://bit.ly/2ST7esg

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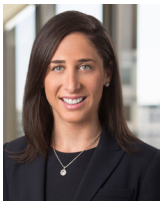

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