BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
Brawner Builders, Inc., FBO Faddis Concrete Products, Inc.	*	
&	*	**Docket No. MSBCA 3098**
Faddis Concrete Products, Inc.	*	
Under	*	
Maryland State Highway Administration Contract No. HO2485126	*	
	*	
Appearance for Appellants	*	Paul A. Logan, Esq. Jodi S. Wilenzik. Esq. Post & Schell, P.C. Philadelphia, PA
Appearance for Respondent	*	Sonia Cho, Esq. Assistant Attorney General Contract Litigation Unit Baltimore, MD
	*	

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OPINION AND ORDER BY MEMBER STEWART

Based on the undisputed facts, the Board denies this Appeal because a timely notice of claim was not filed by the contractor on behalf of its subcontractor.

UNDISPUTED FACTS

Brawner Builders, Inc. ("Brawner") and Respondent, Maryland State Highway Administration ("SHA"), entered into SHA Contract No. HO24851256 (F.A.P. No. NH-95-3 (197)E) (the "Contract") for the construction/extension of a noise barrier in Howard County along the southbound roadway of I-95 beginning 5,000 feet north of MD 100 in a northerly direction to Montgomery Road for a total project length of approximately 0.38 miles (the "Project").

On January 24, 2013, Brawner issued Purchase Order No. 1167-001 to Faddis Concrete Products, Inc. ("Faddis") to provide sound-absorbing concrete panels and access doors for the Project. Faddis executed the Purchase Order on February 5, 2013 and Brawner on February 7, 2013.

On May 2, 2014, Respondent sent a letter to Brawner with the subject line "Panel Discrepancy" stating that the concrete wall panels used on the Project contained aggregate from an unapproved source and that Respondent could not verify the required strength. Respondent asked Brawner to advise how it intended to remediate the situation.

On May 8, 2014, Brawner sent a letter to Respondent explaining Respondent's prior approval of the concrete wall panels in question. Brawner stated that it was merely a customer purchasing an approved product from a source pre-approved by Respondent. Brawner further stated its understanding that all panels produced and delivered on the Project as of the date of its letter were from an approved source and accepted by Respondent. Brawner asked Respondent to confirm this fact. Finally, Brawner noted that all parties involved, including Faddis, had been harmed by this breakdown in the fabrication, inspection, and acceptance procedure at a concrete precast facility approved by the Respondent, and Brawner reserved its rights to extend the duration of the contract and seek monetary compensation if it should become necessary. Brawner requested Respondent consider a temporary shutdown of the Project until a mutually acceptable resolution was reached and promised to "continue to work with all parties in any way possible to help facilitate an expedient resolution."

On May 9, 2014, Respondent sent a letter to Faddis outlining in great detail alleged deficiencies in the production of the concrete panels at its Downingtown, Pennsylvania plant (the

"Pennsylvania Plant") and directed Faddis to suspend production of exposed aggregate panels pending corrective action.

On June 9, 2014, Ms. Michelle Armiger, on behalf of Respondent, emailed officials at Virginia Department of Transportation ("VDOT") and Pennsylvania Department of Transportation ("PennDOT") stating that Respondent had been experiencing ongoing non-compliance issues concerning exposed aggregate sound wall panels at Faddis' Pennsylvania Plant and at Faddis' plant in King George, Virginia. Ms. Armiger also stated that Respondent had directed Faddis to suspend production at the Pennsylvania plant for six months, that the Federal Highway Administration was involved, and that Respondent may be pursuing a case with the Office of the Inspector General. Ms. Armiger's email then asked whether officials in Pennsylvania and Virginia experienced non-compliance issues with Faddis similar to the ones Respondent had experienced.

On June 23, 2014, Faddis sent three (3) letters. The first letter was sent to Respondent stating that Faddis "hereby supplements the notices of claims previously submitted by [Brawner] and furnished to [Respondent's] counsel by our attorney." Faddis stated that Respondent's direct communication with Faddis, "albeit not contract specific," had resulted in the halting of operations at Faddis' Pennsylvania Plant. Faddis also referred to communications between Respondent and VDOT and PennDOT regarding the issue with construction of the concrete panels, and stated that "Faddis therefore supplements all prior notices" and that Faddis reserved the right to recover damages related to "the idling of Faddis' plant and equipment" and for "interferences" with other contracts it had with VDOT and PennDOT.

The second letter Faddis wrote on June 23, 2014 was to Brawner. Faddis requested that Brawner provide it with the notice of claim letter it sent to Respondent related to the panel

discrepancy issue. Faddis also requested that Brawner furnish a copy of the second letter to Respondent as a supplemental notice of claim regarding damages Faddis allegedly suffered as a result of Respondent's communications with VDOT and PennDOT.

The third letter from Faddis was sent by Paul A. Logan, counsel for Faddis, to Scott D. Morrell and Lance M. Young, Assistant Attorneys General ("AAG") for Respondent. Mr. Logan stated: "please accept this letter as Faddis' notice of claim to [Respondent] of its entitlement to recover all damages caused by the actions of [Respondent], most especially what appears to be interferences with Faddis' qualifications in Maryland and other states and Faddis's supply contracts, including those for [Respondent's] projects." Mr. Logan also stated: "[b]e advised that Faddis' and Brawner's prior claim notices in compliance with the contract remain."

On June 24, 2014, AAG Morrell sent an email to Mr. Logan advising him that Brawner, the prime contractor that had a contract with Respondent, had to file its claim with the procurement officer, and also apprised Mr. Logan of the requirements for filing a claim as set forth in Title 15, Subtitle 2 of the State Finance & Procurement Article of the Annotated Code of Maryland and COMAR 21.10.04. AAG Morrell also informed Mr. Logan that if Faddis desired to make a tort claim against Respondent, then it needed to file a notice of claim pursuant to Title 12 of the State Government Article of the Annotated Code of Maryland.

On July 16, 2015, Faddis filed a complaint against Brawner in the United States District Court for the Eastern District of Pennsylvania (the "Federal Complaint") alleging that (i) it had a direct contract with Brawner but not with Respondent for the Project; (ii) Brawner was obligated to pass through any claim it had against Respondent concerning its actions connected with the Project; and (iii) Faddis sent the June 23, 2014 letter requesting Brawner give supplemental notice

to Respondent of its claim.[1] In the Federal Complaint, Faddis filed several causes of action, including breach of contract for failing to pass through its claim to Respondent, interference with Faddis' statutory rights, and unjust enrichment.

On August 11, 2015, Brawner's attorney sent a letter to Mark Crampton, District Engineer for Respondent, forwarding a copy of the Federal Complaint, stating that "we further believe you are the appropriate procurement officer to receive same," and that "[Brawner] intends to defend this claim. If the State requires any further information, please contact this office directly. **Please consider this a 'Notice of Claim'.**" (emphasis added). The letter also referenced the provision of Brawner's contract regarding the filing of claims by a contractor, Respondent's General Provision 5.14.[2]

On August 21, 2015, Respondent wrote back to Brawner's attorney acknowledging "receipt of your Notice of Claim."

On December 7, 2017, the federal case was settled and dismissed.

On May 31, 2018, Mr. Logan sent AAG Morrell a letter asking Respondent to issue a final decision on Faddis' and Brawner's claims. On September 6, 2018, having received no response from Respondent, Faddis and Brawner filed this Appeal.

On October 5, 2019, Respondent filed a Motion to Dismiss, or, in the Alternative, for Summary Decision. On November 28, 2018, Appellant filed a timely Response in opposition to the Motion, and on December 19, 2018, Respondent filed its Reply. A hearing on Respondent's Motion was held on April 5, 2019.

[1] The federal case was later transferred to the United States District Court for the District of Maryland.

[2] General Provision 5.14 mirrors the provisions of COMAR 21.10.04.02 and its provisions regarding the time limits for filing a written notice of claim and claim, the requirements for the contents of a claim, and the mandate that a notice of claim or claim not filed within the prescribed time shall be dismissed.

At the hearing on April 5, 2019, counsel for Faddis and Brawner asserted that Brawner first gave Respondent notice of Faddis' claim via Brawner's May 8, 2014 letter to Respondent, and that Faddis' Federal Complaint, forwarded with Brawner's August 11, 2015 letter to Respondent, constituted its claim.

STANDARD FOR MOTION FOR SUMMARY DECISION

In deciding whether to grant a Motion for Summary Decision, the Board must follow COMAR 21.10.05.06D(2):

> The Appeals Board may grant a proposed or final summary decision if the Appeals Board finds that (a) [a]fter resolving all inferences in favor or the party against whom the motion is asserted, there is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law.

The standard of review for granting or denying summary decision is the same as for granting summary judgment under Md. Rule 2-501(a). *See*, *Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726 (1993). To defeat a motion for summary judgment, the opposing party must show that there is a genuine dispute of material fact by proffering facts that would be admissible in evidence. *Id.* at 737-738. While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *Clea v. City of Baltimore*, 312 Md. 662, 678 (1988).

OPINION

Respondent asserts five grounds for granting its Motion: (1) Faddis, a subcontractor under the contract that is the subject of this Appeal, does not have a written procurement contract with Respondent and, therefore, does not have standing to file this Appeal; (2) Brawner, the general contractor under the contract that is the subject of this Appeal, is not represented by an attorney as

required by COMAR 21.10.05.03.03A:[3] (3) Brawner did not file a timely notice of claim or a claim on behalf of Faddis as required by MD CODE ANN., STATE FIN. & PROC. ("SF&P") §15-211(a) and COMAR 21.10.04.02: (4) there is no final agency action from which to file this appeal:[4] and (5) Faddis' claims asserted against Respondent are barred by the doctrine of sovereign immunity because the State has limited its waiver of sovereign immunity via MD Code Ann., State Gov. ("SG"), §12-201(a) to contractual claims arising out of a written procurement contract. The Board addresses the grounds of Respondent's Motion as follows.

STANDING OF FADDIS TO FILE A CONTRACT CLAIM

In *Jorge Company, Inc.*, MSBCA No. 1339 (1982), this Board held that under the SF&P Art., the COMAR regulations promulgated pursuant thereto, and §12-201 of the SG Art., only a person or contractor who has a written procurement contract with the State may file an appeal of a contract claim to this Board. The Board concluded that a subcontractor's claim must be passed through the prime contractor that has a written procurement contract with the State unless a provision in the subcontract or another agreement between the parties contains assignment or liquidation language allowing the subcontractor to bring a claim under its own name. *Id.* at 3. n.6.[5]

Faddis, relying on the definitions in the SF&P Art. and COMAR, makes a novel argument that it has standing to bring a contract claim in its own name. Faddis argues that it may file a contract claim directly with Respondent because it has a written procurement contract with Respondent insofar as its Pennsylvania Plant is on the State of Maryland's list of qualified

[3] Respondent withdrew this ground on the record at the hearing on April 5, 2019.
[4] Respondent argues that no claim meeting the requirement of COMAR 21.10.04.02B was filed on behalf of Faddis that required final agency action via a decision by the procurement officer or, in the absence thereof, a deemed denial. Since the Board only has jurisdiction per SF&P §15-211(a) to hear appeals arising from the final action of a unit, Respondent argues that the absence of a final agency decision deprives the Board of jurisdiction to hear this Appeal.
[5] The Purchase Order issued to Faddis by Brawner contains no such language.

producers/manufacturers that are pre-approved to provide precast concrete walls to Respondent.[6] Faddis argues that the Approval Requirements is a "procurement contract" between Faddis and Respondent that is supported by consideration (*i.e.*, payment of the annual certification/recertification fee) for the acquisition of supplies, services, construction, construction-related services, architectural services, or engineering services.

The Board rejects Faddis' argument and concludes that Faddis does not have a written "procurement contract" with Respondent. Accordingly, Faddis does not have standing to file a contract claim directly with Respondent. Any contract claim Faddis had concerning the Project had to be filed as a pass-through claim by Brawner on behalf of Faddis. *See, Jorge Company, Inc.*, MSBCA No. 1339 (1982).

TIMELINESS OF BRAWNER'S NOTICE OF PASS-THROUGH CLAIM ON BEHALF OF FADDIS

Respondent argues that Brawner failed to file a timely notice of claim on behalf of Faddis per COMAR 21.10.04.02A *(i.e.*, within thirty (30) days after Faddis knew or should have known the basis for its claim) and failed to file a valid claim on behalf of Faddis per COMAR 21.10.02.04B (*i.e.*, within ninety (90) days after filing notice of the claim). The time limits for filing a notice of claim and claim are set forth in COMAR 21.10.04.02 and are promulgated under the authority of SF&P §15-219(a) and (b). The Board has held that these time limits are mandatory. *See, David A. Bramble, Inc.*, MSBCA No. 2823 (2013).

We begin our analysis of whether Brawner's notice of claim was timely filed by first considering when Faddis knew or should have known it had a claim related to the Project and

[6]Pre-approval requires an annual certification/recertification process set forth in *Maryland Highway Administration Precast Plant Approval Requirements* (the "Approval Requirements"). Producers pay a fee when first certified and again at recertification. There is a cost reimbursement schedule allowing producers seeking pre-approval for the first time or those seeking recertification to be reimbursed for costs associated with certification of their plants under certain circumstances.

when it notified Brawner of the basis of its claim. According to Respondent, Faddis had actual knowledge of its claim sometime before June 23, 2014, or at the very latest on June 23, 2014, as evidenced by Faddis' June 23rd letter to Brawner. Respondent argues that the June 23rd letter put Brawner on notice that Faddis had a basis for a claim against Respondent and that Brawner had to pass through notice of Faddis' claim to Respondent. Thus, Respondent argues, per COMAR 21.10.04.02A, notice of Faddis' pass-through claim was required to be filed by Brawner within 30 days of Faddis' June 23rd letter to Brawner (*i.e.*, by July 24, 2014). Respondent argues that Brawner's notice of claim on behalf of Faddis was not filed until August 11, 2015, more than a year after Faddis had actual knowledge of Faddis' claim.

In Faddis' June 23rd letter to Brawner, Faddis requested that Brawner provide it with prior notices of claim "sent to the [Respondent] related to the above contract for the abatement of time/liquidated damages and payment of additional costs incurred by Faddis...." Faddis further requested that Brawner "furnish to the [Respondent] a copy of this letter which serves to supplement the prior notice and advise the [Respondent] of the continuing and additional damages related to Respondent's 'notices' to VDOT and PennDOT." The remainder of the June 23rd letter clearly stated that Faddis suffered and continued to suffer damages due to Respondent's halting of production of aggregated concrete panels at its pre-approved Pennsylvania Plant.

Faddis' June 23rd letter to Brawner unequivocally notified Brawner that Faddis believed it had a claim against Respondent, and it also set forth the grounds for Faddis' claim. No reasonable person receiving a letter containing such requests could infer otherwise, and Appellants do not dispute that Faddis was asserting a basis for a claim at this time. Given the undisputed fact that both Faddis and Brawner actually knew the basis for Faddis' claim as of June 23, 2014, we need not consider whether Faddis should have known the basis for its claim sooner.

Because Faddis knew it had a claim against Respondent and notified Brawner of the basis of its claim as of June 23, 2014, we must next consider when Brawner gave proper notice to Respondent of Faddis' claim and whether such notice was timely. This requires analysis of whether: (1) Brawner's May 8th letter constitutes a proper notice of claim or, if not, (2) whether Faddis' June 23rd letter to Respondent constitutes proper notice of claim. Although we are required to resolve all inferences in favor of the party opposing summary decision (in this instance, Brawner), those inferences must be reasonable ones. *See, Clea v. City of Baltimore*, 312 Md. at 678.

Brawner's May 8th letter to Respondent was in direct response to Respondent's "Panel Discrepancy" letter of May 2, 2014. In its May 8th letter, Brawner explained that it was merely a customer purchasing an approved product from a source pre-approved by Respondent. Brawner stated that it understood all panels produced and delivered on the Project as of the date of its letter were from an approved source and accepted by Respondent. Brawner asked Respondent to confirm this fact. The May 8th letter also states:

> As of the date of your [May 2, 2014 letter], we were made aware of [Respondent's] position and as such, we reserve our rights to extend contract performance including but not limited to an extension of contract and monetary compensation. **We are not requesting either at this time** but reserve our right to do so should it become necessary. (emphasis added).

The language of this letter informs Respondent that Brawner did not waive its right to pursue a claim *in the future* if Respondent and Faddis did not resolve the issue between them. Brawner's letter expresses Brawner's belief that Faddis and Respondent could resolve the issue and promised to help resolve it "in any way possible." We conclude that nothing in this language can reasonably be construed to be a proper notice of Faddis' claim by Brawner to Respondent.

We further conclude, for the reasons stated previously regarding Faddis' lack of standing, that Faddis' June 23rd letter to Respondent attempting to give "supplemental" notice of its claim directly to Respondent is not a proper notice of claim. Only Brawner had standing to assert a claim or give notice of a claim on behalf of Faddis.

There is no genuine dispute that Brawner filed a "Notice of Claim" via its letter to Respondent on August 11, 2015. The letter referenced the specific provision of the Contract for filing claims and noted that Brawner believed the addressee was the procurement officer. Brawner's August 11 letter also clearly stated: "Please consider this a 'Notice of Claim." Based on the undisputed facts, and having resolved all reasonable inferences in favor of Brawner, we conclude that Faddis had actual knowledge of the basis for its claim on June 23, 2014, that Brawner was provided notice of Faddis' claim and thus had actual knowledge of the basis of Faddis' claim on June 23, 2014, and that a proper notice of claim had to be filed by July 24, 2014. Further, we conclude that no notice of claim was filed by Brawner on behalf of Faddis on or before July 24, 2014, and that the notice of claim filed by Brawner on behalf of Faddis on August 11, 2015, was untimely.

Since Brawner failed to file a timely notice of claim on behalf of Faddis, we need not address the remaining grounds for dismissal or summary decision asserted by Respondent in its Motion.

ORDER

Based on the foregoing, it is this 17th day of May 2019, hereby:

ORDERED that Respondent's for Motion Summary Decision is GRANTED, and it is further

ORDERED that a copy of any papers filed by any party in a subsequent action for judicial review shall be provided to the Board, together with a copy of any court orders issued by the reviewing court.

/s/
Michael J. Stewart Jr., Esq., Member

I concur:

/s/
Bethamy N. Beam, Esq., Chairman

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 contested cases.

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 ten 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 No. 3098, Brawner Builders, Inc., Benefit of Faddis Concrete Products, Inc., & Faddis Concrete Products, Inc., under Maryland State Highway Administration Contract No. HO2485126.

Dated: 5/17/19

/s/
Ruth W. Foy
Deputy Clerk

IN THE MATTER OF THE PETITION OF BRAWNER BUILDERS INC., FBO FADDIS CONCRETE PRODUCTS, INC. & FADDIS CONCRETE PRODUCTS, INC.,	*	
Petitioners	*	
v.	*	
MARYLAND STATE HIGHWAY ADMINISTRATION,	*	
Respondent	*	CASE NO.: 24-C-19-003208
FOR JUDICIAL REVIEW OF THE DECISION OF THE MARYLAND BOARD OF CONTRACT APPEALS	*	

2019 OCT -3 A 8:11
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE CIRCUIT COURT

FOR BALTIMORE CITY

ORDER

This matter came before the court on September 23, 2019, on the Petition for Judicial Review (Doc. No. 1) filed by Brawner Builders Inc., individually and for the benefit of Faddis Concrete Products, Inc., and Faddis Concrete Products, Inc. Having considered all documents submitted, as well as the administrative record of this matter, and following oral argument by counsel, for the reasons set forth on the record in open court, it is this 23rd day of September 2019:

ORDERED that the summary decision of the Maryland Board of Contract Appeals shall be, and is hereby, **REVERSED and VACATED**, and the matter is **REMANDED** to proceed with a hearing on the merits at the Maryland Board of Contract Appeals consistent with the court's ruling on the record.

TRUE COPY
TEST
MARILYN BENTLEY, CLERK

Judge Julie R. Rubin
Judge's Signature appears on the original document.
Judge Julie R. Rubin

CIRCUIT COURT FOR BALTIMORE CITY

NOTICE TO CLERK:
PLEASE SERVE COPIES TO ALL PARTIES AND COUNSEL OF RECORD

Circuit Court for Baltimore City
Case No. 24-C-19003208

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1643

September Term, 2019

MARYLAND STATE
HIGHWAY ADMINISTRATION

v.

BRAWNER BUIILDERS, INC.

Beachley,
Gould,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wilner, J.

Filed: December 18, 2020

This case arises under the State procurement law. The State Highway Administration (SHA) rejected claims filed by appellees Brawner Builders, Inc. (Brawner) and Faddis Concrete Products, Inc. (Faddis) on the grounds that (1) Faddis had no procurement contract with SHA and therefore had no standing to file a procurement claim, and (2) the claims filed by Brawner and Faddis were untimely. In an appeal by appellees, the Maryland State Board of Contract Appeals (MSBCA) agreed with SHA on both of those issues and entered a Summary Decision affirming SHA's rejection of the claims.

In a judicial review action, however, the Circuit Court for Baltimore City had a different view. It concluded, (1) as a matter of law, that Faddis did have a procurement contract with SHA and was entitled to file a claim, and (2) that there was a genuine dispute of material fact as to whether the claims were timely. It therefore vacated the MSBCA summary decision and remanded the case for a hearing on the merits of the claims. Before us is SHA's appeal from that judgment. We shall reverse the Circuit Court judgment and remand with instructions to affirm the MSBCA order.

BACKGROUND

The project that spawned this dispute was the construction of a 0.38-mile noise barrier wall along a stretch of I-95 in Howard County. Noise abatement measures along State highways are required both for Federal funding of highway construction projects and by State law. As a result, in August 2011, SHA issued a Highway Noise Policy that

set forth substantive requirements for precast concrete products and a procedure for SHA certification of plants producing those products. Pre-approval of a plant by SHA was required in order for a manufacturer to be eligible to bid on SHA highway projects. Certification was good for one year, subject to renewal following an annual inspection of the plant and subject also to the manufacturer continuing to operate the plant in conformance with the SHA specifications through a Quality Control Plan. SHA charged a cost reimbursement fee for the cost of inspection and certification. Pursuant to that process, SHA, at some point, certified Faddis's plant in Downingtown, Pennsylvania as "Qualified for Sourcing on State Projects" and included that plant on its list of pre-approved manufacturers of noise barrier systems.

The prime contract for the construction of the 0.38-mile section (Contract No. H02485126) was entered into with Brawner on November 19, 2012. That contract, for whatever reason, was not placed in evidence in the court proceeding and therefore is not included in the record. In February 2013, Brawner and Faddis entered into a subcontract, evidenced by a purchase order, for Faddis to furnish 40,910 noise wall panels and three access doors. All materials and work were required to be in conformance with the conditions and specifications pertaining to the prime contract. The purchase order was contingent on SHA approval of Faddis as a supplier and made clear that Brawner was obligated to pay for all products ordered, produced, and shipped regardless of any payment to Brawner by SHA. There were to be no set-offs. Brawner reserved the right

to cancel the subcontract if Faddis was in breach of any of its obligations, including the performance or delivery of non-conforming work or materials.

In September 2013, Faddis furnished SHA with a sample panel which, on September 27, SHA approved for use on the project. Based on that approval, Faddis began manufacturing the panels for Brawner to erect pursuant to its (Brawner's) contract with SHA.

SHA employed an outside agency to furnish inspectors to assure compliance with the SHA standards, one of whom was Nick Patras. Mr. Patras was stationed at Faddis's Downingtown plant for the purpose of inspecting panels destined for the SHA project. No panels were to be shipped without his approval. It appears, at least from SHA's perspective, that Mr. Patras was not doing his job properly, and he eventually was dismissed. In March 2014, SHA's Office of Materials and Technology concluded that panels manufactured by Faddis after November 27, 2013 contained aggregate from an unapproved source, which was a violation of the noise barrier standards, and, as a result, the required strength of the panels could not be determined. Investigations led the Assistant Division Chief for Field Operations (Christopher Gale) to conclude, among other things, that, throughout the production of the panels, Faddis had (1) failed to provide adequate documentation of the source material for the exposed aggregate panels, (2) altered cylinder test data to reflect values higher than what the material actually achieved, (3) used a mix design that did not meet SHA specifications, and (4) was extremely uncooperative about making changes to meet specifications.

On May 2, 2014, SHA's District Engineer, David Coyne, informed Brawner of those conclusions and requested a response as to how Brawner intended to remedy the problem. Faddis was not copied on that letter. Brawner's project manager responded six days later, on May 8, that the problem was not Brawner's to remedy, that it involved instead "a breakdown in the fabrication, inspection, and acceptance procedure at an SHA pre-approved concrete precast facility." The letter requested a temporary partial shutdown of the project and advised that Brawner was reserving its rights to extended contract performance, including monetary compensation. Brawner added that "we are not requesting either at this time but reserve our right to do so should it become necessary."

On May 9, in a letter to Kevin Iddings, Faddis's Operations Manager, Mr. Gale set forth in detail the concerns of SHA, which included failure to provide adequate documentation regarding the exposed aggregate material used in the panels, mixing concrete "of inconsistent and questionable quality," failure to comply with Faddis's own Quality Control Plan, and using a coarse aggregate from an unapproved source that was not in conformance with Maryland Department of Transportation standards. The letter gave notice that further purchases were suspended for 180 days during which Faddis would be required to take certain specified remedial action. On May 21, Mr. Iddings responded to the points made by Mr. Gale, asserting that, although Faddis "disagree[d] with many of the representations made in the SHA letter," it remained committed to resolving the outstanding issues to SHA satisfaction.

Exacerbating the situation, on June 9, 2014, SHA's Chief of Concrete Technology Division, Michelle Armiger, sent e-mails to officials at the Virginia and Pennsylvania Departments of Transportation advising them of the problems SHA had been having with Faddis and asking whether they had experienced similar issues. Ten days later, the Director of SHA's Office of Materials Technology sent an e-mail to those agencies clarifying that the issues mentioned by Ms. Armiger were in dispute, that there was an administrative process in which SHA and Faddis were engaged, and there had been no final determination by SHA.

The next event in this drama consisted of three letters from Faddis on June 23, 2014. One was to SHA's District Engineer, David Coyne, which stated that it supplemented "notices of claims previously submitted by Brawner," and advised that SHA's action had "impacted Faddis as it specifically relates to the contract *between Faddis and Brawner"* (emphasis added) and had resulted in losses for which "Faddis reserves the right to recover damages for all costs including those related to the idling of Faddis's plant and equipment and interferences with other contracts and Pennsylvania's and Virginia's Departments of Transportation." Faddis insisted that SHA "take immediate steps to abate the harm to Faddis and address these claims and impacts due to its directions and actions."

The second letter was to Brawner, asking that it provide Faddis with "the notice of claim letter" sent to SHA related to the contract between SHA and Brawner and that it furnish SHA with a copy of "this letter which serves to supplement the prior notice and

advise the SHA" of continuing damages. The letter did not identify the alleged notice of claim letter to which it referred. The third letter was from Faddis's attorney, Paul Logan, to Scott Morrell, the Assistant Attorney General who represented SHA. In that letter, Mr. Logan took issue with the conclusions reached by SHA as specified in Mr. Coyne's May 2 letter to Brawner, contended that SHA had acted precipitously and without legal or factual justification, and insisted that (1) all suspensions be lifted, (2) Faddis's panels be accepted, and (3) the project be deemed complete with no liquidated damages or penalties.

Mr. Morrell responded the next day through an e-mail advising Mr. Logan that any procurement claim against SHA had to be filed with the SHA procurement officer by Brawner – the prime contractor with which SHA had a contractual relationship – and that any tort claim had to be filed in accordance with the Maryland Tort Claims Act.

The next event occurred on July 16, 2015, when Faddis filed a civil action against Brawner in the U.S. District Court for the Eastern District of Pennsylvania. That action later was transferred to the U.S. District Court for the District of Maryland. The Complaint was based on Brawner's failure to "pass through" Faddis's claim to SHA, thereby precluding Faddis's claim from being considered by SHA. In that regard, the Complaint alleged that, at all relevant times, "Faddis had a direct contract with Brawner, but no direct contract with SHA" that, in accordance with COMAR regulations, "where claims are being pursued on behalf of suppliers and subcontractors, the claim must be initiated by the prime contractor" and that "Brawner was obligated to pass through all of

Faddis's claims against the SHA and not impede the rights of Faddis to recover the damages it sustained." Although Faddis alleged that it was entitled to damages due to SHA's wrongful interference with Faddis's status as an approved and prequalified supplier, the action was solely against Brawner; SHA was not a party to the action.

On August 11, 2015, counsel for Brawner sent a copy of the Federal Complaint to SHA's District Engineer who, on August 21, acknowledged receipt and accepted it as a Notice of Claim by Brawner. The Federal case was settled and dismissed on December 7, 2017. The record before us does not reveal the terms of the settlement. No action was taken by SHA on the claim. On May 31, 2018, counsel for Faddis, on behalf of both Faddis and Brawner, requested that SHA issue a written decision on the pending claims. When SHA declined to do so, Faddis and Brawner filed an appeal with MSBCA on September 6, 2018.[1]

Through a Motion for Summary Disposition, SHA argued that:

(1) Except for "contract claims" permitted under the State Finance and Procurement Article (SFP) and implementing regulations in COMAR, SHA enjoys the State's sovereign immunity;

[1] As SHA explains in its brief (p. 8, notes 1 and 2), where a claim satisfying the Code and COMAR requirements for a procurement claim is filed, the procurement agency is required to issue a written decision within 180 days after receipt of the claim. If it fails to do so, the failure may be "deemed" a denial that may be appealed to MSBCA. *See* SFP § 15-219(g)(2). At issue in such an appeal, if raised, is whether the claim was a cognizable one that was timely filed.

(2) Only a person having a contract with a procurement agency may file a contract claim, and Faddis, as a mere subcontractor with Brawner, does not have that status;

(3) Even if it did have that status, having settled its Federal suit against Brawner, Faddis has received a recovery for any contract damages due to SHA's conduct, and any damages sought as a result of having contacted the Pennsylvania and Virginia departments would not be in the nature of a contract claim; and

(4) Brawner was a procurement contractor that could have filed a claim on behalf of Faddis but failed to do so timely.

Faddis and Brawner acknowledged that only a procurement contractor may file a procurement claim, but, inconsistently with Faddis's position in the Federal action, they claimed that Faddis *was* a procurement contractor entitled to file a claim directly and that it did so. They based that argument on Faddis's pre-certification by SHA and the agency's approval of Faddis's panels for use in SHA construction projects, which meant that it was, in effect, agreeing to purchase those panels. They asserted that Brawner had given notice of Faddis's claim in the May 8, 2014 letter and that the forwarding of the Complaint in the Federal action on August 11, 2015 constituted the claim itself.

MSBCA rejected that argument. It noted that, under COMAR 21.10.05.06D(2), it was authorized to grant a proposed summary decision – the administrative equivalent of a summary judgment entered by a court – if it finds, after resolving all inferences in favor of the party against whom the motion is made, that there is no genuine issue of material fact and that the moving party is entitled to prevail as a matter of law.

As noted, the Board cited two grounds for its decision: first, that, as a subcontractor, Faddis had no standing to make a direct claim against SHA; and second, that Brawner's pass-through claim on Faddis's behalf was untimely. With respect to the first issue, citing its earlier decision in *Appeal of Jorge Company, Inc.* MSBCA No. 1339 (1982), it concluded:

> "Faddis does not have a written 'procurement contract' with Respondent. Accordingly, Faddis does not have standing to file a contract claim directly with Respondent. Any contract claim Faddis had concerning the Project had to be filed as a pass-through claim by Brawner on behalf of Faddis."

With respect to timeliness, the Board found that Faddis had actual knowledge of a claim at least by June 23, 2014, as evidenced by its letter to Brawner on that date, in which it expressly asked Brawner to forward the letter to SHA to supplement what it believed was a prior notice filed by Brawner. As noted, at the time, Faddis accepted the premise that any claim by it had to be passed through by Brawner. That required that notice to SHA of such a claim be presented by July 24, 2014 (30 days later). The Board rejected Faddis's argument that Brawner's letter of May 8, 2014, in response to SHA's letter of May 2, could constitute the actual filing of a claim, noting that the letter merely reserved Brawner's right to file a claim some time in the future. The Board found that the pass-through claim on behalf of Faddis was not filed until August 11, 2015, long past the deadline.

In the judicial review action, the Circuit Court correctly identified the principal issue as being whether Faddis had a procurement contract with SHA. The court regarded

that as an issue of law subject to *de novo* review. It turned to the definitions of "procurement" and "procurement contract" in SFP §§ 11-101(n) and (o).[2] In relevant part, "procurement" means the process of buying or otherwise obtaining supplies, services, construction, construction related services and includes "the solicitation and award of procurement contracts and all phases of procurement contract administration." With exceptions not relevant here, "procurement contract" means "an agreement in any form entered into by a State Executive Branch agency authorized by law to enter into a procurement contract] for procurement."

The court construed the relationship between Faddis and SHA as falling within the ambit of those definitions. It arrived at that conclusion not just on Faddis's supply of panels for this particular project but on the premise that it had been approved as "a qualified source of its product for a multitude of purposes, not just the project that is before the board in this dispute." That, the court said, constitutes "an independent procurement contract" founded on its "entitle[ment] to be possibly selected for use in a contract with the State through another contractor." On that premise, the court held that the Board erred as a matter of law in its determination that Faddis was not a procurement contractor entitled to file a claim directly with SHA.

[2] At the time of those events, those definitions were codified as subsections (m) and (n) of § 11-101. Effective October 1, 2019, they were re-codified respectively and without textual change as subsections (n) and (o) due to a new definition in subsection (e) that required the relettering of subsequent definitions. We shall use the current designations.

Turning then to the issue of timeliness, the court concluded that the Board inappropriately weighed evidence on whether there was timely notice of Faddis's claim. In reaching that conclusion, the court relied on *Engineering Mgt. v. State Highway*, 375 Md. 211 (2003) for the proposition that "there should be a full hearing on the merits, where the issue of untimely notice is a defense." On those twin grounds, the court "reversed and vacated" the MSBCA summary decision and remanded the case for a hearing on the merits.

DISCUSSION

Standard of Review

The standard of review by an appellate court of the decision of an administrative agency, such as MSBCA, was succinctly stated in *Comptroller v. Science Applications*, 405 Md. 185, 193 (2008), and confirmed more recently in *Motor Vehicle Admin. v. Pollard*, 466 Md. 531, 537 (2019) and *Burr v. Retirement & Pension System*, 217 Md. App. 196, 203 (2014). We review the agency's decision directly, not the decision of the Circuit Court. We will affirm the agency decision if it is supported by substantial evidence appearing in the record and is not erroneous as a matter of law, and, because agency decisions are presumed *prima facie* correct, we review the evidence in a light most favorable to the agency. Although no deference is required to be given to the agency's conclusions of law, courts normally give some deference to an agency's interpretations of the laws it is authorized to administer. *Nat'l Waste Mgr's v. Forks of*

the Patuxent, 453 Md. 423, 441 (2017); *Kim v. Board of Physicians*, 423 Md. 523, 535 (2011); *LVNV Funding v. Finch*, 463 Md. 586, 606, n.10 (2019).

If the agency decision under review was in the form of a summary disposition, we must determine whether that disposition was legally correct, *i.e.*, whether there is no genuine dispute of material fact and the moving party was entitled to that disposition as a matter of law. *Burr, supra*, 217 Md. App. at 203.

Faddis's Status As A Procurement Contractor

There is a sharp disagreement between the parties regarding Faddis's status as a procurement contractor. SHA's position is that, to be entitled to make a contract claim against a procurement agency, the claim must arise from a direct contract between the claimant and a procurement agency and that Faddis had no such contract.

Until late in the game, Faddis accepted that proposition. Its Federal lawsuit against Brawner was based entirely on that proposition. As noted, Faddis alleged in its Complaint that the COMAR regulations require that "in instances where claims are being pursued on behalf of suppliers and subcontractors, the claim must be initiated by the prime contractor" and that Brawner's refusal to make such a claim on Faddis's behalf precluded Faddis from recovering its losses. At least inferentially, if not directly, that is a concession that it had no standing to present its claim directly to SHA or MSBCA. Faddis has clearly abandoned that position. Its current claim is that, by virtue of SHA's pre-

approval and certification of its product, it was a direct procurement contractor and had the right as such to make a contract claim directly on its own behalf. That takes us, ultimately to statutory definitions.

As a preface, SHA points out that, until 1976, the State possessed full common law sovereign immunity from contract actions against the State. *See Katz v. Washington Sub. San. Comm'n,* 284 Md. 503, 507 (1979) ("[T]he doctrine of sovereign immunity from suit, rooted in the ancient common law, is firmly embedded in the law of Maryland" and "is applicable not only to the State itself, but also to its agencies and instrumentalities, unless the General Assembly has waived the immunity either directly or by necessary implication.")

That immunity was partially, and somewhat indirectly, waived by statute in 1976. As now codified in Md. Code, § 12-201(a) of the State Gov't. Article, unless otherwise expressly provided by State law, it precludes the State and its officers and units from raising the defense of sovereign immunity "in a contract action, in a court of the State, based on a written contract that an official or employee executed for the State or 1 of its units while the official or employee was acting within the scope of the authority of the official or employee." *See* also Md. Code, §5-522 of the Courts and Judicial Proceedings Article.[3] Waivers of immunity, which are in derogation of common law, are strictly

[3] It is interesting to note that the waiver of sovereign immunity from tort actions is direct. Section 12-104 of the State Government Article provides that, with certain exceptions, "the immunity of the State and of its units is waived as to a tort action, in a court of the State." That is a direct waiver by the General Assembly. As we observed, § 12-201 uses different language. It prohibits the State and its units from "rais[ing] the defense of

construed in favor of the State. *Central Collection v. DLD*, 112 Md. App. 502, 513 (1996); *Dept. of Public Safety v. ARA*, 107 Md. App. 445, 457, *aff'd. ARA Health v. Dept. of Public Safety*, 344 Md. 85 (1996).

It is necessarily implicit from applying a narrow construction to the waiver of immunity that the Legislature may impose conditions and limitations, both substantive and procedural, on such a waiver, and it has done so with respect to the waiver of immunity in both tort and contract actions. In particular, it has enacted a comprehensive set of laws governing the selection of procurement contractors, what may or may not be included in procurement contracts, the monitoring and enforcement of such contracts, and the processing of contract claims, spread among eight titles of SFP. This case implicates several of those statutes, principally those in SFP Titles 11 and 15 dealing with the structure and procedure for the resolution of procurement disputes.

Both the structure and the procedure hinge on the definition of three terms that shape the universe we are dealing with – procurement, procurement contract, and contract claim. SFP § 11-101(n) defines "procurement" as including the process of "buying or otherwise obtaining supplies, services, construction [and] construction related services" as well as "the solicitation and award of procurement contracts and all phases of

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sovereign immunity in a contract action, in a court of the State." It is a distinction without a difference, however. In *ARA Health v. Dept. of Public Safety*, 344 Md. 85, 92 (1996), the Court held that the Legislature may "waive[ ] immunity either directly or by necessary implication, in a manner that would render the defense of immunity unavailable," and treated § 12-201 as a waiver. *See also Katz v. Washington Sub. San. Comm'n, supra*, 284 Md. at 507, n.2.

procurement contract administration." With exceptions not relevant here, SFP § 11-101(o) defines "procurement contract" to mean "an agreement in any form entered into by a unit for procurement." Those two definitions obviously need to be read together. The third critical term is "contract claim," which is defined in SFP § 15-215 (a) as "a claim that relates to a procurement contract" and includes "a claim about the performance, breach, modification, or termination of the procurement contract."

The structure and procedure begin with the procurement officer, who is the individual authorized by the agency (unit) to enter into, administer, and make determinations and findings with respect to a "procurement contract." SFP § 11-101(o).

With respect to construction projects, this is a two-step process. First, the contractor must file a written *notice* of a claim with the procurement officer within 30 days after the basis for the claim is known or should have been known. SFP § 15-219(a). Within 90 days after submitting that notice, the contractor must submit "a written explanation that states the amount of the contract claim, the facts on which the contract claim is based, and all relevant data and correspondence that may substantiate the contract claim." SFP § 15-219 (b). *See* also COMAR 21.10.04.02. The agency then has a fixed time, depending on the amount of the claim, to investigate and render a decision on the claim. SFP § 1-219 (d)(2). With an exception not relevant here, a contractor may appeal an unfavorable decision to MSBCA within 30 days after receipt of the decision or a deemed denial. SFP § 15-220.

Both parties appear to agree that only a "contractor" – a person who has been awarded a procurement contract – may submit a contract claim and that Brawner qualifies as such a person. They also appear to agree, and, as we shall note *infra*, MSBCA has implicitly recognized as well, that a prime contractor may file, as a pass-through, a claim by a subcontractor, although we are unable to find any statute or COMAR regulation that even mentions, must less approves, such a procedure and none has been called to our attention by the parties.

As we have observed, however, Faddis no longer relies on such a procedure but insists that it was a procurement contractor in its own right. Its position arises from SHA's certification of the Downingtown plant and its acceptance of the sample panel supplied by Faddis in September 2013. Those events, it maintains, constitute "an agreement in any form entered into by a unit for procurement," which thus constituted a "procurement contract" that was entered into by a procurement agency for the acquisition of construction or construction-related services. The Circuit Court stressed that those events made Faddis a contractor not just for this particular SHA project but for *all* SHA noise control projects.

SHA, of course, takes a very different view, insisting that "procurement contract" means a contract entered into directly between the procurement unit and the contractor for a particular project or set of projects. Mere approval of a company's product as being acceptable for some future project or even a project for which the unit has already selected and contracted with another contractor does not make that company a

procurement contractor with standing to make a claim. In the proceeding before the MSBCA, Faddis admitted that its compensation for supplying the panels would come from Brawner, not SHA. Its purchase order subcontract confirms that point. By interlineation, it precludes "set-offs" and specifies that "Buyer [Brawner] shall pay seller [Faddis] for all products ordered, produced & shipped regardless of payment to buyer by owner [SHA]."

Neither side cites a case that controls this issue, and we have found none. There are, however, two prior decisions of MSBCA that are relevant and that were relied on by MSBCA in this case. *Appeal of Jorge Company, Inc.* involved a sub-subcontractor whose claim was rejected by the Mass Transit Administration and who appealed to MSBCA. The Board dismissed the appeal for lack of jurisdiction, holding that, as the statute defined a contractor as "any person having a contract with a State agency" and as Jorge did not have such a contract, it was not entitled to appeal to the Board. The Board observed that, ordinarily, it could dismiss the appeal "without prejudice to the right of the subcontractor to refile its appeal in the name of the prime contractor," but declined to do so because the claim also was untimely.

That is the case in which MSBCA, at least implicitly, recognized the pass-through procedure for presenting claims of subcontractors. The rulings in *Jorge* were confirmed by MSBCA in *Appeal of Davidsonville Diversified Services*, MSBCA 1339 (1988). There, too, a subcontractor was on a SHA project. When its subcontract was terminated by the prime contractor, it filed an appeal to MSBCA based on SHA's approval of the

termination, without ever filing a claim with SHA. It argued that, by reason of the extensive day-to-day control over its work by SHA's field engineer, an implied contract had been created between it and SHA. Citing *Jorge*, the Board reaffirmed the conclusion that a subcontractor that does not have a contract with a State agency cannot maintain the appeal in its own name. It concluded as well that it had no jurisdiction over implied contracts, but only written ones with a procurement agency. Citing yet another of its decisions, in *Boland Trane Associates, Inc.*, MSBCA 1084 (1985), it stated:

> "Since the Legislature sets the terms under which it waives sovereign immunity, it may prescribe what type of contracts with the State may properly be within the ambit of this Board's jurisdiction and what contracts are to be excluded."

Pre-approval of *eligibility* to provide materials, work, or services does not, in our view, constitute a contract to do so. The State procurement law and regulations provide for the pre-approval or certification of various classes of would-be contractors or their products.[4] Pre-approval of an entity's status or products – of eligibility to act as a supplier or even a preferred supplier – does not make the entity a procurement contractor if it is not, in fact, selected by a procurement agency, through a written contract, to provide materials, work, or services to the agency. Many of those entities may end up as

[4] *See*, for example, (1) SFP Title 14, Subtitle 2 and COMAR 21.11.01 providing for the certification of small businesses eligible for preference under the Small Business Preference Program; (2) SFP Title 14, Subtitle 3 and COMAR 21.11.03. providing for the certification of minority businesses eligible for participation in Minority Business Enterprise Program; (3) SFP 14-415, providing a preference for certified recyclers.

subcontractors or sub-subcontractors that have no direct contract with the procurement agency.

We note as well COMAR 21.10.04.02D, dealing with contract claims and disputes, that requires each procurement contract to provide notice of the time requirements for filing claims, acceptable methods of filing a claim, and limitations on filing claims electronically, none of which were part of the pre-approval or certification of Faddis's Downingtown plant or acceptance of the test panel.

From a fair and reasonable construction of the statutes and COMAR regulations, we believe that MSBCA was correct in its conclusion, as a matter of law, that Faddis had no procurement contract with SHA and, as a result, was not a procurement contractor entitled to file an independent claim with SHA or to appeal to MSBCA. Faddis's own assertion of that proposition in its Federal complaint against Brawner powerfully supports that conclusion, although we do not rely on it because we do not need to do so.

Timeliness

That leaves the question of whether a timely claim was made on Faddis's behalf by Brawner. We start with the requirement in SFP § 15-219 (a) that, with respect to construction contracts, a contractor must file written notice of a claim within 30 days after the basis for the claim is known or should have been known and the requirement in § 15-219 (b) that support for the claim itself must be filed within 90 days after submission of the notice of the claim.

As noted, the court believed that there was disputed evidence on that issue that required a full evidentiary hearing. SHA acknowledged Brawner's forwarding of Faddis's Federal Complaint on August 11, 2015 as a Notice of Claim "regarding the matter of *Faddis Concrete, Inc. v. Brawner Builders, Inc.*" The question is whether there was evidence of any earlier notice of claim by Brawner on behalf of Faddis. Correspondence between Faddis and SHA that was not part of any submission by Brawner doesn't count.

Three documents are dispositive. The first is Faddis's June 23, 2014 letter to Brawner reciting, at least in general terms, Faddis's damages from the actions of SHA and requesting that Brawner forward that letter to SHA and advise SHA of the damages suffered by Faddis. That shows the latest date when Faddis and Brawner both were aware that Faddis had a claim that needed to be presented on its behalf by Brawner.

The second document is Brawner's May 8, 2014 letter to SHA, responding to Mr. Coyne's May 2 letter informing Brawner of SHA's conclusions regarding the unacceptability of Faddis's panels. In that May 8 letter, Brawner essentially said that "it's not our problem." The letter acknowledged SHA's position, advised that Brawner and Faddis both had been harmed by SHA's conduct, and asserted that "we reserve our rights" to extended contract duration and monetary compensation "but are not requesting either at this time but reserve our right to do so should it become necessary." Though recognizing that, in considering a summary disposition, the Board needed to resolve all inferences in favor of Brawner and Faddis, the Board nonetheless concluded that

"nothing in [that] language could be construed to be a proper notice of Faddis' claim by Brawner to [SHA]." We agree. It is a direct negation of any attempt to make a claim at that point.

The third document is Faddis's Federal Court complaint, filed July 16, 2015, which fully supports that conclusion by the Board. In that Complaint, Faddis alleged that Brawner was obligated to pass through all of Faddis's claims against SHA and not impede Faddis's right of recovery (¶ 33), that Faddis had provided multiple timely and proper notices to Brawner with requests that they be presented to SHA (¶¶ 37, 38), and that "for reasons still undisclosed to Faddis, upon information and belief, Brawner refused to act, as of the date of this Complaint, continues to refuse to facilitate the pursuit of any claims by or on behalf of Faddis against SHA." (¶ 43). There can be no clearer admission that, as of that date, no written pass-through notice of claim had been filed by Brawner on behalf of Faddis.

It is evident, then, that Brawner failed to file the notice of claim within 30 days after the basis for Faddis's claim was known to Brawner, in violation of SFP 15-219 (a) and COMAR 21.10.04.02B. The COMAR regulation states explicitly that "[a] notice of claim, that is not filed within the time prescribed in Regulation .02 of this chapter *shall be dismissed*." (Emphasis added). There is no exception to that statement and no ambiguity as to its meaning. Following its earlier decision in *Appeal of David A. Bramble, Inc.*, MSBCA 2823 (2013), the Board held that provision mandatory. That is a reasonable construction of the COMAR regulation.

We therefore conclude that there was no flaw in the Board's findings of fact or conclusions of law or in the entry of a summary decision. The relevant documents speak for themselves. We acknowledge the problem that subcontractors may face when they have a legitimate claim and the prime contractor, whether negligently or deliberately, fails or refuses to file a timely claim on the subcontractor's behalf. On the other hand, as SHA acknowledged in oral argument, there may be circumstances where the prime contractor could have a conflict of interest in filing a pass-through claim. There may be ways to deal with that problem without allowing persons having no direct contractual relationship with a procurement agency to file claims against that agency, but any solution must come from the Executive or the Legislative Branch.

JUDGMENT REVERSED; CASE REMANDED TO CIRCUIT COURT FOR BALTIMORE CITY FOR ENTRY OF JUDGMENT AFFIRMING DECISION OF MARYLAND STATE BOARD OF CONTRACT APPEALS; APPELLEE TO PAY THE COSTS.

Circuit Court for Baltimore City
Case No.: 24-C-19-003208
Argued: June 4, 2021

IN THE COURT OF APPEALS

OF MARYLAND

No. 58

September Term, 2020

BRAWNER BUILDERS, INC., et al.

v.

MARYLAND STATE HIGHWAY ADMINISTRATION

Barbera, C.J.
McDonald
Booth
Biran
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned)
Harrell, Jr. Glenn T.
(Senior Judge, Specially Assigned)
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Booth, J.

Filed: August 25, 2021

In this case, we must determine whether a material supplier's status as a "pre-approved supplier" of concrete panels on construction projects administered by the Maryland State Highway Administration ("SHA") constituted a "procurement contract" with the State under the State Finance and Procurement Article. The supplier, who was a subcontractor on a State construction project, contends that its status as a pre-approved supplier of products by SHA constituted a procurement contract with the State, thereby entitling the subcontractor to file a direct contract claim against SHA under the procurement statute.

The dispute arises out of a contract between SHA and Brawner Builders, Inc. ("Brawner") entered on November 19, 2012, for the construction of noise barriers along a section of I-95 in Howard County. To secure the necessary materials for the project, Brawner subcontracted with Faddis Concrete Products, Inc. ("Faddis"), a pre-certified noise barrier manufacturer, to obtain noise wall panels for the project. Unfortunately, things did not proceed as planned. Shortly after Faddis began manufacturing noise wall panels for Brawner's use in connection with the project, SHA learned that the noise panels produced by Faddis contained construction aggregate of a non-conforming coarseness from an unapproved source. Following an investigation, SHA suspended approval of Faddis-manufactured noise panels for a minimum of 180 days.

Displeased with SHA's decision, Faddis sent letters to SHA and SHA's legal counsel alleging, in general terms, harm due to SHA's decision to suspend approval of Faddis-produced noise panels. In addition to sending letters to SHA, Faddis also sent a letter to Brawner. This letter, which apparently recognized that the Maryland State Board

of Contract Appeals ("MSBCA") will not hear procurement contract claims filed by subcontractors unless they pass through the prime contractor, requested that Brawner pass Faddis's contract claims through to SHA, which Brawner ultimately declined to do.

Approximately four years later, Faddis and Brawner sent a joint letter to SHA demanding that SHA render decisions on Faddis's claims, which they asserted were properly submitted to SHA. SHA did not respond to this letter. Interpreting SHA's silence as a denial of all claims, the parties filed an appeal with the MSBCA. SHA timely moved for summary disposition, which the MSBCA granted. In so doing, the MSBCA agreed with SHA that Faddis had no procurement contract with SHA and therefore had no standing to file a procurement claim unless such claim timely passed through Brawner. The MSBCA reasoned that, because Brawner did not timely file Faddis's claim, dismissal was appropriate.

Faddis and Brawner timely filed a petition for judicial review in the Circuit Court for Baltimore City. The circuit court reversed the MSBCA's decision, concluding that, as a matter of law, SHA's certification of Faddis as a pre-approved supplier of noise barriers constituted a procurement contract, thereby conferring upon Faddis standing to file a direct claim against SHA. The circuit court also found error in the MSBCA's conclusion that Faddis failed to timely file a notice of claim with SHA. According to the circuit court, it was inappropriate for the MSBCA to make factual determinations with respect to notice without a full hearing on the merits.

An appeal to the Court of Special Appeals followed. In a reported decision, the intermediate appellate court reversed the circuit court's decision. *Md. State Highway*

Admin. v. Brawner Builders, Inc., 248 Md. App. 646 (2020). In so holding, the court agreed with the MSBCA's conclusion that Faddis lacked standing to file a direct claim against SHA because SHA's certification of Faddis as a pre-approved supplier of noise barriers, without more, did not constitute a procurement contract. Similarly, the court agreed with the MSBCA's conclusion that Brawner failed to timely file notice of claim on Faddis's behalf.

For the reasons more fully set forth herein, we affirm the decision of the MSBCA. We agree with the MSBCA that SHA's certification of Faddis's manufacturing plan as a pre-approved supplier of concrete panels on SHA construction projects does not fall within the definition of a "procurement contract" under the State Finance and Procurement Article. Consequently, Faddis, as Brawner's subcontractor, did not have standing to bring direct contract claims against SHA. We also determine that, as a matter of law, Brawner's submission of a notice of a claim on Faddis's behalf was not timely.

I.

Factual and Procedural Background

A. SHA Highway Noise Policy and Manufacturer Certifications

When Congress enacted the Federal-Aid Highway Act of 1970, Congress compelled the Federal Highway Administration (the "FHWA") to, among other things, adopt highway noise abatement standards and conditioned approval of federal highway projects on adherence to such standards. *See* Federal-Aid Highway Act of 1970, Pub. L. No. 91-605, § 136 (codified, as amended, at 23 U.S.C. § 109(i)). Consistent with this directive, the FHWA not only promulgated regulations establishing noise abatement standards, *see*

Noise Standards and Procedures, 38 Fed. Reg. 15,953 (June 19, 1973) (codified, as amended, at 23 C.F.R. § 772), but also issued guidance requiring state highway agencies to adopt written noise policies demonstrating substantial compliance with the FHWA noise regulations, *see* Fed. Highway Admin., U.S. Dep't of Transp., *Highway Traffic Noise Analysis and Abatement Policy and Guidance* 65 (June 1995). The FHWA later issued additional guidance designed to assist states in drafting adequate noise abatement policies, though this guidance left considerable discretion to the states. One such area of deference left to the states included the authority to draft noise barrier material specifications, subject to FHWA approval. Fed. Highway Admin., U.S. Dep't of Transp., *Highway Traffic Noise: Analysis and Abatement Guidance* 57 (Dec. 2011).

In Maryland, SHA is the agency that implements the FHWA noise regulations. As a result, SHA is tasked with developing noise barrier material specifications and submitting such specifications to FHWA for approval. To ensure that noise barrier manufacturers comply with SHA's specifications, SHA has also developed procedures to pre-certify facilities producing noise barriers for use in SHA projects and limited eligibility to bid on SHA highway projects to SHA-certified manufacturers.

Pursuant to this process, manufacturers interested in attaining SHA pre-certification must, among other things, develop and submit to SHA a Quality Control Plan, undergo an initial plant inspection, and submit to SHA a cost reimbursement fee to cover costs associated with certifying production facilities. Once certified, SHA places the manufacturer on a list of pre-approved noise barrier suppliers. Certification is valid for one year, subject to the condition that the certified manufacturer continues to operate the

plant in accordance with SHA specifications. In the event SHA concludes that a manufacturer failed to satisfy SHA specifications, SHA may suspend or revoke a manufacturer's certification.

B. The I-95 Construction Project

On November 19, 2012, SHA contracted with Brawner to install noise barriers along a 0.38-mile stretch of I-95 in Howard County.[1] Less than three months later, on February 7, 2013, Brawner subcontracted with Faddis, whose Downington, Pennsylvania plant had been certified by SHA as a pre-approved supplier of noise barrier systems, to secure 40,910 noise wall panels and three access doors for the project. In the months that followed, Faddis produced—and furnished to SHA for inspection—a sample noise wall panel. SHA approved the sample on September 27, 2013, and based on that approval, Faddis began manufacturing additional panels for Brawner's use in connection with the project.

The Downington Plant Suspension

The project did not proceed as anticipated. Shortly after Faddis began manufacturing noise panels for Brawner *en masse*, SHA learned that on or around November 27, 2013, Faddis began manufacturing noise panels that contained construction aggregate[2] of a non-conforming coarseness from an unapproved source, which was a violation of SHA's noise barrier standards. After SHA issued a Non-Compliance Report

[1] For reasons unknown to this Court, this contract was never placed into evidence and, as a result, is not in the record.

[2] Construction aggregates are coarse particulate materials mixed into concrete that may affect the overall strength or durability of a concrete structure. Common construction aggregates include sand, gravel, and crushed stone.

related to the incident and Faddis agreed to a Quality Improvement Plan, and after a subsequent investigation, SHA continued to have concerns. Specifically, SHA Assistant Division Chief for Field Operations, Mr. Christopher Gale, concluded, among other things, that Faddis: (1) used a mix design that did not meet SHA specifications "[f]or a considerable portion of production[;]" (2) created panels of inconsistent quality due to deviations from the approved mix design; (3) failed to provide timely documentation identifying the source material for the exposed aggregate panels; (4) "altered cylinder test data to reflect values higher than what the material actually achieved[;]" and (5) "engaged in a pattern of deceptive practices," including the obstruction or delay of almost every SHA effort to assist Faddis in complying with SHA specifications.

Following the investigation, SHA's District Engineer, Mr. David Coyne, sent Brawner a letter, dated May 2, 2014, advising Brawner of Faddis's use of unapproved aggregate, and requesting a response from Brawner explaining "how [Brawner] intends to remediate this situation." Faddis was not copied on the May 2 letter. On May 8, 2014, Brawner's project manager responded to SHA's letter, advising SHA that the problem was not Brawner's to remedy, and asserting that the problem was "a breakdown in the fabrication, inspection, and acceptance procedure at a SHA pre-approved concrete precast facility." Brawner advised SHA that if SHA ultimately revoked Faddis's status as a pre-approved source of noise barriers, SHA should inform Brawner in a separate letter. The May 8 letter from Brawner to SHA requested a temporary shutdown of the project and advised SHA that Brawner was reserving its rights to extend contract performance and seek

monetary compensation. Brawner added that, "*[w]e are not requesting either at this time but reserve our right to do so should it become necessary*." (Emphasis added).

A day later, on May 9, 2014, Mr. Gale sent a letter to Mr. Kevin Iddings, Faddis's Operations Manager, suspending approval of noise barriers manufactured at the Downington plant for a minimum of 180 days, during which time Faddis would be required to undertake specific remedial action. The letter detailed several reasons for SHA's decision, including not only Faddis's failure to "provide adequate documentation of the sources for the exposed aggregate material used in the [noise] panels supplied to SHA[,]" and "comply with provisions of [its] own Quality Control Plan," but also Faddis's use of a coarse aggregate that neither received SHA approval nor conformed to SHA standards. SHA advised Faddis that future approval of noise panels following the 180-day suspension would be contingent on, among other things, demonstrating that all mix designs prepared for SHA projects conform to all applicable SHA specifications. In a letter dated May 21, 2014, Mr. Iddings responded to the issues raised by Mr. Gale, and stated that, although "Faddis disagree[d] with many of the representations made in the SHA letter, [Faddis] remain[ed] committed to resolving outstanding issues to SHA satisfaction[.]"

The relationship between Faddis and SHA deteriorated in June. On June 9, 2014, the Chief of SHA's Concrete Technology Division, Ms. Michelle Arminger, sent emails to officials at the Virginia Department of Transportation ("VDOT") and the Pennsylvania Department of Transportation ("PDOT"), advising those agencies that SHA was having compliance issues with Faddis, and asking whether they had experienced similar issues. Ten days later, the Director of SHA's Office of Materials Technology sent a follow-up

email to VDOT and PDOT, clarifying that the issues mentioned in Ms. Arminger's email were in dispute, that SHA and Faddis were engaged in an administrative dispute process, and that there had been no "final determination by SHA regarding compliance."

A few days later, on June 23, 2014, Faddis sent letters to SHA, Brawner, and SHA's legal counsel. The first letter, addressed to SHA's Mr. Coyne, stated that the letter intended to "supplement[] the notices of claims previously submitted by Brawner[.]"[3] In its letter, Faddis notified SHA that Faddis was reserving its right to recover damages for costs related to SHA's decision to suspend approval of noise panels manufactured at the Downington plant. It was Faddis's position that, although "SHA's direct communications with Faddis . . . [were] not contract specific," SHA's decision to "halt[] operations at Faddis'[s] [Pennsylvania] plant[]" had "impacted Faddis as it specifically relates to the contract between Faddis and Brawner[.]" Faddis further advised SHA that additional damages were incurred as a result of non-compliance notices emailed to VDOT and PDOT.

The second letter, which Faddis addressed to Brawner, requested that Brawner provide Faddis with the "notice of claim letter" sent to SHA related to the contract between SHA and Brawner, and that Brawner provide SHA with a copy of "this letter which serves to supplement the prior notice and advise the SHA" of continuing damages. The letter did not identify the "prior notice" to which the letter referred.

The third letter was from Faddis's attorney, Paul Logan, and was addressed to SHA's legal counsel, Assistant Attorney General Scott Morrell. This letter not only

[3] It was—and still is—Faddis's position that Brawner's letter dated May 8, 2014 constituted a notice of claim for both Brawner and Faddis.

provided an overview of the circumstances, as Faddis perceived them, leading up to the present dispute but also accused SHA of acting precipitously, without notice, and without factual or legal justification. To mitigate the harms associated with SHA's conduct, Faddis demanded that SHA lift the 180-day suspension, accept Faddis's noise panels, deem the project complete without assessing any liquidated damages or penalties, and provide a substantive communication to VDOT and PDOT detailing Faddis's good standing and compliance with SHA specifications. The next day, Mr. Morrell responded by email to Mr. Logan, advising him that any procurement claim against SHA had to be filed by Brawner—the prime contractor with which SHA has its contractual relationship—and that any tort claim had to be filed in accordance with the Maryland Tort Claims Act.

The Federal Lawsuit

A little over a year later, on July 16, 2015, Faddis filed a complaint against Brawner in the U.S. District Court for the Eastern District of Pennsylvania.[4] In its complaint, Faddis alleged it was harmed by Brawner's failure to "pass through" Faddis's claims against SHA, as such failure effectively precluded Faddis from pursuing its claims against SHA. In making this argument, Faddis took the position that it had no direct contract with SHA, and as a result, Faddis's claims against SHA had to pass through the prime contractor—Brawner—before being considered. SHA was not a party to this lawsuit.

Less than a month after Faddis filed its complaint, on August 11, 2015, Brawner sent SHA a copy of the complaint, together with a letter advising SHA of the pending

[4] The case was later transferred to the U.S. District Court for the District of Maryland.

lawsuit. Brawner indicated that the letter was intended to serve as a "Notice of Claim[.]" SHA acknowledged receipt on August 21, 2015 and accepted it as a Notice of Claim by Brawner. Thereafter, Brawner and Faddis settled the federal case and it was dismissed on December 7, 2017. The record before us does not reveal the terms of the settlement. SHA did not take any action on the claim. On May 31, 2018, counsel for Faddis, on behalf of both Brawner and Faddis, requested that SHA issue a written decision on the pending claims. When SHA failed to do so, on September 6, 2018, Brawner and Faddis (sometimes referred to collectively as "Petitioners") filed an appeal with the MSBCA.[5]

C. The Administrative Proceeding

After the appeal was filed, SHA filed a motion to dismiss, or in the alternative, a motion for summary decision. In its filing, SHA argued that dismissal was appropriate because only persons with whom SHA enjoys a direct contractual relationship may file a contract claim against SHA. SHA reasoned that, because Faddis was simply a subcontractor of Brawner, Faddis lacked standing to sue SHA directly. SHA also argued dismissal was appropriate because (1) Brawner failed to timely file both a notice of claim and a detailed claim within the time periods prescribed by the Code of Maryland Regulations ("COMAR"); and (2) Faddis's claims did not fall within the waiver of the State's sovereign immunity, as Faddis's claims were not "contractual claims arising out of a written procurement contract."

[5] Maryland law provides that where an agency fails to timely issue a decision on a pending procurement contract claim, such failure may be treated as a denial of the contractor's claim that may be appealed to the Maryland State Board of Contract Appeals (the "MSBCA"). Md. Code, State Finance and Procurement ("SF") § 15-219(d), (g).

Faddis and Brawner agreed with SHA's contention that only procurement contractors may file a procurement claim against SHA. However, contrary to the position that Faddis took in the federal case, Faddis now contended that *Faddis was a procurement contractor*. According to the Petitioners, Faddis's "contractor" status flowed from its having been certified as one of several pre-approved suppliers of concrete panels on SHA projects.

In response to SHA's assertion that Brawner failed to give timely notice of the claim, the Petitioners asserted that Brawner's May 8, 2014 letter to SHA constituted notice of Faddis's pass-through claim and that Faddis's federal complaint, forwarded with Brawner's August 11, 2015 letter to SHA, constituted the claim itself.

On May 17, 2019, the MSBCA issued an opinion and order granting SHA's motion for summary decision. First, the MSBCA ruled that Faddis did not have a written procurement contract with SHA, and therefore, did not have standing to file a direct contract claim. In reaching this conclusion, the MSBCA rejected the argument that Faddis had a written procurement contract with SHA by virtue of its certification as a pre-approved manufacturer of precast concrete walls. Consequently, the MSBCA determined that "[a]ny contract claim Faddis had concerning the [p]roject had to be filed as a pass-through claim by Brawner on behalf of Faddis."

Second, the MSBCA noted the undisputed fact that both Faddis and Brawner had actual knowledge of the claim at least by June 23, 2014, when Faddis wrote to Brawner asking it to "furnish to the SHA a copy of this letter which serves to supplement the prior notice and advise the SHA of the continuing and additional damages related to SHA's

'notices' to VDOT and [P]DOT." Accordingly, the MSBCA concluded that Brawner was required to provide notice of the claim within 30 days of that letter, *i.e.*, no later than July 24, 2014. The MSBCA rejected Faddis's argument that Brawner's letter of May 8, 2014, in response to SHA's letter of May 2, could constitute the actual filing of a claim, noting that the letter merely reserved Brawner's right to file a claim in the future. The MSBCA determined that Brawner failed to provide SHA with notice of Faddis's claims until August 11, 2015 and concluded that it was untimely.

D. The Circuit Court Proceeding

Faddis and Brawner sought judicial review of the MSBCA's decision in the Circuit Court for Baltimore City. After considering written and oral arguments, the circuit court reversed the MSBCA's decision. In so doing, the circuit court disagreed with the MSBCA's conclusion that Faddis was not a procurement contractor. According to the circuit court, SHA's approval of Faddis as a pre-approved noise panel supplier was "an independent procurement contract[]" because Faddis paid SHA "a fee of some sort" to secure a plant inspection that, if successful, would permit Faddis "to be possibly selected for use in a contract with the State through another contractor." The circuit court reasoned that because Faddis was a procurement contractor, Faddis was entitled to file a direct claim against SHA.

With respect to whether Faddis provided SHA with timely notice of its claims, the circuit court determined that the MSBCA "inappropriately weighed evidence on the issue of whether or not there was adequate timely notice of a claim given." On these grounds,

the circuit court reversed and vacated the MSBCA's summary decision and remanded the case for a hearing on the merits.

E. The Court of Special Appeals Proceeding

SHA appealed the circuit court's decision to the Court of Special Appeals. The intermediate appellate court reversed the decision of the circuit court. *Md. State Highway Admin. v. Brawner Builders, Inc.*, 248 Md. App. 646 (2020). The Court of Special Appeals concluded that the certification of Faddis's manufacturing plant as a pre-approved supplier of concrete panels on SHA construction projects did not fall within the definition of a "procurement contract" under the State Finance and Procurement Article. *Id.* at 662–63. The court observed that, without a separate written contract with a procurement agency, a pre-approved supplier does not automatically become a procurement contractor as a result of its eligibility to become one. *Id.* at 662. Consequently, the court concluded that Faddis, as Brawner's subcontractor, did not have standing to bring direct contract claims against SHA. *Id.* at 663.

The Court of Special Appeals also determined that, as a matter of law, Brawner's submission of a notice of claim on Faddis's behalf was not timely, where the undisputed facts established the date when Petitioners knew the basis for Faddis's claim against SHA, but Brawner did not submit its notice of claim until well over a year after the expiration of the 30-day statutory filing period. *Id.* at 664–65.

Faddis and Brawner petitioned this Court for a writ of *certiorari*, which we granted, to consider the following issues[6]:

> (1) Did the MSBCA err in concluding that Faddis was not a procurement contractor and therefore lacked standing to file a direct procurement contract claim against SHA?
>
> (2) Did the MSBCA err in concluding that Brawner failed to timely file a pass-through claim on Faddis's behalf?

For the reasons that follow, we answer both questions in the negative and shall affirm the decision of the MSBCA.

II.

Standard of Review

When this Court is called upon to review an appeal from an administrative decision, "we 'review the agency's decision directly[.]'" *Motor Vehicle Admin. v. Pollard*, 466 Md.

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[6] For ease of discussion, we have consolidated and rephrased the issues on appeal. The questions in the original petition for writ of *certiorari* were:

> (1) Did the Court of Special Appeals and MSCBA misconstrue the COMAR definition of a "Procurement Contract" and thereby erroneously conclude that Faddis lacked standing to pursue its separate claims against the Maryland State Highway Administration ("SHA")?
>
> (2) Did the Court of Special Appeals and MSCBA improperly conclude that "untimely notice" was a jurisdictional bar to Brawner's and Faddis'[s] claims rather than an affirmative defense, subject to the doctrine of equitable estoppel?
>
> (3) Did the Court of Special Appeals and MSCBA err when they decide [sic] issues of material fact regarding Brawner's "notice" and the factual issue of the existence of a contract between Faddis and SHA by disregarding SHA's admissions that claims were pending, would be responded to and that an administrative process was ongoing?

531, 537 (2019) (quoting *Comptroller of Treasury v. Science Applications Int'l Corp.*, 405 Md. 185, 192 (2008)). "Thus, our inquiry 'is not whether the Court of Special Appeals erred, but whether the administrative agency erred.'" *Frederick Classical Charter Sch., Inc. v. Frederick Cty. Bd. of Educ.*, 454 Md. 330, 369 (2017) (quoting *Spencer v. Md. State Bd. of Pharmacy*, 380 Md. 515, 523 (2004)).

In this case, the agency decision subject to appellate review is an MSBCA order granting summary disposition in SHA's favor. It is well-settled that the propriety of granting a motion for summary disposition is a legal question which we review *de novo*. *See, e.g.*, *Rosello v. Zurich American Ins. Co.*, 468 Md. 92, 102 (2020). Consequently, we must step into the shoes of the MSBCA and determine whether summary disposition was proper under COMAR 21.10.05.06. The legal standard for granting summary disposition is the same as that for granting summary judgment under Maryland Rule 2-501(a). That is, summary disposition is appropriate if "there is no genuine issue of material fact[,] and [a] party is entitled to prevail as a matter of law." COMAR 21.10.05.06D(2)(a), (b).

Even where there are alleged factual disputes, if the factual disputes are irrelevant, they will not prevent the entry of summary judgment. *Seaboard Sur. Co. v. Richard F. Kline, Inc.*, 91 Md. App. 236, 244 (1992). Moreover, once a movant has met its burden of demonstrating sufficient grounds for summary judgment, "[t]he party opposing summary judgment must do more than show simply that there is some metaphysical doubt as to the material facts." *Tyler v. City of College Park*, 415 Md. 475, 498 (2010) (internal quotations and citation omitted). To defeat a properly supported motion for summary judgment,

therefore, the non-moving party must produce admissible evidence demonstrating a dispute. *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 737 (1993).

III.

Discussion

The crux of this dispute is whether Faddis had a procurement contract with the State. As the Court of Special Appeals aptly observed, "[u]ntil late in the game," Faddis accepted the proposition that it did not have a direct contract with the State. *Brawner Builders*, 248 Md. App. at 657. Indeed, its whole premise in the federal lawsuit was that Brawner's refusal to make a claim on Faddis's behalf precluded Faddis from recovering its losses. With the federal lawsuit (and undisclosed settlement with Brawner) in the rearview mirror, Faddis now asserts that it is a procurement contractor by virtue of SHA's pre-approval and certification of its plant, and therefore, it has the requisite standing to make a contract claim in its own right.

Of course, the reason that Faddis is asserting that it is a procurement contractor is to avoid the State's sovereign immunity. Prior to 1976, under common law, the State possessed sovereign immunity from contract actions filed against it. *See Katz v. Washington Suburban Sanitary Comm'n*, 284 Md. 503, 507 (1979) ("[T]he doctrine of sovereign immunity from suit, rooted in the ancient common law, is firmly embedded in the law of Maryland[]" and "is applicable not only to the State itself, but also to its agencies

and instrumentalities, unless the General Assembly has waived the immunity either directly or by necessary implication.").

As noted by our colleagues on the Court of Special Appeals, "[t]hat immunity was partially, and somewhat indirectly, waived by statute in 1976." *Brawner Builders*, 248 Md. at 658. That waiver, currently codified in Maryland Code, State Government Article ("SG") § 12-201, precludes the State and its officers, and units from raising the defense of sovereign immunity "in a contract action, in a court of the State, based on a written contract that an official or an employee executed for the State or 1 of its units while the official or employee was acting within the scope of the authority of the official or employee." We have previously held that waivers of sovereign immunity, which are in derogation of common law, are strictly construed in favor of the State. *Proctor v. Washington Metro. Area Transit Auth.*, 412 Md. 691, 709 (2010); *Bd. of. Educ. of Balt. Cty. v. Zimmer-Rubert*, 409 Md. 200, 212 (2009).

In connection with the limited waiver of immunity for contract claims pursuant to SG § 12-201, the Legislature has enacted a comprehensive set of laws governing procurement contracts, which are codified in Title 11 through Title 19 of the State Finance and Procurement Article ("SF"). While this comprehensive set of laws governs virtually every aspect of procurement contracting, here, we are principally concerned with SF Titles

11, 13, and 15, which deal with the process for entering into procurement contracts, as well as the structure and procedure for resolving procurement disputes.

Procurement Contracting: Formation and Dispute Resolution

Because this case implicates the General Assembly's prescribed method of procurement contract formation and dispute resolution, we begin our discussion with a brief overview of the procurement process. To understand this process, however, it is first necessary to understand a few key terms—namely, "procurement," "procurement contract," and "contract claim"—as these terms "shape the universe we are dealing with[.]" *Brawner Builders*, 248 Md. App. at 659. The first of these terms, "procurement," is defined as "the process of . . . buying or otherwise obtaining supplies, services, construction, construction related services, architectural services [or] engineering services[]" and includes "the solicitation and award of procurement contracts and all phases of procurement contract administration." SF § 11-101(n). The second key term, "procurement contract," is simply defined as "an agreement in any form entered into by a unit for procurement." SF § 11-101(o)(1). The final salient term is "contract claim," which SF§ 15-215(b) defines as "a claim that relates to a procurement contract[,]" including claims "about the performance, breach, modification, or termination of the procurement contract."

The procurement process begins with the procurement officer—the individual authorized by an agency to enter, administer, and make determinations and findings with

respect to procurement contracts—who selects a procurement method[7] and solicits bids for procurement. SF § 11-101(p) (defining "procurement officer"); SF § 13-102 (permitting procurement officer to solicit bids). After securing and reviewing qualifying bids and obtaining any approval required by law, the procurement officer may award the procurement contract to a qualified bidder. *See* SF §§ 13-103 through 13-113. The final agreement must contain certain contract provisions, including those related to termination, excuses for nonperformance, and liquidated damages. SF § 13-218(a); COMAR 21.07.01.01 through 21.07.01.30. Failure to either comply with the statutorily prescribed process for procurement contracting or include mandatory contract terms or provisions results in a contract that is either void or voidable. SF § 11-204; COMAR 21.03.01.01 through 21.03.01.03.

Recognizing that all does not always go as planned in the world of State procurement, the General Assembly created a process for resolving procurement disputes. This process begins when a procurement contractor[8] files a contract claim with the

[7] At all times relevant to this case, procurement officers were required to use a competitive sealed bidding process when soliciting, reviewing, and awarding bids on State projects unless "specifically . . . authorized" to employ an alternative procurement method. Md. Code (2001 Repl. Vol.), SF § 13-102(a). This changed in 2017, when the General Assembly amended SF § 13-102 to provide procurement officers with discretion to select a procurement method from a list of ten authorized procurement methods. *See* 2017 Md. Laws 3483–84.

[8] The parties appear to agree that only the person to whom a procurement contract has been awarded may submit a contract claim. Similarly, the parties also appear to accept the MSBCA's decision in *Jorge Co.*, MSBCA No. 1339 (1982). In that case, the MSBCA held a subcontractor that does not have a contract with a State agency cannot maintain an action in its own name and must instead submit all claims through the entity with whom

procurement officer. SF § 15-217. Notably, the filing of a contract claim generally proceeds in two steps. First, the contractor files 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." SF § 15-219(a). After filing a general notice of claim, the contractor must submit "a written explanation that states: (1) the amount of the contract claim; (2) the facts on which the contract claim is based; and (3) all relevant data and correspondence that may substantiate the contract claim." SF § 15-219(b). This written explanation must be filed no more than 90 days after the contractor submits the notice of claim. *Id.* In the event that a procurement contractor fails to meet the applicable filing deadlines, the claim must be dismissed. COMAR 21.10.04.02.

Once a contract claim is filed, the agency has a fixed amount of time, depending on the amount of the claim, to investigate and issue a final decision. SF § 15-219(d). If an agency issues an unfavorable decision, a contractor may appeal to the MSBCA, though such an appeal must be filed within 30 days of the agency issuing the final decision. SF § 15-220. In the event that an agency fails to timely issue a decision on a pending claim, a contractor may treat such silence as a decision not to pay the contract claim and appeal such decision to the MSBCA. SF § 15-219(g).

The Parties' Contentions

Brawner and Faddis argue that the MSBCA erred in concluding Faddis was not a procurement contractor and therefore lacked standing to file a direct claim against SHA.

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the State has a direct contractual relationship. Because the parties do not dispute either issue, we assume, without deciding, that the parties' assumptions are correct.

According to Brawner and Faddis, a procurement contract is "an agreement in any form entered into by a procurement agency for . . . the acquisition of services, construction, construction-related services, or engineering services." (Internal quotations and emphasis omitted). Based on this definition, Brawner and Faddis contend that SHA's "written approval of Faddis'[s] engineered 'concrete mix designs[,]' structural engineering of the noise wall panels and posts[,] . . . and acceptance of Faddis'[s] quality control/quality assurance plan" constituted a procurement contract. To the extent it is unclear if Faddis had a direct contractual relationship with SHA, Brawner and Faddis argue such a determination is an issue of fact that is inappropriately resolved at the summary disposition stage.

Proceeding from the premise that Faddis had a valid procurement contract with SHA, Brawner and Faddis assert sovereign immunity is no bar to Faddis's claims. Specifically, Brawner and Faddis argue that the General Assembly "either directly or by necessary implication" waived the State's sovereign immunity with respect to procurement contract claims by enacting the State Finance and Procurement Article, as such enactment established a process for resolving procurement disputes between contractors and State agencies. It follows that because Faddis had a valid, written[9] procurement agreement with SHA, sovereign immunity should be no bar to Faddis's claims against SHA.

[9] Although Brawner and Faddis assert the SHA-Faddis procurement contract is set forth in "multiple documents," these documents appear nowhere in the administrative agency record. Instead, the record includes no more than a blank print out of the standardized plant inspection checklist and a PDF print out indicating Faddis's status as a pre-approved supplier of noise barriers.

Brawner and Faddis also assert that the MSBCA erred in finding that Brawner failed to timely file a notice of claim on Faddis's behalf. According to Brawner, knowledge is a factual issue. And because it is generally inappropriate for disputed questions of fact to be determined on summary disposition, it was inappropriate for the MSBCA to conclude Brawner failed to timely file a notice of claim on Faddis's behalf. In the alternative, Brawner and Faddis argue that even if it was appropriate for the MSBCA to make factual determinations with respect to knowledge at the summary disposition stage, summary disposition was still inappropriate because Brawner and Faddis squarely raised the issue of equitable estoppel. Because equitable estoppel is an inherently fact-specific inquiry, Brawner and Faddis contend the MSBCA was precluded from resolving the issue without a full hearing on the merits.

Of course, SHA disagrees with arguments advanced by Brawner and Faddis. According to SHA, the MSBCA did not err in summarily entering judgment in SHA's favor because SHA was immune from Faddis's claims. With respect to contract claims, SHA asserts that sovereign immunity is only waived where there is a written contract. It follows that because there was no written agreement signed by an authorized procurement officer memorializing Faddis's status as a pre-approved concrete barrier supplier, any claims related to such relationship would fall outside the State's limited waiver of sovereign immunity.

In the event sovereign immunity is no bar to Faddis's claims, SHA asserts that designating Faddis a certified supplier of noise barriers did not constitute a procurement contract. As such, it is SHA's position that Faddis lacked standing to file a direct claim

against SHA and any claims Faddis had against SHA needed to timely pass through Brawner.

While SHA concedes that Brawner eventually passed through Faddis's claims to SHA, SHA asserts the pass-through claim was untimely. According to SHA, the undisputed evidence indicates Brawner knew of Faddis's claim by June 23, 2014. It follows that, because Brawner did not pass through a notice of claim on Faddis's behalf until August 11, 2015, Faddis's claims were untimely, and dismissal was required. Importantly, SHA rejects Faddis's assertion that Brawner's May 8 letter served as a notice of claim, observing that the plain language of Brawner's letter shows it did nothing more than reserve Brawner's right to file a claim should it become necessary. SHA also asserts that, even if the May 8 or June 23 letters served as notice of Faddis's claim, summary disposition was still appropriate because Brawner did not file a written explanation of Faddis's claims within 90 days of filing a notice of claim.

A. There is No Procurement Contract Between Faddis and SHA

We agree with SHA that its certification of Faddis as a pre-approved supplier of noise panels did not constitute a procurement contract. Starting with the plain language of the State Procurement Article, as noted above, an agreement is only a procurement contract to the extent the agreement is "entered into by a [State agency] for procurement." SF § 11-101(o)(1). It follows that a procurement contract only exists where the State contracts to "buy[] or otherwise obtain[] supplies, services, construction, construction related services, architectural services, [or] engineering services[.]" SF § 11-101(n) (defining

"procurement"). SHA procured nothing by certifying Faddis as a pre-approved supplier of noise barriers.

As the intermediate appellate court succinctly observed, "[p]re-approval of *eligibility* to provide materials, work, or services does not . . . constitute a contract to do so." *Brawner Builders*, 248 Md. App. at 662 (emphasis in original). We can say it no better. "Pre-approval of an entity's status or products—of eligibility to act as a supplier or even a preferred supplier—does not make the entity a procurement contractor if it is not, in fact, selected by a procurement agency, through a written contract, to provide materials, work, or services to the agency." *Id.* As the MSBCA correctly observed, being on an approved supplier list did not obligate SHA to "buy one single piece" of panel from Faddis, or to engage Faddis in any capacity on any project in the State. Nor did the certification require that any general contractor purchase from Faddis. The only status granted to Faddis through the pre-approved certification, was to permit Faddis to furnish its panels to other contractors, in the same manner as other certified suppliers on the list.

Under Faddis's argument, individuals and companies on any other state certified list would qualify as "procurement contractors" with authority to bring direct contract claims against the State and other agencies. For example, the State maintains a certified list of small businesses eligible for preferences under the Small Business Preference Program, *see* SF Title 14, Subtitle 2 and COMAR 21.11.01, as well as a certified list of minority businesses eligible for participation in the Minority Business Enterprise Program, *see* SF Title 14, Subtitle 3 and COMAR 21.11.03. Under Faddis's theory, any company or person identified on a certified list as being *eligible* under one of these programs, would have a

procurement contract with the State, simply by virtue of its eligibility. When asked about these other types of certified lists at oral argument, counsel for Faddis simply asserted that the relationship is "different" and that the certification process for plant approval is a "completely different process than that which would be used for [a] disadvantaged business enterprise." Although we agree that the approval process for becoming a pre-certified supplier of noise barriers is certainly different from other certifications, we fail to see why one type of pre-approval constitutes a "procurement contract," but others do not. Simply put, being an approved supplier of concrete panels does not create a procurement contract with SHA any more than being on an approved list of minority business enterprises creates a procurement contract with the Department of Transportation.

SHA, in pre-approving Faddis as a certified noise-barrier supplier, was engaged in neither buying nor otherwise obtaining anything from Faddis. To the contrary, SHA's certification of Faddis simply conferred upon Faddis eligibility for selection—either by SHA or a third party—as a supplier of noise barriers for future SHA projects. It should go without saying that the eligibility to supply products or services is different than actual selection as the source for supplies or services on a particular project.

That SHA's certification of Faddis as a pre-approved supplier of noise barriers is not a procurement contract finds additional support in the fact that SHA vests the ultimate decision to certify noise barrier manufacturers in someone other than a procurement officer. As previously noted, there is a clear process through which State agencies enter into procurement contracts. It begins with a procurement officer who solicits, evaluates, and, where appropriate, awards procurement contracts. *See* SF §§ 11-101(p), 13-102, 13-103

through 13-113. There is nothing in the record to reflect that SHA engaged in the procurement process when undertaking the plant certification process.

In a similar vein, we also observe that the written documentation alleged by Faddis to constitute a procurement contract lacked many of the standard terms and provisions agencies are required by law to include in procurement contracts. As noted above, the State Finance and Procurement Article and its implementing regulations require State procurement contracts to include a handful of standardized terms. *See* SF § 13-218(a); COMAR 21.07.01.01 through 21.07.01.30. Notwithstanding this clear directive, the "multiple documents" Faddis produces to prove the existence of a procurement contract with SHA lack many—if not all—of these mandatory provisions.

We determine that Faddis's status as a certified noise barrier supplier lacked all the requisite requirements to fall within the statutory definition of a procurement contract. By certifying the plant for *eligibility* for SHA contracts *generally*, SHA did not enter into a procurement contract to purchase the panels, or otherwise transform an eligible supplier into a prime contractor.

B. The Pass-Through Claim Submitted by Brawner on Faddis's Behalf Was Untimely

We similarly reject Faddis's and Brawner's assertion that Brawner timely filed a pass-through notice of claim against SHA on Faddis's behalf. As previously discussed, the State Finance and Procurement Article provides that a party seeking administrative review on a procurement contract claim must "file a written notice of a claim . . . within 30 days after the basis for the claim is known or should have been known." SF § 15-219(a).

After filing a notice of claim, a contractor is required to submit "a written explanation that states[] (1) the amount of the contract claim; (2) the facts on which the contract claim is based; and (3) all relevant data and correspondence that may substantiate the contract claim." SF § 15-219(b). This written explanation must be filed within 90 days of filing the notice of claim. *Id.* In the event the applicable filing deadlines go unmet, the claim must be dismissed. COMAR 21.10.04.02.[10]

The record reveals that on June 23, 2014, Faddis authored a letter advising Brawner, in general terms, that Faddis incurred damages due to SHA's conduct and requesting Brawner forward the letter to SHA to advise SHA of damages incurred by Faddis. As the Court of Special Appeals aptly observed, this letter effectively "shows the latest date when Faddis and Brawner both were aware that Faddis had a claim that needed to be presented" to SHA by Brawner. *Brawner Builders*, 248 Md. App. at 663–64.

It follows that, in order for Faddis's claim to be timely, Brawner needed to pass through notice of Faddis's claim to SHA within 30 days of June 23, 2014. That did not happen. Instead, Brawner did not pass Faddis's claim through to SHA until August 11, 2015, when Brawner sent a letter to SHA advising SHA that Faddis filed suit against Brawner in federal court.

Our conclusion that Brawner did not timely pass through Faddis's claim against SHA finds support in Faddis's own words. Specifically, on July 16, 2015, Faddis filed a federal complaint against Brawner, wherein Faddis alleged harm due to Brawner's refusal

[10] Neither party disputes that the filing deadlines apply to pass-through claims.

to facilitate the pursuit of Faddis's claims against SHA. Stated differently, the federal complaint was premised on Brawner's failure to pass through Faddis's claims against SHA. We agree with the Court of Special Appeals that "[t]here can be no clearer admission that, as of [July 16, 2015], no written pass-through notice of claim had been filed by Brawner on behalf of Faddis." *Id.* at 664.

In reaching our conclusion that notice of Faddis's claim was untimely filed, we reject Faddis's claim that Brawner's May 8, 2014 letter to SHA constituted a notice of claim, as such a conclusion is inconsistent with the plain language of the May 8 letter. As previously noted, Brawner sent SHA a letter on May 8 to respond to SHA concerns related to Faddis's Downington facility. Though it is true that this letter advised SHA that Brawner and Faddis had been harmed by SHA's conduct and that they were reserving their rights to extended contract duration and compensation, the letter did not advise SHA that either Faddis or Brawner were requesting any relief at the time. To the contrary, Brawner's letter stated that they were instead reserving their "right to do so should it become necessary." In other words, the May 8 letter did the opposite of what Faddis contends—it notified SHA that Faddis and Brawner did *not* have any claims against SHA at that time.

Finally, Brawner and Faddis argue that it was inappropriate for the MSBCA to conclude that Faddis failed to provide timely notice of its claims against SHA without a full hearing on the merits. Relying on this Court's decision in *Engineering Management Services v. Maryland State Highway Administration*, 375 Md. 211 (2003), Faddis and Brawner assert that summary disposition is inappropriate whenever resolution of a contested issue involves factual determinations related to knowledge, motive, or intent.

Specifically, they contend that, because the timeliness of notice under SF § 15-219(a) turns on when a would-be contract claimant knows or should have known of a claim, the issue should only be resolved after a full hearing on the merits rather than summary disposition. Even if this is not the case, Brawner and Faddis argue our decision in *Engineering Management Services* still precludes summary disposition in this case because summary disposition is inappropriate where a party opposing summary disposition "squarely raise[s] the issue of 'equitable estoppel' respecting the issue of 'notice[.]'" Specifically, Faddis and Brawner argue that discovery conducted in connection with Faddis's federal lawsuit, as well as correspondence between SHA, Faddis, and Brawner established that SHA had notice of Faddis's claim and was acting on it. We find both arguments unpersuasive.

Our decision in *Engineering Management Services* simply restates the general rule that it is often inappropriate to grant summary disposition where there are factual issues related to knowledge, motive, or intent because such issues may require "greater than usual factual development[.]" *Berkey v. Delia*, 287 Md. 302, 306 (1980). But this general rule is not absolute, as we have oft observed summary judgment may be appropriate notwithstanding the presence of factual issues concerning knowledge, motive, or intent so long as there are "no genuine issue[s] of material fact," *id.*, and the facts are not susceptible "to inferences supporting the position of the party opposing summary judgment[.]" *Clea v. Mayor and City Council of Balt.*, 312 Md. 662, 677 (1988). Thus, where, as here, there are no genuine disputes of material fact with respect to whether or when Faddis had knowledge of a claim against SHA, we find no error in the MSBCA's decision to resolve the dispute via summary disposition.

Turning to Brawner's second argument, we begin by observing that equitable estoppel is not a procedural panacea that spares all litigants who utter the phrase from summary disposition. To the contrary, equitable estoppel, like factual determinations related to knowledge, intent, or motive, is a factual matter, the resolution of which should generally follow a full hearing on the merits. This does not mean, however, that summary disposition is precluded in every instance that a party raises equitable estoppel. Indeed, just as summary disposition may be appropriate on issues related to knowledge, motive, or intent where there are neither any disputes as to material facts nor facts susceptible to inferences supporting the party opposing summary judgment, so too may summary disposition be appropriate in matters involving equitable estoppel as long as material facts are not in genuine dispute and such facts are not susceptible to inferences drawn in favor of the party opposing summary disposition.

We find this case falls into the exception to the general rule and therefore, the MSBCA did not err in resolving this case on summary disposition notwithstanding the presence of arguments related to equitable estoppel. Brawner's equitable estoppel argument makes much ado about an SHA email, dated June 19, 2014, wherein a SHA employee indicated Faddis and SHA were "currently engaged[]" in "an administrative dispute process[.]" This admission, Brawner and Faddis suggest, indicates SHA had effectively waived any notice requirements with respect to Faddis's claims against SHA. We disagree for two reasons: first, Faddis's conduct in the days following the June 19 email contradict Faddis's equitable estoppel narrative. Specifically, on June 23, 2014, Faddis wrote to Brawner requesting that Brawner produce a copy of the notice of claim sent to

SHA and wrote separately to SHA with a letter intended to serve as Faddis's notice of claim. There would have been no need for Faddis to send the June 23 letters if Faddis had indeed relied on statements made in the June 19 email. Second, Faddis's equitable estoppel argument appears to confuse two separate SHA administrative dispute processes: the ad hoc SHA process for handling plant certification disputes and the formal SHA process for handling procurement contract disputes. A review of the correspondence reveals that while it may be true that the June 19 email referenced "an administrative dispute process," the email's context clearly indicates that SHA was simply referring to a dispute resolution process pertaining to plant certification. Thus, the June 19 email does not indicate SHA had effectively waived any notice requirements with respect to Faddis's claims against SHA.

Brawner's equitable estoppel argument also relies heavily on internal SHA emails and documents concerning Faddis, which were uncovered by Faddis during discovery in the federal lawsuit. These documents have no bearing on the issue of equitable estoppel. Indeed, equitable estoppel turns on what Faddis knew and relied on in 2014, not what Faddis happened to learn after the fact through discovery in federal litigation.

IV.

Conclusion

We find no error in the MSBCA's decision to grant SHA's motion for summary decision. We agree with the MSBCA's determination that SHA's certifying Faddis as a pre-approved supplier of noise barriers did not constitute a procurement contract, and Faddis was therefore precluded from pursuing claims against SHA unless and until

Brawner timely passed Faddis's claims through to SHA. The undisputed facts show Brawner failed to timely file notice of claim on Faddis's behalf, and thus, the MSBCA properly dismissed Faddis's claims and entered judgment in SHA's favor.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR ENTRY OF JUDGMENT AFFIRMING THE DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS. COSTS TO BE PAID BY PETITIONERS.