BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of	)	
Manuel Luis Construction Co., Inc.	)	
	)	**Docket No. MSBCA 2875**
Under SHA Contract No. BA6885184	)	

APPEARANCE FOR APPELLANT: **Scott A. Livingston**
Michael A. Miller
Rifkin, Livingston, Levitan & Silver, LLC
Bethesda, Maryland

APPEARANCE FOR RESPONDENT: **Ian R. Fallon**
John Y. Lee
Assistant Attorneys General
Baltimore, Maryland

MEMORANDUM ORDER BY BOARD MEMBER DEMBROW

This contract dispute comes before the Maryland State Board of Contract Appeals (Appeals Board) for determination of Appellant's Motion for Partial Summary Decision as to Entitlement for Appellant's Claims filed July 2, 2014 and argued August 13, 2014 and the State's Motion for Partial Summary Decision filed July 31, 2014 and argued September 22, 2014. The underlying contract concerns a certain roadway reconstruction and pedestrian safety improvement project along Maryland Route 7 including resurfacing and widening of that roadway, installing new curb, gutter, and sidewalks, improving drainage, constructing retaining walls, landscaping, and modifying traffic signalization. Development of the specifications for this $10 million project took about two years, after which bids were solicited in December 2006 with an original deadline for bid submission by January 25,

2007. After resolution of a bid protest, the Maryland State Highway Administration (SHA) on June 13, 2007 issued to Appellant Manuel Luis Construction Co., Inc. (M. Luis) a notice of award. It was executed by Douglas R. Rose, Deputy Administrator, Chief Engineer for Operations, along with a notice to proceed on June 27, 2007 executed by Mark J. Flack, Director of the SHA Office of Construction, for Douglas R. Rose. The initial anticipated contract completion date was 390 working days later, namely, on October 14, 2009, though the project was not actually substantially completed until April 13, 2010.

M. Luis mobilized its work force at the job site on July 30, 2007 to begin construction of the project as initially envisioned and specified but immediately afterwards, on August 1, 2007, SHA promulgated 169 design changes. About a month later, an additional 160 change orders were issued. Over the course of the contract, a staggering total of nearly 1,000 design changes were directed by SHA to the contract awardee, for which M. Luis now continues to seek equitable adjustment of $1,553,019 for its direct cost claims in addition to $1,987,796 more for delay, including $1,637,655 for loss of productivity occasioned by the numerous change orders.

It is not disputed that appellant's initial claim to SHA for equitable adjustment was timely filed. General Provision (GP) 5.14(a) of the contract specifications provides, "The contractor shall file a written notice of claim…with the procurement officer within 30 days after the basis for the claim is known or should have been known." Similar to the aforementioned contractual provision, the Code of Maryland Regulations (COMAR) 21.10.04.02 provides, "Unless a lesser period is prescribed by law or by contract, a contractor shall file a written notice of a claim relating to a contract with the appropriate procurement officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier." It is unclear from the

record whether SHA designated a particular procurement officer as its authorized sole point of contact on this project. Several different SHA officials appear to have handled the procurement. COMAR further mandates that "A notice of claim or a claim that is not filed within the time prescribed in Regulation .02 of this chapter shall be dismissed." COMAR 21.10.04.04(2)(C).

By longstanding discussions following contract completion in April 2010, the parties successfully negotiated partial settlement of appellant's direct costs claims. On August 8, 2011, SHA rendered a decision unfavorable to appellant on the balance of its direct cost claims, issuing a determination letter which stated, "We are advising at the conclusion of this letter that any of these issues included on the attached sheets are the District's Final Decision; and any which MLC [M. Luis] does not accept, the denied [claims] or the [claims] paid as per SHA, they may make claim as described at the conclusion of this letter." The conclusion of that correspondence again stated, "This is the Final Decision from this office regarding these issues." That correspondence was signed by David W. Peake, SHA's Metropolitan District Engineer for Baltimore and Harford Counties.

The last sentence of that notice made no reference to appellant's right to appeal to the Appeals Board from a prospective final action by SHA, stating instead, "An appeal may be filed by formally submitting a claim to Mr. Steve Marciszewski, Acting Director, Office of Construction, 7450 Traffic Drive, Hanover, Maryland 21076. The claim should be forwarded in accordance with the attached outline (Structure of a Claim Submittal) and GP 5.14, filing of a Claim by Contractor; GP 5.15 Disputes…" It is telling that the August 8, 2011 letter did not comply with COMAR 21.10.04.04(B), which provides, "If the contractor claim is not settled, the procurement officer shall prepare a recommended decision on the claim, which normally should contain:…(5) A paragraph substantially as follows: 'This

decision is the final action of this agency. This decision may be appealed to the Maryland State Board of Contract Appeals in accordance with Regulation .09 of this chapter. If you decide to take such an appeal, you must mail or otherwise file a written notice of appeal with the Appeals Board within 30 days from the date you receive this decision.'" Instead of receiving notice to file an appeal with the Appeals Board within 30 days, M. Luis was directed to file an appeal with Mr. Steve Marciszewski at SHA. Thus, the August 8, 2011 letter was not a final SHA decision.

In accordance with the provisions of Sec. 15-220(a) of the State Finance & Procurement Article (SF&P) of the Maryland Annotated Code, "a contractor may appeal the final action of a unit to the Appeals Board." SF&P Sec. 11-101 defines "unit" as "an officer or other entity that is in the Executive Branch of the State government and is authorized by law to enter into a procurement contract." SHA is undeniably a unit of State government. On the other hand, there is no representation that the various Offices of the District Engineers for SHA are also independent units of state government that may enter into contracts on their own. The Office of the District Engineer acts as an agent of SHA. Road construction contracts are not entered into by the Office of the District Engineer except as that Office serves as an authorized agent of SHA, a unit of State government. Only SHA is empowered to enter into contracts. The Office of the District Engineer for SHA merely supervises and manages those contracts as an arm of SHA. Surely the Offices of the District Engineers are authorized to serve as agents of SHA, but they are not separate units of State government as defined by statute. Only receipt of a final decision by a unit of state government triggers the 30-day deadline to note an appeal with the Appeals Board.

If the August 8, 2011 decision was indeed SHA's final action, as SHA now contends, why did that letter expressly

provide for appealing that determination not to the Appeals Board, but instead, to another office within SHA? The Appeals Board must conclude therefore that the August 8, 2011 notice shall not be deemed SHA's "final action" on appellant's direct costs claims as set forth in the SF&P Sec. 15-220(a). Upon close examination, by the very words included in that notice, the August 8, 2011 determination was merely the "final decision *from this office* regarding these issues." (Emphasis added.) The letter bearing that date is from SHA's District Engineer for Baltimore and Harford Counties rather than the statewide Office of Construction. In other words, on August 8, 2011, appellant was notified by SHA that SHA's Office of the District Engineer had rendered a final determination, but that decision was final only as to the Office of the District Engineer, expressly subject to further review and consideration by SHA's statewide Office of Construction. Moreover, it was not a final SHA determination, only a final decision by the Office of the District Engineer. No follow-up letter was sent by SHA upon the expiration of 30 days after the August 8, 2011 letter notifying appellant that, in the absence of the noting of an appeal with the Office of Construction, the final decision made the Office of the District Engineer was converted to a final decision of the Office of Construction. The statutory 30-day deadline for noting an appeal to the Appeals Board does not run concurrently with a 30-day time frame to note an appeal for further internal review within a State agency.

Unfortunately, appellant did not follow SHA's instructions on August 8, 2011 to appeal to the SHA Office of Construction. By e-mail dated September 19, 2011, appellant requested of Donald A. Schaefer, SHA's Assistant District Engineer for Construction, reconsideration of SHA's August 8, 2011 decision. By e-mail dated September 20, 2011, SHA responded with a communication to M. Luis stating, "We did reconsider and reviewed all the

information on the issues on the project and based our decisions on the specifications. These issues have been discussed for a long time during the project. Unfortunately the District does not agree nor can [it] be convinced that payment for the remaining issues are appropriate. Therefore, as you disagree with District[']s stance, as we stated in the letter it is incumbent upon M. Luis Construction to proceed with filing a claim with the Office of Construction as described in the letter. We look forward to discussing the remaining issue of Productivity loss soon." From this language, it is evident that, as of September 20, 2011, Donald E. Schaefer, SHA's Assistant District Engineer for Construction, did not believe that appeal of the direct cost claims of M. Luis were time barred for failure to note an appeal to the Appeals Board by September 7, 2011. The Office of the District Engineer continued to anticipate further internal review of the August 8, 2011 decision higher in the chain of command within SHA contracting authority, namely, by the Office of Construction.

On October 17, 2011, M. Luis did finally appeal to SHA's statewide Office of Construction by correspondence to Steve Marciszewski, Acting Director of the Office of Construction, stating, "M. Luis Construction Co., Inc. would like to file a claim file a claim [sic] to the Office of Construction. We will use the outline provided by the State Highway Administration and follow these guidelines in GP5.14 & GP5.15 to submit a detailed claim report supporting our position and justification for all compensation outstanding." Later, on February 1, 2012, counsel for M. Luis requested a time extension to submit its substantiation for equitable adjustments as it again submitted an itemized breakdown of its direct cost claims which SHA now contends were adjudicated by its determination of August 8, 2011. On May 21, 2013, M. Luis provided to SHA documentation in support of all of appellant's claims, for $1.5 million in direct costs as

well as $2 million for loss of productivity and delay.

Then, on July 3, 2013, apparently conceding a conditional merger between the two classes of outstanding claims, M. Luis sent correspondence to SHA which stated, "M. Luis has elected to withdraw the direct cost claims subject to reasonable settlement of the equitable adjustment of $1,987,706 per the Substantiation of Claims." Finally, by letter dated December 4, 2013, SHA afforded M. Luis another final decision, informing appellant, "Thus, from the date that SHA had informed M. Luis of the denial [on August 8, 2011], M. Luis had 30 days to file notice of claim, by September 6, 2011. In its October 17, 2011 letter, M. Luis stated it 'would like to file a claim to the office of Construction [sic][footnote omitted]. The basis of filing M. Luis' claim notice was a September 20, 2011 SHA email as noted in this letter. SHA, however, actually denied the requests for equitable adjustment on August 8th, not September 20th. Thus M. Luis has not met the time provisions for filing its notice of claim.'" Unlike the August 8, 2011 final decision letter, the December 4, 2013 final decision letter from SHA did contain the language set forth in COMAR 21.10.04.04(B)(5) notifying M. Luis of its right to appeal within 30 days to the Appeals Board.

Promptly after receipt of the December 4, 2013 letter by which SHA denied all of appellant's claims for equitable adjustment, M. Luis thereafter appealed to the Appeals Board by the instant appeal docketed December 12, 2013. As previously referenced, SF&P Sec. 15-220 provides, "a contractor may appeal the final action of a unit to the Appeals Board…for a contract claim, within 30 days after receipt of the notice of a final action." And COMAR 21.10.06.02A states, "Notice of an appeal…shall be mailed to or filed with the Appeals Board within the time specified in the contract or otherwise allowed by law or regulation."

On the merits rather than the procedural basis of this dispute, appellant posits alleged proofs that the contract specifications were not reasonably accurate and that SHA breached its warranty of correctness and adequacy of the specifications advertised when the work was put out for bid in 2006, claiming in part that if the contractor had followed the initial defective specifications which appellant relied upon when it bid the job, a satisfactory result would not have been achieved, as may be surmised by the undisputed profligate change orders. Thus, by its Motion for Partial Summary Decision, appellant seeks a pre-hearing determination by the Appeals Board that M. Luis is entitled to at least some modicum of compensation. On the other hand, by its opposing procedural Cross-Motion for Partial Summary Decision, the State seeks to bar appellant from pursuing at the hearing on the merits appellant's direct costs claims in the amount of $1,553,019 because appellant did not file a timely appeal within 30 days of SHA's August 8, 2011 determination to deny those claims.

Given the extraordinary number of change orders here imposed upon the contractor, and their immediacy to work commencement and continuity throughout work performance, one may easily speculate that such circumstances dictate that appellant is indeed entitled to some measure of equitable adjustment. Among appellant's proofs of defective design specifications is a hand-written note by a professional engaged by SHA to review the specs for constructability in which he states, "This job is not ready to be advertized. Needs a lot of work." However, decisions by the Appeals Board are not and cannot be rendered on the basis of speculation, nor upon appellant's admittedly strong but one-sided averments to date of undeniable entitlement to equitable adjustment. M. Luis insists that it is entirely predictable that it will prevail in its loss of productivity claim because of the numerous contract modifications imposed by SHA after contract

award. That is entirely possible and might even be considered probable in light of appellant's initial allegations, but those contentions are not yet proven, nor has the true meaning and significance of the factual support for appellant's claims been subjected to cross-examination and rebuttal evidence. Therefore it would be premature for the Appeals Board to grant appellant's Motion and render a determination at this juncture of the litigation that costs were incurred from loss of productivity and that additional compensation is inexorably due to be paid to M. Luis. The Appeals Board further notes that even if it were compelled or inclined to grant appellant's Motion, the question of what amount may be due to be paid to the contractor would remain completely unresolved.

Turning to the State's Cross-Motion for Partial Summary Decision, the Appeals Board is not persuaded that appellant's pursuit of the direct costs elements of its claims are barred by statute, regulation, or contract provision requiring a notice of appeal from a final decision to be filed within 30 days of the notification dated August 8, 2011. SHA's Office of the District Engineer did indeed render a final determination of the direct costs claims on August 8, 2011. But that final determination was made expressly subject to further review by SHA's Office of Construction, which admittedly was not sought by appellant until October 17, 2011. SHA authorities evidently continued to reconsider the August 8, 2011 decision until their "final" final determination dated December 4, 2013 from which M. Luis took appellate recourse to the Appeals Board. Prior to that time, SHA as an authorized unit of State government had yet to make or issue a final decision; only SHA's Office of the District Engineer had done so, and although that determination was called a "final decision," it was concomitantly made expressly subject to further SHA review.

To sum, appellant is not eligible to receive a pre-hearing determination that it is entitled to recover at least some portion of its $2 million claim for increased delay costs and time for performance of the work resulting from defective design, but in addition, appellant is not barred at this juncture from pursuing its $1.5 million claim for additional compensation for direct costs.

WHEREFORE, it is by the Appeals Board this _____ day of October, 2014,

ORDERED, that appellant's Motion for Partial Summary Decision be and hereby is DENIED without prejudice to renewal during the course of hearing on the merits, and it is further,

ORDERED that the State's Motion for Partial Summary Decision be and hereby is DENIED without prejudice to renewal during the course of hearing on the merits.

Dated:

_____
Dana Lee Dembrow
Board Member

I Concur:

_____
Michael J. Collins
Chairman

_____
Ann Marie Doory
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2897, appeal of Appeal of Atlas Painting and Sheeting Corp. Under MDTA Contract No. KH-2705-000-006R.

Dated:

_____
Michael L. Carnahan
Deputy Clerk