BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of **Milani Construction, LLC**	*	
	*	**Docket No. MSBCA 3198**
Under SHA Contract No. SM2025271	*	
Appearance for Appellant		Dana A. Reed, Esq.
	*	Baltimore, Maryland 21239
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	*	
Appearance for Respondent		Kerry B. Fisher, Esq.
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	*	Contract Litigation Unit Baltimore, Maryland 21202
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OPINION AND ORDER BY CHAIRMAN BRINKLEY

This Appeal is from the Procurement Officer's ("PO") Final Decision denying Appellant's contract claim for interest on an alleged late payment made by Respondent. After a hearing on motions for summary decision filed by both parties, the Board unanimously grants Respondent's Motion for Summary Decision and Dismissal of Appeal ("Cross-Motion") and denies Appellant's Motion for Summary Decision ("Motion").

UNDISPUTED FACTS

The parties to this Appeal entered into a contract in the amount of $1,353,000.00 for excavation and grading to allow for utility relocations at the intersection of MD 5 at Abell/Moakley Streets in St. Mary's County ("Contract"). Respondent issued a Notice to Proceed on June 14, 2018. During the course of contract performance, Respondent directed Appellant to add a number

of additional work items, which resulted in Appellant's submission of eight (8) requests for equitable adjustment ("REA") during the period from June 19, 2018 through November 2, 2018. As discussed below, the parties' dispute over these REAs continued for nearly two (2) years and generated three Price Acceptance Letters, which ultimately resulted in one fully executed change order ("CO") on February 14, 2020 ("CO No. 1").[1]

On June 19, 2018, Appellant requested compensation for tree root pruning. On July 23, 2018, Ms. Corren Johnson, Respondent's District 3 Engineer, sent a "Price Acceptance Letter for Change Order No. 1" to Appellant, which stated that Respondent "has reviewed your request and agrees to make payment for this modification." Her letter also included the approved unit price for this item, for a total CO in the amount of $10,230.00. Ms. Johnson advised Appellant that these "[p]rices are considered full payment for all incidentals necessary to complete each item" and instructed Appellant to sign and date the concurrence block and indicate whether Respondent should initiate the CO. She further stated that "[w]hen fully executed, this letter will serve as the approval and acknowledgment of prices and [Respondent] will prepare a Change Order." On August 16, 2018, Appellant's project manager signed the acknowledgement and indicated that Respondent should "[i]nitiate change order."

On July 20, 2018, Appellant requested compensation relating to two items: placement of two inches and four inches of furnished topsoil, respectively. On August 8, 2018, Ms. Johnson sent Appellant the same "Price Acceptance Letter for Change Order No. 1" she had previously sent for

[1] There are discrepancies in the record as to when CO No. 1 was fully executed. In the PO's Final Decision dated November 21, 2021, Mr. Stephen Bucy stated that CO No. 1 was fully executed on February 21, 2020. In his February 1, 2022 Affidavit filed with Respondent's [Response] to Appellant's Motion for Summary Decision, Mr. Bucy again stated that the CO was fully executed on February 21, 2020. However, in his Affidavit dated April 8, 2022, which was attached as Exhibit A to Respondent's Motion for Summary Decision and Dismissal of Appeal, Mr. Bucy stated that the last required signature was obtained on February 14, 2020. The fully executed CO No. 1 attached to his April 8, 2022 Affidavit reflects that the last signature was indeed obtained on February 14, 2020. For purposes of these Motions, it is irrelevant when CO No. 1 was fully executed: neither party has raised this discrepancy as a genuine dispute of material fact.

tree root pruning, which included all the same language and instructions, but reflected the approved unit prices for placement of topsoil, for a total CO in the amount of $56,138.75. On August 15, 2018, Appellant's project manager signed the acknowledgement and indicated that Respondent should "[i]initiate change order."

Two months later, Appellant sent Respondent three separate letters, dated October 24, 2018, November 2, 2018, and November 14, 2018, requesting compensation for a total of six (6) line items.[2] On February 12, 2019, Ms. Johnson sent a letter to Appellant labeled "Revised Price Acceptance Letter for Change Order No. 1," which included the approved line-item pricing for each of these six line items, for a total CO in the amount of $73,722.16. Again, this letter included the same language and instructions as her previous two letters. On February 18, 2019, Appellant's project manager signed the acknowledgement and indicated that Respondent should "[i]nitiate change order." As of February 18, 2019, Appellant had completed the work identified in the three Price Acceptance Letters, and the parties had agreed on the prices Respondent would pay for that work. It would take another year for CO No. 1 to become fully executed.

In May 2019, three (3) months after all three Price Acceptance Letters had been fully executed, Respondent sent its standard CO form to Appellant for signature for the total amount of $148,490.91 (comprising, in part, the amounts approved and accepted in the three Price Acceptance Letters). The signature block on the CO form included Respondent's standard "Contractor's Acceptance" language, whereby a contractor acknowledges that execution of the CO constitutes a full accord and satisfaction.[3]

[2] The six line items were for temporary riser structure for sediment basin, temporary seed, 21-inch corrugated metal pipe, removal of existing manhole, removal of existing masonry, and water meter housing.

[3] The "Contractor's Acceptance" language on the CO form provides:

> THE TERMS AND CONDITIONS OF THIS CHANGE ORDER, INCLUDING THE AMOUNT AND THE TIME CONTAINED HEREIN, CONSTITUTE A FULL ACCORD AND SATISFACTION BY THE CONTRACTOR

On May 22, 2019, Appellant's project manager signed the CO, but added a notation to "See Milani Letter No. 101." Milani Letter No. 101, also dated May 22, 2019, asserted that this CO "serves to resolve only the negotiated direct costs for items of work necessary in the performance of this change order" and that the "matter of time related costs … that may result from the delay are not included in the change order and will be reviewed and resolved separately."[4]

On May 23, 2019, Respondent emailed Appellant stating that the "attached change order as submitted is unacceptable. The change order form cannot be modified to include any warranty or additional amendment." On June 3, 2019, Appellant sent Respondent Milani Letter No. 103, which was a duplicate of its May 22 Milani Letter No. 101, along with the signed CO. This time, however, the CO was signed by Appellant's President and included the notation "See Milani Letter No. 103." In response, on June 10, 2019, Respondent emailed Appellant repeating what it had said in its May 23 email.

The back and forth over the extent of Appellant's release continued for approximately seven (7) months until January 6, 2020, when Appellant sent a letter to Respondent advising that, because it still had not received payment for the work reflected in the CO, it was requesting interest at the rate of nine percent (9%). The next day, on January 7, 2020, Respondent sent Appellant a letter acknowledging that it now agreed with Appellant's position that "Change Order No. 1 incorporates the direct costs solely for all items noted herein" and that "all indirect costs associated

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FOR ALL COSTS AND TIME OF PERFORMANCE RELATED TO THE ACTIONS DESCRIBED OR REFERENCED HEREIN, INCLUDING BUT NOT LIMITED TO, DELAY AND IMPACT COSTS RESULTING FROM THIS CHANGE ORDER. EXCEPT AS AMENDED HEREIN, ALL PROVISIONS OF SAID CONTRACT REMAIN IN FULL FORCE AND EFFECT.

[4] At the hearing, Appellant introduced Exhibit 18, which was an email dated October 11, 2018, in which Respondent stated to Appellant that "[a]dditional time added to the project schedule will be reviewed at the end of the project" and that the final "CPM submission should show all delays that occurred on the project during construction." Respondent concluded that "[a]t the end of the project, you can then submit a time extension request."

Appellant followed Respondent's instructions and did not include any of its time-related costs in the REAs that later became the three Price Acceptance Letters, and, ultimately, CO No. 1. Appellant's notation on the CO was a reminder that these costs were to be handled separately from the direct costs per Respondent's instructions.

with this change order will be reviewed when the costs are known and upon submission of a Time Impact Analysis Schedule." Enclosed with the letter was a clean copy of the CO for signature. With this acknowledgment, on January 14, 2020, Appellant's project manager signed the CO, without amendment, and returned it to Respondent.

One month later, on February 14, 2020, SHA obtained the last of the signatures required for CO No. 1 to be fully executed. Respondent approved payment to Appellant in the amount of $148,490 on March 3, 2020, the same day that Appellant certified that it had paid or would pay all of its suppliers and subcontractors as required by MD. CODE ANN., STATE FIN. & PROC. ("SF&P") § 17-106. Appellant received payment for CO No. 1 twenty (20) days later, on March 23, 2020, eleven (11) months after the last of the Price Acceptance Letters had been fully executed.

On March 23, 2020, the same day it received payment, Appellant submitted a request for payment of interest in the amount of $17,274.10 for the period beginning February 18, 2019, the date when the last Price Acceptance Letter was signed by Appellant, through March 23, 2020. After waiting another 11 months without a response, Appellant sent another letter to Respondent dated February 4, 2021, requesting a decision on its request for interest by February 18, 2021. Five (5) months later, on July 16, 2021, Appellant received a decision letter from Ms. Johnson denying the request and advising Appellant that it had 30 days to file a written notice of claim with the PO.

On August 13, 2021, Appellant filed its Notice of Claim with the PO for interest in the amount of $16,350.77. Appellant referenced its previous letter to the PO dated February 22, 2021 as its initial Notice of Claim and Claim for interest on the alleged late payment. By letter dated November 1, 2021, the PO issued his final decision on behalf of Respondent and denied the Claim.

On November 22, 2021, Appellant filed its Notice of Appeal with the Board. After some delay in the proceedings necessitated by two amendments to the Scheduling Order, the Board held a hearing on the parties' cross motions for summary decision on March 22, 2023.

STANDARD OF REVIEW

In deciding whether to grant a motion for summary decision, the Board must follow COMAR 2 l.10.05.06O(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." *Id*. 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). While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *See 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. *See Beatty*, 330 Md. at 737-38.

DECISION

The parties agree that the facts are not in dispute and that the issues in this Appeal involve only questions of law for the Board, that is, whether Appellant is entitled to interest on the alleged late payment made by Respondent.

We recently considered this same issue in *Milani Construction, LLC*, MSBCA No. 3181 (2022), which involved the same parties as here. In that appeal, the Board determined that despite

the inordinately long period of time that it took for the State Highway Administration to pay Milani what it was owed,[5] the payment was timely made in accordance with MD. CODE ANN., SF&P § 15-103 because Milani was paid within 30 days of when the payment became due under the procurement contract. *See id*. at 7-9. We determined that because the amount was in dispute, payment did not become due until the parties reached a final agreement on all terms (which was reduced to writing in a CO), that the CO was not fully executed until December 11, 2019, and that Milani was paid within 30 days thereafter on January 10, 2020. *See id*. Thus, no interest was owed.

Appellant distinguishes this case from *Milani* No. 3181 contending that, here, the payment amount was undisputed, as evidenced by the Price Acceptance Letters signed by Ms. Johnson on behalf of Respondent.

SF&P § 15-112, the section of the Procurement Law that addresses change orders, provides in relevant part:

> **§ 15-112. Change orders.**
>
> (a) *Applicability*. (1)(i) Except as provided in subparagraph (ii) of this paragraph, this section applies to State procurement contracts for construction.
>
> (ii) This section does not apply to State procurement contracts for public school construction or public school capital improvements.
>
> (2) **For purposes of this section, a written acceptance letter for a State Highway Administration or Maryland Aviation Administration procurement contract for construction shall have the same force and effect as a change order until the State Highway Administration or Maryland Aviation Administration issues a written change order.**
>
> (b) *In general*. – (1) Except as provided in paragraphs (2) and (3) of this subsection, a unit may not require a prime contractor and a prime contractor may not require a subcontractor to begin change order work under a contract until the procurement officer for the unit issues a written change order that specifies whether the work is to proceed, in compliance with the terms of the contract ….

[5] The work was performed in 2016-17, but Milani was not paid until January 10, 2020.

Id. (emphasis added). Thus, SF&P § 15-112(b) addresses both when a CO is required and when a CO is not required. SF&P § 15-112(b)(1) sets forth the circumstances under which a prime contractor and a subcontractor must have a fully executed CO before they can begin change order work. By contrast, SF&P § 15-112(b)(2) sets forth the circumstances under which a CO is *not* required to perform work—if a procurement officer and contractor do not agree that the work is included within the original scope of the contract, then a procurement officer can issue an order to perform the disputed work, which the contractor may not refuse. In such an event, a contractor's only recourse is to file a claim seeking additional compensation.

SF&P § 15-112(b)(3) deals with contracts in which a unit price methodology is used to pay for the work performed:

> (i) If a unit is to pay for a contract or a part of a contract using a unit price methodology, a change order **may not be required** for work to continue and be completed beyond the estimated quantities in the contract.
> (ii) After work is completed, a unit shall:
> 1. determine the actual quantity used to complete the contract; and
> 2. **if necessary**, issue a final adjustment change order to the contract.

SF&P § 15-112(b)(3)(i-ii) (emphasis added).

Relying on SF&P § 15-112(a)(2) (the "Disputed Provision"), Appellant asserts that the three Price Acceptance Letters, all fully executed as of February 18, 2019, had the same force and effect as a CO. Thus, Appellant argues, payment became due (and interest began to accrue) on February 18, 2019, and because payment was not received until March 23, 2020 – more than a year later and well after the 30 days allowed under SF&P § 15-103 – Appellant is entitled to interest pursuant to SF&P § 15-104.

Respondent counters that the Disputed Provision has no application here, and that § 15-112(a)(2) is "limited to when a contractor may not require a subcontractor to begin change order work under a contract until the procurement officer issues a written change order. For purposes of

this section means it's limited to that." March 22, 2023 Hr'g Tr. ("Hr'g Tr.") at 31:12-16. After repeated inquiries from the Board for counsel to explain the asserted limitation, Respondent's counsel reiterated his position like this:

> A unit may not require a subcontractor to begin change order work under a contract until the procurement officer for the unit issues a written change order that specifies whether the work is to proceed. So what they're saying is, is that for the limited purposes of this section it will go forward but it will not be a change order. And it says in the first five words for purposes of this section.

Hr'g Tr. at 38:9-18. Put another way, Respondent's position is that a written acceptance letter has "the same force and effect as a change order" only when a CO is required under the circumstances set forth in § 15-112(b)(1), that is, when a contractor or subcontractor is asked to perform CO work before a written CO has been issued. This appears to contemplate a scenario in which a contractor or subcontractor would begin to perform CO work in reliance on a written acceptance letter that will later become a formal and fully executed CO.

By contrast, in the matter before us, the Price Acceptance Letters were executed long after Milani had already completed the work. This factual scenario may fall under either § 15-112(b)(2) or (b)(3). As we have seen, SF&P § 15-112(b)(2) does not contemplate that a CO would be required. On the other hand, SF&P § 15-112(b)(3) states that "if necessary … a final adjustment change order to the contractor" shall be issued after the work is completed. We find that the Disputed Provision applies not only to § 15-112(b)(1), but may also apply to SF&P § 15-112(b)(3).

Respondent further argues that even if the Disputed Provision were to apply here, the Price Acceptance Letters are not binding on Respondent because they were signed by the District Engineer and, "pursuant to the terms of the Contract[,] Ms. Johnson does not have the authority to sign and issue a letter that has the same force and effect as a change order." Respondent asserts that only the PO has the authority to make changes in the work of the Contract and that any work

done without the PO's approval is unauthorized. According to Respondent, "[Mr. Bucy] never reviewed or approved the three (3) Price Acceptance letters."

The Board finds this argument perplexing in at least two respects. First, Respondent's practice of allowing persons without actual authority to sign documents having "the same force and effect as a change order," in this case, the Price Acceptance Letters, induces reliance by a contractor to accept the offered prices based on its erroneous belief that such letters are binding on the State. The Price Acceptance Letters here further implied that an agreement was reached between the parties insofar as it included language providing that "[Respondent] has reviewed your request and agrees to make payment for this modification." It is not only misleading, but also manifestly unjust that a written acceptance letter that has not been signed by a procurement officer, should be binding on the contractor for purposes of forcing it to perform work without a CO, but that it would not be enforceable against the State for purposes of getting paid for the work.

Second, Respondent's practice of using written price acceptance letters signed by unauthorized personnel has the appearance of circumventing a statutory scheme that was specifically enacted to ensure that construction work proceeds in an expeditious manner unhampered by excess bureaucracy, and that contractors are timely paid. The statute clearly provides that "written acceptance letters," as applied to State procurement contracts for construction, "shall have the same force and effect as a change order." Written price acceptance letters intended to have the same force and effect as a CO, as they were in this case, should be signed *only* by a person with actual authority to bind the State on prices and payments, whether for work to be performed or for work already performed. This is consistent with the clear language of the statute and, we believe, also the legislative intent.

We are keenly aware of the fact that Respondent took approximately a year to complete the CO process once the parties had agreed on prices (i.e., from February 19, 2019, when the last of the Price Acceptance Letters was fully executed until February 14, 2020, when the CO was fully executed), and the fact that it took almost two years for Appellant to get paid from the time it submitted its first REA. Such delay in paying a contractor for its work is inexcusable — it betrays the purposes and policies of the Procurement Laws and, more specifically, the legislative intent of the requirement that contractors be timely paid for their work. Sadly, as we have said before, and as we concluded last year in *Milani* No. 3181, we are constrained to follow the letter of the law, even when its spirit has been so egregiously violated.

Unfortunately for Appellant, we do not find the Disputed Provision in SF&P § 15-112 dispositive of this Appeal because it does not fully answer the question of when payment becomes "due and payable by law and under a written procurement contract" for the purposes of determining whether and when interest is due on a late payment under SF&P § 15-104. Even if the Price Acceptance Letters here are binding on the State to the same extent as a CO, there are nevertheless additional legal requirements that must be met before the State can issue payment. The limiting phrase "[f]or purposes of this section" suggests that SF&P § 15-112(a)(2) applies only to determining when and under what circumstances COs are required before (or after) a contractor performs work; it does not apply to other statutory provisions regarding when payment becomes due and payable by law or under the contract.

In this case, disposition regarding when payment became due and payable under the procurement contract turns on when Appellant complied with the requirements of SF&P § 17-106, which prohibits the State from issuing payment to a contractor until the contractor has certified, in writing, that all its suppliers have been paid or will be paid from the proceeds of that payment.

Thus, payment does not become "due and payable by law" until the required certification has been provided. There is no dispute that Appellant provided this certification to Respondent on March 3, 2020, or that Appellant received payment 20 days later, on March 23, 2020. Consequently, despite the nearly two years it took for Appellant to get paid for its work, there was no late payment under the law, and thus no interest is owed.

For all of the foregoing reasons, the Board finds that there are no genuine issues of material fact and that Respondent is entitled to prevail as a matter of law.

ORDER

Based on the foregoing, it is this 3rd day of May 2023 hereby:

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

ORDERED that Appellant's Motion for Summary Decision is DENIED; and it is further

ORDERED that a copy of any papers filed by any party in any 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/
Bethamy B. Brinkley, Esq.
Chairman

I concur:

/s/
Sonia Cho, Esq., Member

/s/
Michael L. Carnahan, 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 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 hereby certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA No. 3198, Appeal of Milani Construction, LLC, under SHA Contract No. SM2025271.

Date: May 3, 2023

/s/
Ruth W. Foy
Clerk