BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of **Holder Construction Group, LLC**	*	
	*	**Docket No. MSBCA 3087**
Under **University of Maryland Global Campus f/k/a University of Maryland University College** **Contract No. 90950**	*	
	*	
Appearance for Appellant	*	**Christopher J. Olsen, Esq.** **Henner & Scarbrough, LLP** **Atlanta, Georgia 30328**
Appearance for Respondent	*	**Melodie M. Mabanta, Esq.** **Assistant Attorney General** **Office of the Attorney General** **Contract Litigation Unit** **Baltimore, Maryland 21202**

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OPINION AND ORDER BY MEMBER KREIS

Upon consideration of Holder Construction Group, LLC's ("Appellant" or "Holder") Motion for Award of Costs and Attorneys' Fees ("Motion"), the University of Maryland Global Campus's ("Respondent" or "University") Opposition to Motion for Award of Costs and Attorneys' Fees, Appellant's Reply, counsels' arguments and witnesses' testimony at the October 19, 2022 Hearing, and having considered all post-hearing briefs, the Board denies Appellant's Motion.[1]

[1] When the Contract was entered into Respondent was known as University of Maryland University College or UMUC. During this litigation, UMUC changed its name to University of Maryland Global Campus.

PROCEDURAL BACKGROUND AND FINDINGS OF FACT

On July 25, 2011, Appellant entered a Construction Management at Risk ("CM at Risk") contract with Respondent to renovate the Inn and Conference Center located at the University ("Conference Center"). As part of the renovation Appellant was required to remove and replace the Conference Center's carpeting. Shortly after installation the carpet began to de-laminate from the carpet padding. Appellant's multiple repair attempts were unsuccessful.

In July 2015, the University entered a contract with a new contractor to remove and replace the carpet throughout the building. The contractor successfully completed its removal and replacement of the carpeting on January 13, 2016, which caused the University to incur costs in the amount of $699,718.99.

On November 14, 2017, the University filed a $699,718.99 affirmative claim with the Procurement Officer ("PO"), alleging that Appellant, as the CM at Risk, was legally required to provide the University with a fully functioning Conference Center, including properly installed carpet that was not a danger to employees and visitors. On April 13, 2018, the PO issued its Final Decision Letter ("PO Decision") granting the University's claim for reimbursement of $699,718.99.

On May 16, 2018, Holder appealed the PO's Decision to this Board. Discovery was conducted and on May 15, 2020 Appellant filed a Motion for Summary Decision. Respondent filed its Opposition on June 5, 2020 and Appellant filed its Reply on June 26, 2020. The Board held a hearing on July 1, 2020. At the end of the hearing the Board ruled from the bench that there was no genuine dispute of material fact that necessitated a hearing on the merits. It further stated that the issues in this Appeal were purely questions of law concerning Holder's scope of responsibility and the University's written notice. We found:

> As to the scope of responsibility, we hold that it was Holder's responsibility to comply with the construction manager's obligations under Section 5 of the RFP. Holder had the option and ability to conduct whatever tests it deemed necessary to determine the efficacy of using the UMGC or Marriott-specified carpet and padding. In electing not to do so, Holder assumed the risk that the carpet installation might fail.
>
> As such, under Section 4.08(b) of the General Conditions of the contract, Holder had the obligation to remove and replace the carpet and padding once UMGC determined that it was not satisfied with the attempts to repair.
>
> As to whether UMGC provided the requisite written notice under the contract, we hold that it is undisputed that UMGC did not provide written notice delivered either in person or via registered mail; that UMGC was not satisfied with the attempted repairs; and was demanding that Holder remove and replace the carpet pursuant to its obligation to do so under Section 4.08(b) of the General Conditions of the contract.
>
> Accordingly, we conclude that there was no breach of the contract by Holder because Holder's obligation to remove and replace the carpet and padding was never triggered.

Respondent appealed the decision to the Circuit Court for Baltimore City. Appellant moved to dismiss for improper venue. The Circuit Court for Baltimore City denied the motion to dismiss but transferred the case to the Circuit Court for Prince George's County. Appellant filed another motion to dismiss alleging the petition for judicial review was untimely. On July 13, 2021, the Circuit Court denied that motion and affirmed the Board's decision granting summary decision.[2]

On August 9, 2021, Appellant filed a Notice of Appeal to the Maryland Court of Special Appeals ("CSA"). In a July 19, 2022 unreported opinion, the CSA affirmed the judgments of the Circuit Courts. No petition for certiorari was filed.

On September 7, 2022, pursuant to MD. CODE ANN., STATE FIN. & PROC. ("SF&P") § 15-221.2 and COMAR 21.10.06.32, Holder filed the present Motion requesting that the Board make a finding that the University had acted in bad faith and without substantial justification in

[2] The Circuit Court for Prince George's County also affirmed the Board's Decision denying a motion to compel. As the motion is not relevant to the present issue before the Board it will not be discussed.

processing the claim. It further requested that it be awarded all costs including, but not limited to, attorneys' fees incurred in this proceeding. The University filed its Opposition on September 23, 2022, and Appellant filed its Reply on September 30, 2022.

The Board conducted an evidentiary hearing on the Motion on October 19, 2022. Counsel called witnesses and made legal arguments. Appellant called Jessica Potkovick, a director in Holder's Risk Management Division and Robert Dashiell, Esq. a private attorney offered and admitted as an expert on the reasonableness of the fees that were incurred by Holder in this action.[3]

The Board also raised a preliminary jurisdictional issue at the hearing that had not been previously raised or addressed by either the party. The Board asked whether SF&P § 15-221.2(b) provides it with authority to award costs and attorneys' fees to Holder for defending an affirmative claim filed by the University, or whether it only provides authority to award costs and attorneys' fees when the initial claim is filed and pursued by the contractor. Because this issue had not been raised prior to the hearing and because the Board had additional issues it wanted to hear more from the parties on, it ordered post-hearing briefs to address six specific questions, only one of which is ultimately relevant to our decision:

> Discuss whether SF&P Section 15-221.2 allows the Board to award costs and attorneys' fees to an appellant that is defending an affirmative claim filed against it by the State, or whether the statute restricts us to awarding costs and fees only when claims are filed by an appellant.

Both parties submitted their post hearing briefs on November 14, 2022.

[3] As this Opinion ultimately rests on a very limited jurisdictional issue, unrelated to the witness testimony presented at this hearing, the Board need not make any factual findings concerning the testimony.

DISCUSSION

State procurement is governed by statute and regulation, and therefore when presented with Appellant's Motion we first turned to the SF&P § 15-221.2, which is the statute Appellant claimed authorized it to recover the costs and attorneys' fees it incurred defending the State's affirmative claim. Upon examining the language of § 15-221.2, the Board was surprised to learn that it applied only to claims filed and pursued by a contractor under a contract for construction, and not to costs and attorneys' fees incurred by a contractor in defending an affirmative claim filed by the State. Accordingly, this Board must deny Appellant's Motion as it lacks subject matter jurisdiction to hear it.

Maryland courts have consistently espoused a simple rule when it comes to statutory interpretation. They have stated:

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. *See Melton v. State,* 379 Md. 471, 476, 842 A.2d 743, 746 (2004). We begin with the plain language of the statutes. As we have frequently stated, if the statutory language is unambiguous when construed according to its ordinary and everyday meaning, then we give effect to the statute as it is written. *Id.* at 477, 842 A.2d at 746.

Collins v. State, 383 Md. 684, 688 (2004). This Board has adopted the same approach when interpreting its statutes and regulations. "The primary source a court or board has for ascertaining the intent of the Legislature is the language of the statute, there is usually no need to look elsewhere to ascertain legislative intent." *Spruell Development Corporation*, MSBCA 1203 (1984), at 6, *citing In re Special Investigation No. 236,* 295 Md. 573, 576 (1983); *Md. National Capital Park and Planning Commission v. Mayor and Council of Rockville*, 272 Md. 550 (1974).

SF&P § 15-221.2. "Appeal from unit's decision – costs incurred by contractor" became effective on October 1, 1996, and other than a 2007 amendment correcting a minor grammatical error, has remained unchanged since that time.[4] It currently states:

> (a) *Applicability of section.* - This section only applies to a claim resulting **under a contract for construction.**
>
> (b) *Award of Reasonable Costs.* - The Appeals Board **may award to a contractor** the reasonable costs **of filing and pursuing a claim**, including reasonable attorneys' fees, if the Appeals Board finds that the conduct of unit personnel in processing a contract claim is in bad faith or without substantial justification.
>
> (c) *Regulations.* - The Appeals Board shall adopt regulations to implement this section.

(Emphasis added).

Neither side disputes that the underlying Contract is a construction contract, creating the possibility of an award of reasonable costs, including attorneys' fees, if certain other factors are met, which are not in this Appeal. The Board finds this statute to be unambiguous and therefore does not need to go beyond its plain meaning to reach its decision on this Motion. SF&P § 15-221.2(b) clearly states the Board may only make an award to a contractor for filing and pursuing a claim. It is undisputed that Respondent, UMGC, filed and pursued an affirmative claim against Holder for failing to repair or replace the defective carpet. In fact, Appellant's Complaint in this Appeal repeatedly refers to "UMUC's Claim." Because Holder has neither filed nor pursued a claim against the State, but instead defended and appealed an affirmative claim filed against it by the State, it is not entitled to costs or attorneys' fees under SF&P § 15-221.2.

In fact, SF&P § 15-221.2 could not have been meant to apply to affirmative claims, as there was no statutory authority in existence allowing the State to file an affirmative claim when

[4]Acts 1996, c. 682, § 1, eff. Oct. 1, 1996, 1996 Md. Laws 3848. Amended by Acts 2007, c. 5, § 1, eff. March 22, 2007, 2007 Md. Laws 605. The 2007 amendment changed "attorney" fees to the current "attorneys'" fees.

the statute was enacted on October 1, 1996. Five months after the statute was enacted, the Court of Appeals confirmed that the General Assembly had not authorized the State to file affirmative claims. *See University of Maryland v. MFE Incorp.*, 345 Md. 86 (1997), *superseded by statute,* as stated in *University System of Maryland v. Mooney*, 407 Md. 390 (2009).

The General Assembly did not provide units of the State the authority to file affirmative claims until 2004, approximately 8 years after it enacted SF&P § 15-221. *See* Acts 2004, c. 373, § 1, eff. Oct. 1, 2004. 2004 Md. Laws 1353, enacting H.B. 767. H.B.767 did several things, including:

1. Amended § 15-211(a)(2) to allow the Appeals Board to have jurisdiction over a contract claim by a "contractor or a unit."

2. Amended § 15-217(a)(2) to allow "A unit or" a person who has been awarded a procurement contract to submit a contract claim to the PO.

3. Added § 15-219.1 defining how a unit files a contract claim against a contractor.

4. Amended § 15-222 to allow the Appeals Board to award interest to a unit in a contract claim accruing after the PO receives the claim from a unit. Previously, interest could only be awarded to a contractor.

When making these additions and amendments in 2004, the General Assembly could have easily amended SF&P § 15-221.2 (like it did with SF&P § 15-222 governing the award of interest) to specifically allow for contractors to be awarded costs, including attorneys' fees, for defending a claim brought by a unit against it, but it did not.[5] It also could have made this

[5] Additionally, as currently drafted the statute does not authorize the State to be awarded reasonable costs and attorneys' fees for defending a contractor's claim brought in bad faith or without substantial justification, or for having to pursue an affirmative claim that a contractor defends in bad faith or with substantial justification. Additionally, this statute still only applies to construction contract claims, and not all contracts with the State.

simple change in 2007, when it fixed the minor grammatical issue in SFP § 15-221.2(b) discussed above, or at any time since then, but it did not.

The Court of Appeals has held that the General Assembly has given a "great deal of attention to drafting State procurement law." *MFE*, 345 Md. at 102. The General Assembly generally amends or declines to amend statutes based on its intended purpose. *See generally, MFE; see also Dept. of General Services v. Harmans Associates Ltd. Partnership*, 98 Md. App. 535 (1993)(In SF&P § 15-222 the General Assembly specifically provided for pre-decisional interest.). The plain language of § 15-221.2 does not permit a contractor to move for reasonable costs, including attorneys' fees, when defending an affirmative claim. Accordingly, consistent with *MFE*, the Board lacks authority, or more specifically jurisdiction, to award them to Holder in this Appeal.

Finally, the Board's analysis and opinion today is consistent with this Board's prior ruling in *Spruell*. In *Spruell,* the Board held that a small business contractor was not entitled to recover its attorneys' fees and costs incurred in pursuing its bid protest appeal per MD. CODE ANN., STATE GOV'T ("SG") § 10-217[6] which only permits such recovery when the State initiates a contested case or civil action against a small business or nonprofit. *Spruell,* MSBCA 1203 at 7. Where the appeal was initiated by a disappointed bidder or offeror there was no basis upon which to award attorneys' fees and litigation expenses.[7] Much like the Appellant in this Appeal has argued for a liberal definition of "claim" that would allow it to pursue fees, the Appellant in *Spruell* argued for a meaning of the word "initiate" that would allow for SG § 10-217 to "be

[6] Now codified as SG § 10-224.

[7] *Spruell* was decided about 12 years prior to the enactment of the costs and attorneys' fees provision at issue in this Appeal. However, even if SF&P § 15-221.2 had been available it would not have allowed the Board to award costs and attorney's fees as it only applies to construction contracts claims, and *Spruell* did not involve a construction contract claim, but a protest of a proposed award of a lease.

construed more liberally so as to effectuate the policy objective which underlies it." *Id.* at 5. The Board declined then, and we decline now, to go beyond strictly construing the unambiguous language of the statute. *Id.* at 6.[8]

For the reasons stated above the Appellant's Motion is denied.

ORDER

Based on the foregoing, it is this 12th day of December, 2022, hereby:

ORDERED that Appellant's Motion for Award of Costs Attorneys' Fees 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/
Michael J. Stewart Jr., Esq.
Member

[8] The Board noted in *Spruell* that "[T]he statute relaxes the common law prohibition against the award of attorneys' fees and cannot be extended, by construction or implication, to situations not fairly or clearly within its provisions." *Id.* at 6 (citing *Dillon v. Great Atlantic and Pacific Tea Company, Inc.*, 43 Md. App. 161, 166 (1979)). Moreover, this Board notes that the Court of Appeals recently in *Brawner Builders, Inc. v. Maryland State Highway Admin.,* 476 Md. 15 (2021) stated that the limited waiver of sovereign immunity codified in SG § 12-201 allowing contract claims against the State, which is in derogation of common law, is to be strictly construed in favor of the State. *Id.* at 32. If the General Assembly intended to allow a contractor to be awarded its reasonable costs and attorneys' fees incurred in defending an affirmative State claim brought in bad faith or without substantial justification, then such a waiver of its sovereign immunity would have to be explicit.

DISSENTING OPINION BY CHAIRMAN BRINKLEY

I respectfully dissent from the majority's opinion that the Board lacks subject matter jurisdiction because the plain language of MD. CODE ANN., STATE FIN. & PROC. ("SF&P") § 15-221.2. does not limit our jurisdiction to award attorneys' fees in only those cases involving claims brought by construction contractors. And although the majority's decision does not make any findings of fact or reach the issue of whether State personnel acted in bad faith or without substantial justification, I would have found that the Board does indeed have jurisdiction to make an award of attorneys' fees and that State personnel, and/or their attorneys acting as agents, clearly and relentlessly pursued their claim against Appellant, both before the Board and before the Circuit Court and the Court of Special Appeals, without substantial justification once they learned during discovery that they did not have any evidence to support their false allegations—that they demanded that Appellant remove and replace the carpet, and that Appellant refused.[9]

The starting point in the analysis is the plain meaning of the statute. Subsection (a) of SFP § 15-221.2 sets forth the "Application of section" and provides: "[t]his section only applies to **a claim** resulting under a contract for construction." (emphasis added). Although the word "claim" is not defined in the statutory provisions of the Procurement Law, SF&P § 15-215(b)(1) defines a "contract claim" as "a claim that relates to a procurement contract," and § 15-215(a)(2) provides that "a contract claim includes a claim about the performance, breach, modification, or termination of the procurement contract." *Id*. Hence, a claim must relate to a procurement

[9] Appellant asserted that Respondent had pursued its claim in bad faith and/or without substantial justification because Respondent knew, and admitted during depositions taken during discovery, that it had never made a demand upon Appellant to remove and replace the carpet, thus depriving Appellant of the opportunity to cure the defective carpet pad. Appellant further asserted that it had sent Respondent letters, on two separate occasions during the course of the Appeal, putting Respondent on notice that Appellant would be seeking recovery of its costs and fees because it believed that proceeding with the claim, when it lacked any evidence to support its claim, was in bad faith and/or without substantial justification.

contract and involve matters regarding performance, breach, modification, or termination of the procurement contract. Nothing in the statutes limits the definition of a "claim."

If anything, the regulations implementing this statute unequivocally prove the contrary. The regulations define the word "claim" as "a complaint by a contractor **or by a procurement agency** relating to a contract subject to this title, except a real property lease." COMAR 21.10.04.01B(1) (emphasis added). Taken together and read in *pari materia*, it is crystal clear that the plain meaning of §15-221.2. Award of costs for contract of construction, is that the statute is applicable to **all** "contract claims" or "claims," **including claims filed** "**by a procurement agency**," and that the Board is authorized to award such costs after making the requisite findings of fact that the "conduct of unit personnel" was in "bad faith or without substantial justification."

The majority reads the language of subsection (b) as limiting the applicability of the statute, which is clearly set forth in subsection (a), to only claims brought by a contractor and not to claims brought by the State. They "read into" subsection (b) words that are not actually there, as shown in brackets in the following:

> The Appeals Board may award to a contractor the reasonable costs of [a contractor] filing and pursuing a claim…

Alternatively, one could just as easily "read into" this provision the following words not actually there, also shown in brackets:

> The Appeals Board may award to a contractor the reasonable costs of [a unit or agency of the State] filing and pursuing a claim…

This exercise of "reading into" the statute words that are not actually there is improper and can lead to vastly different results, which may be inconsistent with the legislative intent, as evidenced by the majority's decision to read into the statute the words "a contractor."

The appropriate construction of subsection (b) is one that either does not read into the provision words that are not there, or one that interprets the provision as if the following bracketed words are implied, thereby rendering the interpretation consistent with the applicability of the statute that is set forth in subsection (a):

> The Appeals Board may award to a contractor the reasonable costs of [a party] filing and pursuing a claim…

In short, I do not construe subsection (b) as limiting the applicability of the statute to only claims filed and pursued by a contractor, particularly since such a construction would conflict with the language in subsection (a) prescribing the applicability of the statute.

The majority asserts that the Legislature, when it reformed the Procurement Law in 2004 to allow the State to bring affirmative claims against a contractor, "could have easily amended SF&P § 15-221.2…to specifically allow for contractors to be awarded costs, including attorneys' fees, for defending a claim brought by a unit against it, but it did not." Thus, the majority infers, the Legislature did not intend for this statute to apply to frivolous claims brought by the State against a contractor—it only applies to claims brought by a contractor and frivolously defended by the State. But why would the Legislature need to amend a statute that quite clearly (as discussed above) applies to **all claims**, including claims filed **by a procurement agency** as provided in COMAR 21.10.04.01B(1)? Put simply, why fix it if it ain't broken?

"If the language of the statute is clear and unambiguous and expresses a meaning consistent with the statute's goals and apparent purpose, our inquiry normally ends with that language." *Melgar v. State*, 355 Md. 339, 347 (1999). As we previously acknowledged in *HMSHOST, Inc.*, MSBCA 2377 at 6 (2004), the "oft stated, cardinal rule of statutory construction is to construe a statute to give effect to the intent of the Legislature." *See Chesapeake Charter v. AA Co. Board of Education*, 358 Md. 129, 135 (2000).

Even if the language of the statute were to be found ambiguous—and I do not believe that is the case here—then the Board must adopt a construction "which avoids an illogical or unreasonable result, or one which is inconsistent with common sense." *HMSHOST*, *Inc.* at 6 (citing *Chesapeake Charter*, 358 Md. at 135). The Court of Appeals explained that, when construing a statute, we must consider

> not only the literal or usual meaning of the words, but their meaning and effect in light of the setting, the objectives and purpose of the enactment, and, in those circumstances, in seeking to ascertain legislative intent, we consider the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense.

Chesapeake Charter, Inc., 358 Md. at 135-36 (citations omitted).

Here, the majority adopts a construction of the statute that would lead to the following result: contractors who incur fees for filing and pursuing a claim are compensated if the State relentlessly pursues a defense against the claim in bad faith, but contractors who incur fees for defending against a claim are punished (*i.e.*, **not** compensated) if the State relentlessly pursues a claim against a contractor in bad faith.

I cannot accept that the Legislature intended this unreasonable outcome. It simply makes no sense in light of the objectives and purpose of the statute's enactment, which was to compensate construction contractors who have been abused by the conduct of State personnel, whether it be the procurement agency or its attorneys acting as its agents, who relentlessly litigate a claim in bad faith or without substantial justification, causing the contractor to incur prohibitive costs and attorneys' fees.

/s/
Bethamy B. Brinkley, 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 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 denying Appellant's Motion for Award of Costs and Attorneys' Fees in Docket No. MSBCA 3087, The Appeal of Holder Construction, LLC under UMGC Contract No. 90950.

Date: December 12, 2022

/s/
Ruth W. Foy
Clerk