BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of **Milani Construction, LLC**	*	
Under SHA Contract No. BA9785226	*	**Docket No. MSBCA 3181**
Appearance for Appellant	*	**Dana A. Reed, Esq.** **802 Oak Hill Court** **Baltimore, Maryland**
Appearance for Respondent	*	**Kerry B. Fisher, Esq.** **Assistant Attorney General** **Office of the Attorney General** **Contract Litigation Unit** **Baltimore, Maryland**

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OPINION AND ORDER BY MEMBER KREIS

Upon consideration of Respondent Maryland State Highway Administration's ("SHA" or "Respondent") Motion for Summary Decision and Dismissal of Appeal ("Motion"), Appellant Milani Construction, LLC's ("Milani" or "Appellant") Motion for Partial Summary Decision[1] ("Cross Motion"), all responses and replies to both motions, and counsels' arguments at the February 23, 2022 hearing, the Board holds that there are no genuine issues of material fact and that the Respondent is entitled to prevail as a matter of law.

UNDISPUTED FACTS

This appeal arises out of SHA Contract No. BA9785226 to provide and install noise barriers along MD Route 295 in the Baltimore Highlands and Riverview communities of Baltimore County ("Contract"). SHA awarded the Contract to Appellant, a small construction

[1] In essence, these are cross motions for summary decision; however, Appellant is only requesting summary decision as to entitlement and not as to the actual amount of interest owed. At the hearing, both Motions were argued at the same time.

firm that specializes in bridge and highway construction, and work began on the project in 2015.

The original contract price for the work was $8,945,000. During the Contract, SHA issued over $962,000 in change orders ("CO"), amounting to over 10% of the original contract amount. CO #11 is the only CO at issue in this appeal. Pursuant to CO #11, SHA agreed to pay Appellant $421,144.17 for direct costs incurred by Appellant because of changes to the Contract required by Respondent and differing site conditions encountered on the project. The issues that ultimately resulted in the execution of CO #11 began in early 2016. Between March 2016, and October 10, 2017, Appellant submitted 22 change proposals ("Change Proposals") to Respondent for additional work that Respondent required it to perform on the Contract.

SHA District 4 was responsible for administration of the Contract. On September 24, 2018, SHA Assistant District Engineer Jesse Free ("Mr. Free") and SHA Area Engineer Bruce Cain ("Mr. Cain") met with Milani President Saeed Milani ("Mr. Milani") and Milani Vice President Ira Kaplan ("Mr. Kaplan") at the District 4 office to discuss and negotiate Appellant's claimed direct costs associated with changes on the Contract. The parties agreed to some, but not all, of Appellant's claims for compensation. Later the same day, Mr. Kaplan sent a letter to Respondent titled "Global Settlement Negotiations" that confirmed the day's discussions and indicated that Appellant would be gathering additional information for additional Maintenance of Traffic ("MOT") and field costs and forwarding it to Respondent.

On September 25, 2018, Mr. Milani spoke with Mr. Free by telephone, and Mr. Kaplan later confirmed the conversation in an email to Mr. Free. The email set forth the agreed-upon items and asked that a CO be issued for those items. It also noted that the MOT number

discussed at the meeting was incorrect, and that the correct amount was $21,478. Mr. Kaplan stated that "[i]f you agree with this amount, please include it in the change order."

On September 26, 2018, Mr. Free replied to the email stating that "[w]e are in agreement with most of the listing below except for the time and MOT." He further indicated that SHA would take a second look at MOT and see if the lane closures were necessary. Finally, he indicated that he would follow up with a decision letter within two weeks outlining the information noted. Later that day, Mr. Kaplan emailed Mr. Free thanking him for starting the CO process on the agreed items and stating that it was premature for SHA to issue a final decision as the parties were still trying to reach a global settlement.

On September 28, 2018, Mr. Free retired from State employment and, effective September 30, 2018, Mr. Cain was named Acting Assistant District Engineer for Construction at District 4. Before leaving, Mr. Free confirmed with Mr. Cain that there was no complete agreement about the matter discussed at the September 24, 2018 meeting and that Mr. Cain would need to follow up on these negotiations.

On October 1, 2018, Mr. Kaplan sent an email to Mr. Cain stating: "I'm emailing to confirm SHA has initiated the change order for the direct cost of the various additional work in the amount of $421,144.17…." On October 10, 2018, having heard nothing further on the matter, Mr. Kaplan sent Mr. Cain another email that's subject line included this Contract and another unrelated project, stating: "Please let me know the status for the CO's for these projects…." Mr. Cain responded on October 12, 2018, indicating the CO on the unrelated project was complete and that he was now working on the CO for this Contract.

On April 30, 2019, Mr. Kaplan sent another email to Mr. Cain following up on the CO, indicating that "[q]uite some time has passed" (over 6 months) and requesting an update as to the status of the CO. No immediate response was received to this email.

On June 5, 2019, Mr. Kaplan sent an email to Michael Akers, SHA's Assistant Area Engineer ("Mr. Akers") attaching the email trail for the negotiated Change Proposal and stated: "Time issue is not yet resolved." Mr. Akers responded on June 6, 2019: "I cannot write a change order or even discuss it unless I have . . . the back up information." Mr. Kaplan responded the same day attaching the Change Proposal logs showing the original Change Proposal amount and the agreed-upon amount. He again noted that the $21,478 amount for MOT was not part of the negotiation, but that Appellant expected to be paid for it.

On August 22 & 23, 2019, Mr. Akers and Mr. Kaplan exchanged emails and back up documents for the Appellant-requested CO. On August 27, 2019, they again exchanged emails confirming that Appellant and Respondent agreed to a "negotiated settlement total of $421,144.17 to cover all outstanding invoices."

On November 11, 2019, Mr. Kaplan, an authorized Milani representative, signed the "Contractor's Acceptance" box of CO 11 for $421,144.17. The signature box confirms that the contractor's acceptance constitutes "a full accord and satisfaction by the contractor for all costs . . . related to the actions described or referenced . . . ." CO 11 was then signed by four separate individuals from SHA, with the first signature dated November 18, 2019, and the last signature from the Assistant Director, Office of Finance and Information Technology dated December 11, 2019.[2]

[2] There are actually five signatures from SHA representatives on CO #11. The District Engineer signed in two places. The first signature of the District Engineer at the top of the page is not dated.

The amount of the CO was included on Estimate #29, dated December 27, 2019. On January 10, 2020, exactly thirty (30) days after the final SHA signature was obtained, Appellant was paid for CO #11. After retainage was deducted from the full amount of $421,144.17, Appellant received $400,086.97.

On January 29, 2020, Appellant sent a letter to SHA requesting "payment for interest accrued on the late payment . . . in accordance with TC-7.07" of the Contract. Appellant alleged that an agreement had been reached on all CO #11 cost issues on September 24, 2018 and that the $421,144.17 was due no later than December 24, 2018. It claimed interest at 9% per annum from that date forward, which totaled $36,007.83.

Rather than respond to Appellant's request for interest, almost 8 months later, by a letter dated September 23, 2020, Respondent wrote to Appellant stating it was starting the process of closing out the Contract. On October 17, 2020, Appellant responded by letter informing Respondent that Respondent had not responded to its request for interest. On February 17, 2021, the District Engineer denied the interest claim and informed Appellant that it had 30 days to file its claim with the PO.

On February 23, 2021, Appellant filed its Claim with the PO. Appellant was now requesting interest at 9% per annum starting 31 days after the alleged September 24, 2018 agreement, increasing its interest claim to $39,441.81. The PO issued his final decision denying the claim on May 21, 2021. He found that that Appellant never submitted a proper invoice for the interest it was claiming and, therefore, pursuant to TC-7.07(d), no amount was due. Additionally, he found that CO #11 was not entered into until December 17, 2019 and that payment was timely made within 30 days on January 10, 2020.[3]

[3] The last signature on CO #11 was December 11, 2019; however, Progress Estimate No. 29 that reflected the settlement amount was not generated until December 17, 2019. As will be discussed later in more detail, whether

On June 21, 2021, Appellant timely appealed the denial of its Claim to this Board, and on July 20, 2021 filed its Complaint. The parties filed Cross Motions for Summary Decision, which were argued on February 23, 2022.

STANDARD OF REVIEW

In deciding whether to grant a motion for summary decision, the Board must follow COMAR 2 l.10.05.06O(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 of 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 2-50 I (a). *See Beatty v. Trailmaster Prod., Inc.,* 330 Md. 726 (1993). While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *Crickenberger v. Hyundai Motor America,* 404 Md. 37 (2008*); Clea v. Mayor & City Council of Baltimore,* 312 Md. 662 (1988), superseded by statute on other grounds, MD CODE ANN., STATE GOV'T § 12-101(a). 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. *Beatty*, 330 Md. at 737-38.

DISCUSSION

It is incontrovertible that it took far too long to complete CO #11 and pay Appellant what it was owed. The extra or additional work in question was performed by Appellant in 2016 and 2017, and payment was not received until January 10, 2020. At the hearing, Counsel for Respondent honestly admitted that dealing with the government comes with a

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the time for payment began to run on December 11th or 17th is not a material factual dispute as it is undisputed that payment was made on January 10, 2020, which is within 30 days of both dates.

great deal of bureaucracy and that he is not happy with the amount of time that it takes to get a CO processed and fully signed. He then respectfully stated that this problem needed to be remedied elsewhere, and that the Board did not have the authority to change existing laws. Unfortunately, under the facts in this case, even with the substantial delay in payment caused predominately by SHA, the Respondent is correct.

At its simplest, this case is about whether Appellant is entitled to interest based on what it claims is an extremely untimely payment for work performed as reflected in CO #11. The parties spent a significant amount of time arguing about when interest begins to accrue, when an invoice for interest must be sent, what an invoice must contain, and whether such an invoice was ever sent by Appellant. However, for any of those issues to have any relevance in this Appeal, Appellant must first prove that Respondent failed to make a timely payment to Appellant.

Maryland law is clear as to when payment must be made under a procurement contract. MD. CODE ANN., STATE FINANCE & PROCUREMENT ("SF&P") § 15-103 – Payment by State, provides:

> It is the policy of the State to make a payment under a procurement contract within 30 days:
> (1) after the day on which payment becomes due under the procurement contract; or
> (2) if later, after the day on which the unit receives an invoice.

See also COMAR 21.06.09.05. However, to determine when payment was required to be made, the Board must first resolve when payment was **due** for the additional work that Appellant performed at Respondent's direction. It is axiomatic that payment for work performed by a party, when the amount of that payment is in dispute, cannot become due until the parties have reached an agreement on the amount actually due. Once that settlement

agreement is reduced to writing, then payment becomes due in accordance with the terms therein, or in accordance with any applicable statute. In this case, the parties were still negotiating their dispute as of September 24, 2018, thus payment could not become due until they had reached an agreement on all terms, and that agreement was reduced to writing. CO #11 is the written settlement agreement that reflects the amount due, and it was not fully executed until December 11, 2019, when the final signature was obtained.

Respondent contended that the CO process involved several time-consuming steps to become a fully-executed agreement after Appellant signed CO #11 on November 11, 2019. Respondent's position was that payment did not become due until December 11, 2019, when the last of the five mandatory SHA signatures was obtained on CO #11 and the document was fully executed. Pursuant to the statute, payment was required to be made 30 days later. Thus, its January 10, 2020 payment to Appellant was timely-made within 30 days, thereby eliminating Appellant's claim to any interest.

Appellant's position was that the statute provides that "once you submit an invoice where payment is due, the State is responsible for paying within 30 days."[4] Appellant claimed that, theoretically, it could have asked for interest 30 days after the purported "invoices" for additional work were issued between March 16, 2016 and October 10, 2017.[5] Notwithstanding, Appellant negotiated with Respondent and was only demanding interest from October 25, 2018 forward, which is 31 days after the September 24, 2018 meeting in which the parties agreed on most of the items ultimately included in CO #11.

[4] This presumes, of course, that there is no dispute as to the amount due.
[5] Although Appellant claimed these were "invoices" at the hearing, they were, in fact, the 22 Change Proposals that were the starting point for the negotiated settlement that resulted in CO #11. In fact, in Appellant's Cross Motion, they were defined as "Change Proposals."

While this Board is very sympathetic to Appellant having to wait entirely too long after September 24, 2018 for CO #11 to be finalized and to get paid, and while this Board does not condone SHA's lack of urgency on this matter, we find that Appellant's position on when payment became due is untenable. The mere unilateral submission of Change Proposals to Respondent is not sufficient to start the payment clock running, as the amount owed as reflected in the Change Proposal(s) could be and, in this case, was disputed. Additionally, although not much changed between September 24, 2018 and November 11, 2019, the date when Appellant ultimately signed CO #11, it is undisputed from the back and forth communications after September 24, 2018 that there was not a final fully-authorized written agreement on September 24, 2018 and thus, payment did not become due until the parties had a signed written agreement (*i.e.*, a CO) reflecting the agreed-upon amount due.[6]

The Board further finds that there was no obligation under this Contract for Respondent to pay Appellant until all required State signatures were obtained on CO #11, because any one of those individuals, after reviewing CO #11, could have refused to sign it and prevented SHA from obtaining actual authority to enter into it. CO #11 became fully executed and binding on the parties when the last State signature was obtained on December 11, 2019. Appellant was timely paid 30 days later, on January 10, 2020 and, therefore, is not entitled to any interest.[7] The Board finds that there are no genuine issues of material fact, and that Respondent is entitled to prevail as a matter of law.

[6] At the hearing, the Board raised the possibility of whether SF&P §15-112(a)(2,) which allows for a written acceptance letter to have the same force and effect as a CO until the formal CO is finalized, might be applicable to when payment was due on CO #11. Respondent said there was no evidence of any such written acceptance letter in the record. Appellant agreed. This Board concurs and finds that no such agreement exists in this Appeal.

[7] At the hearing, Respondent took the position that its payment obligation clock started running immediately after the last State-required signature on the CO was obtained, and not upon the issuance of the next monthly estimate after obtaining the fully executed CO. Pursuant to the facts in this Appeal, payment was timely made using either date; therefore, the Board need not address this issue.

ORDER

Based on the foregoing, it is this _17th_ day of March 2022, hereby:

ORDERED that Respondent's Motion for Summary Decision and Dismissal of Appeal is GRANTED; and it is further

ORDERED that Appellant's Motion for Partial Summary Decision is DENIED; 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/
Lawrence F. Kreis, Jr., Member

I concur:

/s/
Bethamy B. Brinkley, Chairman

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

Certification

COMAR 21.10.01.02 **Judicial Review.**

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

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

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

(1) the date of the order or action of which review is sought;

(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or

(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

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

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Opinion and Order in Docket No. MSBCA 3181, The Appeal of Milani Construction, LLC, under SHA Contract No. BA9785226.

Date: March 17, 2022

/s/
Ruth W. Foy
Deputy Clerk