

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

**In the Appeal of
Civil Construction, LLC**

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Docket No. MSBCA 3180

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**Under
SHA Contract No. XX2295376R**

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Appearance for Appellant

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**Gerard J. Emig, Esq.
Gleason, Flynn, Emig & McAfee,
Chtd.
Rockville, Maryland 20850**

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Appearance for Respondent

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**Douglas Carrey-Beaver, Esq.
Office of the Attorney General
Contract Litigation Unit
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OPINION AND ORDER BY MEMBER CARNAHAN

Upon consideration of Respondent Maryland State Highway Administration’s (“SHA” or “Respondent”) Motion for Summary Decision (“Respondent’s Motion”), Appellant Civil Construction, LLC’s (“Civil” or “Appellant”) Cross Motion for Summary [Decision] (Appellant’s Motion), all oppositions and replies to both, and counsels’ arguments at the August 10, 2022 hearing, the Board finds that there are genuine issues of material fact with regard to the timeliness of Appellant’s claim. However, assuming *arguendo* Appellant’s claim was timely filed, the Board

further finds there are no genuine issues of material fact regarding the merits of Appellant's claim and that Respondent is entitled to prevail as a matter of law.

UNDISPUTED FACTS

Respondent issued the Invitation for Bids ("IFB") for SHA Contract No. XX2295376R (F.A.P. No. AC-STBG-NHPP-000B(265)E), Geometric Improvements at Various Locations in Montgomery and Prince George's Counties (the "Contract"). The IFB solicited bids for an area-wide contract for construction of "Safety and Spot improvements at various locations in Montgomery and Prince George's Counties."

The IFB stated that "this contract is for Montgomery and Prince George's Counties, and **project sites may be located throughout both counties.**" (Emphasis added). The IFB also included a location map confirming that the entirety of both Montgomery and Prince George's Counties were covered by the Contract.

Prior to bid opening, Respondent issued a total of four (4) addenda to the IFB. Addendum No. 3 to the IFB was issued on February 22, 2019. Addendum No. 3 revised the "Project Description" to add the following:

The Contractor is reminded that this contract is for Montgomery and Prince George's Counties, and **project sites may be located throughout both counties.** Plans are included for Site 1.

Site 1: MD 28 (Norbeck Road) from MD 97 (Georgia Avenue) to Bailey's Lane.

This project (Site 1) will provide sidewalk and pedestrian amenities on the south side of MD 28 (Norbeck Road) from MD 97 (Georgia Avenue) to Bailey's Lane with a connection to East Norbeck Park in Montgomery County.

(Emphasis added.). Corresponding to the revision to the Project Description, Addendum No. 3 added Plan Sheet Nos. 1-46 for Site 1.

In addition, under “Work Scheduling,” Addendum No. 3 provided:

The Engineer will provide a written and/or verbal list of the proposed locations of work to be scheduled to the Contractor at the pre-construction meeting and prior to each subsequent season. The Engineer may add to, delete from, revise, or update this list through the term of the Contract.

Work assignments will be issued to the Contractor in the form of a ‘Notice to Proceed with Task’ (NTP/T) letter for each assigned task. The NTP/T letter will include, but not be limited to, the following information: the limits of the work, the scope of work to be performed, and the NTP/T ‘on or before’ date and the number of working days allocated for the task (task time). Multiple crews may be required to complete the work given. Simultaneous NTP’s, if needed, will be mutually agreed upon by both the Contractor and the Administration.

Finally, Addendum No. 3 made several revisions to the project’s Schedule of Items in the Proposal Form Packet. One of these revisions was the addition of “Item No. 1038 (110100) 1 LUMP SUM of ‘CLEARING AND GRUBBING.’” Section 101 of the MDOT SHA Standard Specifications for Construction and Materials (“Standard Specifications”) governs “clearing and grubbing.” Specifically, Section 101.04 provides:

101.04 MEASUREMENT AND PAYMENT

Clearing and Grubbing will not be measured but will be paid for at the Contract lump sum price. The payment will be full compensation for the removal and disposal of fences, removal and resetting of mailboxes, damage repair and compensation for trees, restoration measures for damaged or destroyed protected resources, repair to other damaged properties, removal and disposal of existing buildings when not covered as a specific pay item in the Contract Documents, and material, labor, equipment, tools, and incidentals necessary to complete the work.

On March 7, 2019, Appellant submitted its bid. The total amount of Appellant’s bid was \$5,202,833.00. For “Item 1038, Clearing & Grubbing,” Appellant submitted a lump sum price of \$700,000.

Bids were opened on March 7, 2019. Appellant was the lowest bidder. It received the Notice of Award on May 16, 2019. Respondent issued the Notice to Proceed on June 6, 2019, and Appellant began work on Site 1 shortly thereafter. Once the work was completed, SHA paid Appellant \$350,000, which was half of the lump sum amount included in Appellant's bid for clearing and grubbing.

On March 6, 2020, Appellant submitted a claim to the Procurement Officer ("PO") requesting that SHA pay Appellant the remainder of the lump sum amount for Pay Item 1038. Appellant demanded a payment of \$357,000, representing the remaining balance of \$350,000, plus \$7,000 in interest. On June 4, 2020, SHA paid Appellant the remaining balance of \$350,000, and on June 11, 2020, Respondent asked Appellant to withdraw its claim.

In response to SHA's request, Appellant withdrew its claim via a June 11, 2020 email from Mehdi Mirshahi to Beth Ann Larson at SHA. Appellant's email further stated:

However, we reserve our rights to be paid for any clearing and grubbing work beyond MD 28 that may be included and necessary in the future assignments based on mutually agreed amounts.

On June 12, 2020, Ms. Larson replied to Appellant's email:

MDOT SHA acknowledges your statement regarding clearing and grubbing payment, and will make any future determination regarding this matter in accordance with the contract documents and specifications.

Because the claim had been withdrawn, SHA did not issue a final decision or otherwise address Appellant's purported reservation of rights.

On July 20, 2020, SHA issued a Notice to Proceed with Task for MD 190, which was Assignment #7 under the Contract. The Notice to Proceed specified that Appellant was to begin work on MD 190 "on or before August 4, 2020." From reviewing the plans, Appellant

knew that there would be clearing and grubbing work needed on MD 190. *Respondent's Motion Exhibit 10, Mirshahi Dep., 20:18- 21:4.* Appellant began clearing and grubbing on MD 190 on August 3, 2020 and continued working on it throughout the entire month of August.

On October 16, 2020, Appellant submitted to Gary Stahl, the SHA District 3 Area Engineer, its "Request for Change Order for Clearing & Grubbing Work at MD 190, Assignment #7." Appellant asserted that MD 190 "include[d] a large amount of clearing and grubbing which was unrevealed to Civil Construction before bidding this contract" and asked for compensation "for the work we performed by allowing payment for the additional clearing & grubbing work on this Assignment." Appellant requested payment of "the Lump Sum price of \$70,582.01 as detailed in the attached breakdown." SHA District 3 denied the request.

By letter dated November 5, 2020, Appellant submitted a claim to the PO titled "Claim No. 2 for non-Payment: Additional Clearing & Grubbing on MD 190 Request for Equitable Adjustment" ("Claim"). Appellant requested payment of \$78,985.64 for the alleged "additional clearing and grubbing" work, which was \$8,403.63 more than the amount previously requested in its October 16, 2020 submission to SHA.

On May 13, 2021, the PO denied Appellant's November 5, 2020 Claim. The PO noted that SHA's decision "to pay Civil the remaining \$350,000 balance of the \$700,000 lump sum price after the filing of the previous claim exhausted the amount payable to Civil for 'clearing and grubbing,'" and that "Civil is not entitled to any further monies under the contract for 'clearing and grubbing.'"

Appellant filed its Notice of Appeal with this Board on June 10, 2021. In February and March 2022, the parties filed cross Motions for Summary Decision. The Board held a hearing on all open motions on August 10, 2022.

STANDARD OF REVIEW

In deciding whether to grant a motion for summary decision, the Board must follow COMAR 21.10.05.06D(2): "[t]he 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." This standard "is the same as that for granting summary judgment under Maryland Rule 2-501(a)." *Brawner Builders, Inc. v. State Highway Admin.*, 476 Md. 15, 31 (2021). And while we "must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones." *See Crickenberger v. Hyundai Motor Am.*, 404 Md. 37, 45 (2008) (internal quotations and citation omitted). To defeat the motion for summary decision, Appellant must produce admissible evidence demonstrating a factual dispute. *See Brawner Builders, Inc.*, 476 Md. at 31.

DECISION

I. Introduction

At the hearing on this matter, the parties agreed that there were no genuine issues of material fact concerning the merits, that the merits concerned only a legal issue, and that the legal issue was one of contract interpretation. *Hr'g Tr.*, 48:18-21:13.

Respondent asserted that, pursuant to COMAR 21.10.04.02, Appellant failed to file a timely notice of claim within thirty (30) days after it knew or should have known the basis for its

Claim and that even if its Claim had been timely filed, Appellant had already been paid in full for all clearing and grubbing work on the project under Item No. 1038. Appellant asserted that it was entitled to an equitable adjustment for alleged additional clearing and grubbing work that it was directed by SHA to perform when SHA issued its Notice to Proceed with Task for MD 190 on July 20, 2020.¹ In support of its Claim, Appellant made four arguments, which we have restated as follows: (1) the IFB, including Addendum No. 3, is ambiguous regarding the scope of work identified in Item No. 1038; and (2) due to the alleged ambiguous language in the IFB, the conduct of the parties controls how the IFB and/or the Contract should be interpreted.²

The Board finds that although there are genuine issues of material fact regarding the timeliness of Appellant's claim, there are no genuine issues of material fact regarding the merits of Appellant's claim and that Respondent is entitled to prevail as a matter of law.³

¹ Appellant contends that its June 11, 2020 email to Respondent, which related to its March 6, 2020 claim, was a reservation of rights that Respondent consented to in its June 12, 2020 reply. It was not, and Respondent did not. Respondent merely acknowledged receipt of the email and indicated it would rely on the Contract language to guide it on any future claims.

² If Appellant believed there was ambiguity in the language of the IFB, including in Addendum No. 3, it should have asked clarifying questions prior to submitting its bid. There is no evidence in the record that Appellant ever asked such questions. It was Appellant's obligation "to bring to the State's attention prior to bid opening obvious or patent discrepancies or errors or conflicting provisions in the contract specifications in order to prevail in a subsequent dispute arising out of such error, discrepancy or conflict." *Adler Services Group, Inc.*, MSBCA No. 2114 at 3 (2000).

³ Respondent argued that Appellant knew or should have known the basis of its claim on August 3, 2020 when it reviewed the plans for the project at MD 190, but that Appellant did not file its claim until November 5, 2020, which was more than 30 days after it knew or should have known the basis for its claim. COMAR 21.10.04.02A requires a notice of a claim to be filed within thirty (30) days after the contractor knew or should have known the basis for its claim. Appellant argued that there was a dispute as to when the basis was known or should have been known. Appellant stated that the plans for MD 190 indicated that clearing and grubbing may be required, and that it was not until it had to perform the clearing and grubbing work that it became aware of the basis for its claim. For purposes of this Motion, we review the facts in the light most favorable to the non-moving party and conclude that there are genuine issues of material fact as to when Appellant knew or should have known the basis of its claim. However, even assuming the Claim was timely filed, Appellant nevertheless loses on the merits of its Claim.

II. The Language of the IFB is Not Ambiguous

Appellant asserted that the clearing and grubbing work for MD 190 was beyond the scope of the Contract because Addendum No. 3 to the IFB only included plan sheets for “Site 1: MD 28 (Norbeck Road) from MD 97 (Georgia Avenue) to Bailey’s Lane.” Appellant argues that SHA’s inclusion of plans only for Site 1 is evidence that SHA intended this to be the only site for which it was seeking bids under lump sum Item No. 1038.

Appellant’s interpretation is unreasonable because it is clearly inconsistent with language throughout the Contract.⁴ Addendum No. 3 added plan sheets for Site 1 and clearly indicated that this was “Site 1.” Addendum No. 3 also included the following language: “[t]he Contractor is reminded that this contract is for Montgomery and Prince George’s Counties, and **project sites may be located throughout both counties**. Plans are included for Site 1.” (Emphasis Added.) It also provided a notice that “[t]he Engineer may add to, delete from, revise, or update this list through the term of the contract.” The plain meaning and only reasonable interpretation of Addendum No. 3 is that SHA intended for Site 1 to be just that--the first of multiple sites under the Contract for which clearing and grubbing would be required.

During the deposition of Appellant’s corporate designee, Mr. Steve Salehi, Appellant made clear that Mr. Salehi would be testifying about the bidding portion of this matter. *Resp. Ex. 4, Salehi Dep., 4:11-12*. Mr. Salehi acknowledged in his testimony that he was aware that the project was for multiple sites throughout Montgomery and Prince George’s Counties. When asked if he understood the language of Addendum No. 3 to mean that the Contract would only have Site 1, he answered “no.” He then admitted that he did not know how many sites there would be, but that he

⁴ For example, see Project Description at page 60 of the IFB.

knew this was the first site that would be assigned under this Contract. *Resp. Ex. 4, Salehi Dep., 16:20-18:4*. Mr. Salehi's testimony clearly demonstrates that he was the one responsible for Appellant's bid and that he was aware that additional sites would be assigned under this Contract, some or all of which may require clearing and grubbing work.

The Contract clearly provides for a lump sum payment for Item No. 1038. A "lump sum price" is "a single amount to be paid for that item of work, no matter what quantity of that work might ultimately prove necessary." *Genstar Stone Paving Prods. Co., Inc. v. State Highway Administration*, 94 Md. App. 594, 596 (1993). Mr. Salehi confirmed in his deposition that he understood he was bidding one lump sum price for all clearing and grubbing. *Resp. Ex. 4, Salehi Dep., 20:5-13*.

There is no contract provision that allows for additional payment for clearing and grubbing performed under the Contract within the scope of work contemplated by Item No. 1038. During the hearing, Appellant's counsel was asked if it could identify any provision within the Contract that would allow for payment above the lump sum for clearing and grubbing work, and he responded, "[t]here's nothing that specifically says it" *Hr'g Tr., 48:5-14*.

Because we find no ambiguity in the language describing the lump sum payment to be made for clearing and grubbing work needed at all of the project sites included in the Contract, and because Appellant acknowledged its understanding that (i) the Contract was for multiple sites throughout Montgomery and Prince Georges Counties and (ii) Addendum No. 3 included plans only for Site 1, we decline to address Appellant's second argument, which is predicated on a finding that the language in Addendum No. 3 is ambiguous. We therefore conclude, based on the

undisputed facts, that Appellant has been paid in full for all clearing and grubbing under the scope of work set forth in the Contract and that it is not entitled to an equitable adjustment.

ORDER

Based on the foregoing, it is this 2nd day of November, 2022, hereby:

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

ORDERED that Appellant's Motion for Summary Ruling 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/
Michael L. Carnahan, Jr.
Member

I concur:

/s/
Bethamy B. Brinkley, Esq.
Chairman

/s/
Lawrence J. Kreis, Jr., Esq.
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 3180, The Appeal of Civil Construction, LLC under SHA Contract No. XX2295376R.

Date: November 2, 2022

/s/
Ruth W. Foy
Clerk