UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: January 5, 2016

CBCA 2878

JANE MOBLEY ASSOCIATES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Ralph C. Thomas, III of Barton Baker Thomas & Tolle, LLP, McLean, VA, counsel for Appellant.

Catherine Crow and John S. Tobey, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SHERIDAN**, and **KULLBERG**.

SHERIDAN, Board Judge.

Respondent, General Services Administration (GSA or Government), moves to dismiss counts I, III, IV, "Relief Requested," and portions of count II of the second amended complaint of appellant, Jane Mobley Associates, Inc. (JMA). The motion requests dismissal for lack of jurisdiction, or in the alternative, failure to state a claim for which relief may be granted. For the reasons set forth below, we deny respondent's motion.

Background

On February 5, 2010, GSA awarded task order GS-P-06-10-GX-0012 to JMA in the amount of $99,940.25 under JMA's Federal Supply Schedule contract GS-23F-0354P. Pursuant to the task order, JMA was to provide environmental communications consultant services necessary to support the Government's response to public health concerns arising from complaints made by current and former government employees that the GSA-controlled Bannister Federal Complex in Kansas City, Missouri, might be contaminated.

The task order was originally awarded as a firm-fixed-price contract for the period February 5 to March 8, 2010. By amendment dated March 8, 2010, the task order was extended for two additional months, from March 9 to May 10, 2010. The modification increased the obligated funds for the task order by $134,400, from $99,940.25 to $234,340.25. The modification further provided:

> 4. Jane Mobley shall provide documentation upon invoicing showing the hours invoiced for during that monthly period. Jane Mobley will be paid based on the hours documented and verified for each labor category and task during that month. Monthly payment shall not exceed documented hours. If at any time services are no longer needed the Government reserves the right to cancel services and reimburse Jane Mobley for any direct labor costs incurred prior to cancellation. Any over-committed funds shall be de-obligated from the task order.
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> 5. All other terms and conditions remain unchanged.

Upon contract completion, the task order was closed out on May 10, 2010, in a formal contract closeout meeting; the closeout was confirmed by the GSA contracting officer in a subsequent report. GSA paid JMA $234,338.08 under the contract.

Some time after contract completion, GSA's Office of Inspector General (OIG) conducted an audit concerning the award and administration of the JMA task order. In its subsequent report issued January 10, 2012, the OIG concluded that JMA had overbilled GSA for various labor costs in an amount totaling $40,105.69, based on JMA's invoices, timesheets, and supporting documentation submitted during the extension period, which included $23,941.92 for labor costs billed under invoice 306 and $16,163.77 for labor costs billed under invoice 405. OIG further found JMA was indebted to GSA in the amount of $971.16 for JMA's failure to include the required 0.5% prompt payment discount terms on its invoices. However, OIG also determined that JMA was entitled to an upward adjustment of $8241.08 for allowable subcontractor costs, which it deducted from the claimed amount

of overpayments "to ensure that [its] refund calculation was not overstated." The OIG therefore recommended that GSA take steps to recoup $32,835.77 in overbilled amounts.

On January 9, 2012, following the OIG's recommendation, GSA issued to JMA a notice of demand for the recovery of the alleged overpayments in the amount of $32,835.77. The letter further indicated that if JMA disputed the assessment, it could do so in writing within thirty days of the date of the notice. By letter dated January 23, 2012, JMA refuted the OIG's reported findings and asserted that no overpayment occurred on the task order, on the grounds that the task order was contracted at a firm-fixed price, successfully closed out, and completed with a rating of "Excellent" in GSA's contractor performance assessment report; that each party fulfilled its obligations under the contract; that labor rates and labor hours were not germane to payment under the firm-fixed-price contract; and that the language regarding the tracking of labor hours contained in the "Description" section of the task order modification was meaningless and irrelevant, as the contracting officer had assured JMA that the language would not alter the firm-fixed-price nature of the contract. Further, JMA argued that it was not required to offer a prompt payment discount on its invoices, as the task order incorporated the prompt payment discount terms by reference. Thus, the Government could have withheld the discount at its discretion when making timely payment to the contractor, but it elected not to do so. Accordingly, JMA concluded, it was not indebted to GSA for any of the $32,835.77 demanded.

On June 1, 2012, the GSA contracting officer (CO) issued a final decision on the dispute for overpayment as addressed by the earlier notice of demand and JMA's response letter. However, the CO determined that JMA overbilled GSA by $21,981.85 under invoice 306 and by $14,263.29 under invoice 405. The CO also found JMA owed slightly more in prompt payment discounts – $990.46 – and was not entitled to any upward equitable adjustment for subcontractor costs incurred during the extension period. The decision further addressed each of JMA's justifications provided in its response to the GSA demand notice and found that each of these defenses to the overpayment was without merit. GSA concluded JMA was indebted to the United States in the new amount of $37,235.60.

JMA timely appealed the final decision to the Board, where the case was docketed as CBCA 2878. Thereafter, the parties engaged in discovery. The Board earlier denied respondent's motion to dismiss count IV of JMA's complaint in a November 14, 2012, decision. *Jane Mobley Associates, Inc. v. General Services Administration*, GSBCA 2878, 12-2 BCA ¶ 35,178. In August 2013, the GSA moved to dismiss counts I, III, and IV, "Relief Requested," and portions of count II of the amended complaint. The Board declined to rule on the motion until after a scheduled hearing had been completed.

In several orders preceding the hearing, the presiding judge clarified her understanding regarding the scope of the appeal – namely, that the sole question before the Board is whether GSA is entitled to recover the $37,235.60 it seeks for alleged overpayments made to JMA on the task order. Immediately preceding the hearing, by Order dated August 26, 2015, in response to respondent's motion in limine, the judge again noted that the only question before the Board is whether GSA is entitled to recover the alleged overpayments it made, and

> [t]o the extent that, for example, appellant believes the GSA contracting officer violated some statute or regulation and that should preclude GSA's recovery (related to the $37,235.60 in issue), evidence and arguments relating to that argument will be considered by the Board in deciding this appeal, because it relates to the claim before us[.] What will not be considered is a separate claim (seeking money damages) for GSA's purported violation of statute or regulation above or beyond the $37,235.60. So too, the Board will not restrict appellant from presenting evidence and arguments that the contract is not a time and materials contract. That issue goes to the heart of the dispute and is not a new or separate "claim" as respondent seems to posit.

Prior to the hearing, the presiding judge again noted that the scope of the appeal is limited to whether GSA was entitled to recover the $37,235.60 sought in its final decision; appellant reaffirmed that it had no separate monetary claims before the Board. In its opening statement, appellant offered that the thrust of its case was that the Government cannot assert a demand for overpayment under the terms of a firm-fixed-price contract, and as such, JMA does not owe GSA the amount sought. Following the three-day proceeding, the parties submitted post-hearing briefs. Appended to respondent's brief was a new motion to dismiss. Relying on new case law developments since the filing of its original motion to dismiss in 2013, GSA now moves to dismiss for lack of jurisdiction or, in the alternative, for failure to state a claim upon which relief may be granted, counts I, III, IV, "Relief Requested," and portions of count II of JMA's second amended complaint. The basis of respondent's motion is that the Board must dismiss for lack of jurisdiction the various defenses raised by JMA, as they present distinct "claims" that have not been properly submitted to the contracting officer for final decision as required by the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (2012) (CDA).

Discussion

I. Jurisdiction and Standard of Review

A. Jurisdiction

The CDA delineates the bounds of the Board's jurisdiction over contract disputes, and "[t]he strict limitations of the CDA constitute jurisdictional prerequisites to any appeal." *ARI University Heights, LP v. General Services Administration*, CBCA 4660, 15-1 BCA ¶ 36,085, at 176,187 (quoting *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 35,928, at 175,603 (citing *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004)). Importantly, "jurisdiction . . . requires both a valid claim and a contracting officer's final decision on that claim."[1] *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010). Because the CDA does not define the term "claim," we look to the definition provided in Federal Acquisition Regulation (FAR) Disputes clause that defines a "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 CFR 52.233-1(c) (2014); *see Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575-76 (Fed. Cir. 1996 (en banc). "The claim "need not be submitted in any particular form or use any particular wording, [but] it must contain a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Maropakis*, 609 F.3d at 1327 (internal citations and quotation marks omitted).

These jurisdictional rules apply with equal force even when a claim is asserted as a defense to a government claim. *Maropakis*, 609 F.3d at 1331 ("[W]e 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 action." (emphasis added)). Thus, just as jurisdictional defects preclude the Board from considering the merits of a contractor's affirmative claim, *see, e.g.*, *ARI University Heights*, where a contractor's defense to a government claim is in the nature of a contract adjustment and fails to meet the CDA's requirements, the Board lacks jurisdiction to entertain that defense. *Maropakis*, 609 F.3d at 1331-32; *see also TPL, Inc. v. United States*, 118 Fed. Cl. 434, 441-45 (2014) (reasoning *Maropakis* precluded its defenses of impossibility/impracticability, mutual mistake, and

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[1] Neither party challenges the Board's jurisdiction over JMA's appeal of the contracting officer's decision which makes the underlying government claim for the alleged overpayments.

unconscionability because such defenses seek adjustment of contract terms and had not been submitted for final decision); *K-Con Building Systems, Inc. v. United States*, 114 Fed. Cl. 722, 735 (2014) (finding jurisdiction over contractor's properly presented claim of government-caused delay); *EKRA Construction Co.,* ASBCA 57618, 12-2 BCA ¶ 35,129, at 172,474 (finding contractor's "directed change" defense was, in essence, a constructive change claim requiring a final decision).

In contrast, the rule of *Maropakis* is inapplicable where the contractor's defense does not seek an adjustment of contract terms. *Total Engineering, Inc. v. United States*, 120 Fed. Cl. 10, 15-16 (2015) (distinguishing the *Maropakis* contractor's defensive equitable adjustment claim from Total's defective specifications defense).[2] Where the contractor is merely "appealing and defending a Government claim [and] not asserting its own claim for relief," the strict rules of the CDA do not apply to the contractor's defense. *Id*. at 15 ("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."). A tribunal presented with such an appeal would thus have jurisdiction over the contractor's defense. *Id*. at 16.

In light of the foregoing, in assessing our jurisdiction under the rule of *Maropakis* and its progeny, we must now be mindful of the critical difference between "a contractor's affirmative CDA claims arising out of or relating to the contract . . . [and] a contractor's defenses against [a government claim] through an attack of its factual underpinnings." Steven L. Schooner, *A Random Walk: The Federal Circuit's 2010 Government Contracts Decisions*, 60 Am. U. L. Rev. 1067, 1098 (2011) (discussing prior decisions of the boards of contract appeals and predecessor courts of the Court of Appeals for the Federal Circuit and the Court of Federal Claims related to government claims assessing liquidated damages and contractors' defenses against those claims). In this regard, the following is instructive:

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[2] Similarly, a contractor does not advance a CDA "claim" where the contractor asserts ordinary common law affirmative defenses. These defenses do not seek an adjustment of contract terms, and as such, *Maropakis* does not dictate that these defenses be submitted to the contracting officer for a final decision. *Palafox Street Associates, L.P. v. United States*, 122 Fed. Cl. 18, 33 (2015) (citing *Sikorsky* and discussing estoppel, waiver, laches, and statute of limitations); *Sikorsky Aircraft Corp. v. United States*, 102 Fed. Cl. 38, 48 n.14 (2011) (discussing accord and satisfaction, laches, and waiver); *AFSA International Construction Industry & Trade, Inc.*, ASBCA 57880, 14-1 BCA ¶ 35,736 (discussing waiver).

> The key to understanding this distinction is in the form of relief requested. An affirmative CDA claim is *an attempt to modify or adjust the contract* to counter the liquidated damages assessment (e.g., compensable time extensions as a result of government delays). A *factual defense* to a liquidated damages assessment merely serves *to attack the assessment itself* (e.g., the government's assessment was incorrect because the delay was excused as a result of government delays). Plainly stated, *a CDA claim seeks affirmative relief under the contract through a contract adjustment*; a factual defense only attempts to *reduce or eliminate* the liquidated damages assessment.

Id. (emphasis added) (footnote omitted).

B. Standard of Review

When ruling on a motion to dismiss an appeal for lack of subject matter jurisdiction:

> we "[accept] as true the undisputed allegations in the complaint and draw all reasonable inferences in favor of the plaintiff." However, once a party has presented sufficient facts to challenge the Board's jurisdiction to hear a dispute, the party bringing the action must establish jurisdiction by a preponderance of the evidence.

ARI University Heights, 15-1 BCA at 176,187 (citations omitted).

Earlier in this litigation, in *Jane Mobley Associates, Inc.*, 12-2 BCA ¶ 35,178, we denied a similar motion to dismiss for failure to state a claim made by respondent, citing longstanding precedent and the elements necessary to support such a motion:

> Dismissal for failure to state a claim should not be granted unless it appears beyond doubt that the appellant cannot prove any set of facts in support of its claim that would entitle it to relief. Controlling precedent at the Court of Appeals for the Federal Circuit[] noted recently that "[i]n reviewing a dismissal for failure to state a claim, we must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant. Dismissal for failure to state a claim should not be granted unless it appears beyond doubt that the appellant cannot prove any set of facts in support of its claim that would entitle it to relief."

Id. at 172,600-01 (quoting *Blackstone Consulting, Inc. v. General Services Administration*, CBCA 718, 08-1 BCA ¶ 33,770, at 167,160; *Charles Engineering Co. v. Department of Veterans Affairs*, CBCA 582, 07-2 BCA 33,698, at 166,831 (citations omitted)).

II. Does the Board Possess Subject-Matter Jurisdiction over JMA's Defenses and Relief Requested?

As noted above, GSA asserts that the Board lacks jurisdiction over the various defenses JMA has raised, as they constitute independent contractor "claims" that fail to satisfy the requirements of the CDA because they were not submitted to the contracting officer for a final decision. We consider each defense in turn.

A. Count I - Violation of Statute or Regulation

In count I, JMA alleges that, in issuing the task order modification, GSA violated provisions of FAR 16.2 defining firm-fixed-price contracts. This is not a "claim" within the meaning of the CDA. Rather, JMA merely attacks the Government's claim of alleged overpayment with the factual allegation that the parties understood that the contract was always firm-fixed-price and that the task order modification did not alter the nature of the contract. *See* Appellant's Post-Hearing Brief at 31 ("In her Final Decision, as well as her testimony, GSA's [c]ontracting [o]fficer ("[C]O") confirmed JMA's assertion that she gave verbal clarification to JMA that the language in the contract modification did not change the terms of the contract from a firm fixed price task order.") (internal footnote omitted). JMA does not seek an adjustment of contract terms or other entitlement under the contract due to the alleged violation of statute or regulation and is therefore not required to submit this defense as a "claim" for a final decision. *Total Engineering*, 120 Fed. Cl. at 15. Accordingly, we have jurisdiction over count I.[3]

B. Count II - The Government's Demand Is Invalid

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[3] The line of cases following *American Telephone & Telegraph Co. v. United States*, 177 F.3d 1368 (Fed. Cir. 1999), which GSA cites in support of its contention that JMA has presented a "claim," are readily distinguishable. In those cases, the contractor was advancing its own affirmative claim – as opposed to raising a defense to a government claim – and sought relief on the ground that the contract was void *ab initio* due to the government's failure to comply with applicable regulations regarding the award of firm-fixed-price research and development contracts under the Defense Appropriations Act of 1987. JMA does not advance a similar claim here.

In count II, JMA alleges GSA's demand is invalid because the task order was a firm-fixed-priced contract, the parties fulfilled their obligations under the contract, and JMA was paid the full amount under the contract. JMA further alleges that the Government's demand for a prompt payment discount is invalid because it was within GSA's discretion to retain the discount, but the agency elected not to retain it. These allegations, likewise, are not "claims" within the meaning of the CDA. JMA does not seek an adjustment of contract terms which might entitle it to relief under the contract due to the alleged invalid demand. *Total Engineering*, 120 Fed. Cl. at 15. Instead, JMA asserts factual allegations of GSA's own conduct in the administration of the contract, which it asserts undercuts the propriety of the agency's demand for overpayment. *See, e.g.*, Appellant's Post-Hearing Brief at 44 ("In the instant case GSA cannot demonstrate that the proximate cause of its failure to obtain JMA's prompt payment discount was because . . . JMA's terms were not on the invoice."). Therefore, we conclude the Board has jurisdiction over count II.

C. Count III - Breach of Contract

From the outset of the appeal, JMA has asserted that "GSA is in breach of contract for failure to follow the regulatory terms of a [f]irm [f]ixed [p]rice contract by issuing a modification with terms contrary" to applicable regulations, which led GSA to demand from JMA a refund to which the Government was not entitled. While this allegation appears in both its original and amended complaints and its pre-hearing brief, JMA did not present any evidence in support of this argument during the hearing. As well, JMA did not discuss this allegation in either its post-hearing brief or its reply to GSA's post-hearing brief. This leads to the conclusion that JMA's position in this regard has been abandoned. *See, e.g.*, *Steenberg Construction Co.*, IBCA 520-10-65, 72-1 BCA ¶ 9459, at 44,056 n.247. Accordingly, there is no jurisdictional issue to decide related to count III.

D. Count IV - Partial, Unfair, and Inequitable Treatment

In count IV, JMA contends that GSA "improperly compromised JMA's [f]irm [f]ixed [p]rice contract and failed to ensure that JMA received impartial, fair, and equitable treatment as required by the FAR." Second Amended Complaint ¶ 31. As we observed in our prior decision addressing count IV, "[t]he issue raised by this count is whether respondent, by changing the practice as to payments through the modification, violated the implied covenant of good faith and fair dealing present in all contracts." 12-2 BCA at 172,600. "'The covenant of good faith and fair dealing . . . imposes . . . the duty not to interfere with the other party's *performance* and not to act so as to destroy the *reasonable expectations* of the other party regarding the *fruits of the contract*.'" *Metcalf Construction Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014) (quoting *Centex Corp. v. United States*, 395 F.3d 1283,1304 (Fed. Cir. 2005). "The implied duty of good faith and fair

dealing . . . prevents a party's acts or omissions that, though not proscribed by the contract expressly, are inconsistent with the contract's purpose and deprive the other party of the contemplated value." *Id*. (citing *First Nationwide Bank v. United States*, 431 F.3d 1342, 1350 (Fed. Cir. 2005)).

While a claim of breach of the implied duty of good faith and fair dealing may be asserted as a "claim" within the meaning of the FAR entitling a party to relief under the contract, *see, e.g.*, *Metcalf*, 742 F.3d at 991, JMA does not seek a contract adjustment or separate monetary relief for the alleged breach. *See Total Engineering*, 120 Fed. Cl. at 15. Rather, JMA raises factual defenses to the Government's claim to demonstrate GSA took actions that were "inconsistent with the [firm-fixed-price] contract's purpose" and which may "deprive [JMA] of the contemplated value" under the contract. *Metcalf*, 742 F.3d at 991. As such, count IV is not a CDA "claim," and we have jurisdiction over this count.

E. Relief Requested

GSA asserts the Board lacks jurisdiction over appellant's requested relief because the underlying "claims" supporting the prayers for relief do not satisfy the CDA's final decision and sum certain requirements. For the reasons above, we find that the defenses raised in counts I, II, and IV are not "claims" requiring compliance with the CDA and that we accordingly have jurisdiction over each count and, thus, over the relief requested under each.[4] However, we briefly address two of GSA's additional arguments.

First, GSA correctly asserts that we do not possess authority to grant injunctive relief. *Eyak Technology, LLC v. Department of Homeland Security*, CBCA 1975, 10-2 BCA ¶ 34,538. However, we may grant other relief, such as finding that JMA is entitled to retain the alleged amount of overpayments. *Id*. at 170,340 ("[W]e are not limited to granting only the relief sought in the complaint." (citing Fed. R. Civ. P. 54(c)). Thus, JMA's "failure . . . to properly articulate the remedy available from the Board does not deprive us of jurisdiction." *Id*.

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[4] The case GSA cites for the opposite conclusion, *Skip Kirchdorfer, Inc.*, ASBCA 40515, et al., 93-3 BCA ¶ 25,899 (*SKI*), is distinguishable in that the appeal there concerned two separate contracting officer's final decisions denying the *contractor's claims* for time extensions due to excusable delays under its respective contracts with the Navy. The Government first moved to strike the prayers for relief in the complaint because the claims had not been quantified and later moved to dismiss for lack of jurisdiction because they had not been certified. To the extent that *SKI* did not involve contractor defenses to a government claim, the decision is inapposite.

Second, GSA is incorrect that the Board may not award attorney's fees as requested. As we noted in *TST Tallahassee, LLC v. Department of Veterans Affairs*, CBCA 1576, 11-1 BCA ¶ 34,672, at 170,806, "Claims for attorney's fees and costs are considered under the Equal Access to Justice Act, 5 U.S.C. § 504 (2006). Applications for attorney's fees and costs are considered *after* Board decisions are final, in accordance with [Board] Rule 30 (48 CFR 6101.30 (2009))." (emphasis added). GSA directs us to our decision in *Sigma Services, Inc. v. Department of Housing & Urban Development*, CBCA 2704, 12-2 BCA ¶ 35,173. However, that case does not stand for the proposition that a party may not request attorney's fees and costs at *all*; rather, we held such costs will not be awarded in connection with a party's preparation of a response to a *motion* during the pendency of an appeal. JMA's request concerns costs associated with pursuing its *appeal*, not any interim motion. JMA's entitlement to attorney's fees and costs, if any, will not be determined until after the Board has rendered a decision on the merits of the appeal and, if JMA is the prevailing party, it files an application for such fees and costs.

III. Has JMA Failed to State a Claim upon which Relief May Be Granted?

The Government also seeks dismissal of the various counts for failure to state a claim upon which relief can be granted. We grant such a motion if, viewing the allegations in favor of the nonmovant, the appellant can prove *no* facts entitling it to relief. *Jane Mobley Associates, Inc.*, 12-2 BCA at 172,600-01 (citing *Blackstone Consulting, Inc. v. General Services Administration*, CBCA 718, 08-1 BCA at 167,160). Viewing the allegations in favor of JMA, we find that, under counts I and II, JMA has proffered evidence that, if found to be credible, may entitle it to relief – including record evidence that the contract was awarded as firm-fixed-price; that GSA representatives informed JMA that the task order modification would not change the firm-fixed-price nature of the contract; and that it was within GSA's discretion to take advantage of the prompt payment discount. Accordingly, as to those counts, JMA has stated a claim upon which relief may be granted. Concerning count IV, we do not disturb our earlier decision. *Id*.

IV. Conclusion

We conclude that the Board has jurisdiction over the defenses raised in counts I, II, and IV of appellant's complaint and that in each count JMA has stated a claim upon which relief can be granted. In so doing, we are heedful of Federal Circuit precedent in this nuanced area within the realm of CDA litigation. However, we are also mindful of the history and purpose of the CDA, which was promulgated to accord contracting parties full due process in, and to facilitate efficient adjudication of, contract disputes – and our important role in fulfilling that purpose. *See, e.g.*, S. Rep. No. 95-1118, at 12-13 (1978)

(discussing the role of the agency boards of contract appeals in dispute resolution and observing, "The aim of any remedial system is to give the parties what is due them as determined by thorough, impartial, speedy, and economical adjudication."). That purpose is frustrated when we "impose [upon the contractor] a meaningless duplicative administrative exhaustion requirement not contemplated by the CDA." *Total Engineering*, 120 Fed. Cl. at 15. By enforcing this "requirement," in addition to doing a disservice to the contractor, we run afoul of United States Supreme Court precedent advising lower courts to refrain from imposing – in the absence of a clear directive from Congress – jurisdictional bars based on "claim-processing rules." *See Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) ("Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of this term. We have urged that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction. Other rules, even if important or mandatory, should not be given the jurisdictional brand." (citations omitted)). In 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." *Total Engineering*, 120 Fed. Cl. at 15.

Decision

For the reasons set forth above, respondent's motion is **DENIED**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

H. CHUCK KULLBERG
Board Judge