

In October 2017, Appellant was awarded SHA Contract No. FR3885171 for reconstruction of the interchange between MD 85 and I-270 in Frederick County. During contract performance, Appellant encountered subsurface rock conditions at various project locations, which it alleges were materially different from the boring data provided by Respondent in the bidding documents. The presence of unanticipated rock resulted in damages for which Appellant filed three claims for equitable adjustment for differing site conditions, and all of them were denied by the Procurement Officer (“PO”). Fay appealed each of the PO’s decisions to this Board.

In Appeal No. MSBCA 3165, the first appeal filed in these consolidated proceedings, Appellant alleged that it began to encounter unanticipated rock “early on in the Project” and, although it was unclear whether the “rock encounters were outliers or actually pervaded throughout the Project,” Appellant made “verbal disclosures” to Respondent’s representatives for several months concerning the alleged differing site conditions.

When the parties’ discussions failed to result in a resolution of Appellant’s concerns regarding the rock encounters, Appellant submitted a letter dated April 27, 2018 to SHA District Engineer, John M. Concannon, entitled “Notice of Impact – Rock Elevations,” providing “a detailed analysis in support of Fay’s conclusion that the quantities of rock that it was encountering at the Project site was indeed a differing site condition.” Compl. ¶ 21. In that letter, Appellant stated that it encountered subsurface conditions that differed materially from those disclosed in the Contract documents in three locations.¹ The letter went on to state that Appellant was preparing a detailed analysis of each of the areas where rock was encountered and that it was compiling the associated cost impacts that would be forwarded to Respondent for review.

By letter dated May 11, 2018, Mr. Concannon acknowledged receipt of Appellant’s April 27, 2018 letter and stated that Respondent “will evaluate the submittal in accordance with GP 4.05 Differing Site Conditions when received.”

Appellant followed up with a letter on August 31, 2018, which “serves as Fay’s justification that the surface elevations and physical conditions of the rock encountered at these three particular locations across the site constitute a Type 1 Differing Site Condition.” The letter

¹ Fay describes the three locations as: (1) Storm drain run from ES-1101 to MH-1104; (2) Storm drain run from ES-905 and MH-906; and (3) Stage One Support of Excavation (“SOE”).

provided further detail supporting Fay's contention that the existing site conditions were materially different from what was disclosed in the boring logs.²

By letter dated September 5, 2018, the District Engineer disagreed that there was a differing site condition and rejected Appellant's request for equitable adjustment. Noting that the borings indicated the presence of rock in the field, Mr. Concannon pointed to the language in the Invitation for Bids (which was incorporated into the contract) that stated:

201.01.03 Rock – The Contractor shall note that auger refusal and rock was encountered in the project. The Contract must consider the presence of rock when developing his unit prices for excavation, pipe and related items. No additional compensation will be allowed for rock excavation on the project.

(emphasis in original).

On September 20, 2018, the parties held a meeting to discuss Appellant's "concern[s] with the hasty nature" of the District Office's decision. Appellant alleges that "[a]t the conclusion of the meeting," Respondent "expressed a willingness to further review and consider" its August 31, 2018 request. Compl. ¶¶ 29-30.

In an October 23, 2018 letter entitled "Final Decision – Differing Site Conditions Rock Impacts," Mr. Concannon reiterated the District Office's position that no differing site condition existed and, again, denied the request for additional compensation. The letter further stated:

This is the final decision from this office regarding this issue; it is not the final decision of MDOT SHA. Per the provisions in GP 5.14 of the Standard Specifications for Construction and Materials, you have 30 days from the date of this letter to file a written notice of claim with the Procurement Officer.

² Appellant asserts that this was "the first time" that "Fay asserted that it was entitled to an equitable adjustment based on the differing site condition." Response in Opposition to Respondent's Motion, at 6.

On November 19, 2018, Appellant submitted a letter entitled “Notice of Claim – Differing Site Conditions, Rock Impacts” to Victor Grafton,³ and asked that Respondent “accept this letter as formal written notice of claim for extension of time and equitable cost adjustment.”

By letter dated December 17, 2018, Appellant submitted to the District Office “Change Order Request – Rock Impacts Crestwood Waterline Relocation.” In this letter, Appellant stated that its subcontractor, Franco’s Liberty Bridge, Inc., encountered rock during the installation of the proposed waterline relocation from August 22 to August 31, 2018, and requested a change order in the amount of \$38,975.82.⁴ Mr. Concannon denied this request in a December 19, 2018 letter, stating that “[n]o additional compensation will be allowed for rock excavation on the project.”

On December 18, 2018, Appellant emailed to the District Office a letter from another subcontractor, Aldridge Electric, Inc., alleging that its work was impacted due to unforeseen rock during excavation for installation of conduits and manholes.⁵

On February 14, 2019, Appellant sent a letter to Mr. Grafton requesting “to extend the time for formal submission of the claim referenced” in its November 19, 2018 Notice of Claim – Differing Site Conditions, Rock Impacts, because it was “not ready to make final submittal of all of the required documents.” Appellant requested that “the 90 day time frame for submission of the claim be adjusted to start as of January 17, 2019,” and promised that “Fay will have all

³ At this time, Mr. Grafton was serving as Acting Director and acting PO while Stephen A. Bucy, the regular Director and PO, was deployed on National Guard service.

⁴ The work associated with Franco’s Liberty Bridge, Inc. is described as “Waterline Relocation at Crestwood Boulevard.”

⁵ The work associated with Aldridge Electric, Inc. is described as “Crestwood Boulevard Potomac Edison Conduit Installation” and “Interstate 270 Highway Lighting.”

documents related to the cost and schedule impacts submitted to your office no later than April 17, 2019.”

On August 21, 2019, Appellant sent to Mr. Grafton “an update on the status of the Differing Site Conditions (DSC) Claim package to be submitted to your office.” In addition to advising Mr. Grafton that Appellant had encountered more rock at other locations on the project beyond those previously identified, Appellant stated that supporting documents “related to cost and schedule for the rock DSC are diligently being compiled and will be submitted to your office by October 18, 2019.”

On August 22, 2019, Stephen A. Bucy, Director of Office of Construction at SHA and the PO, acknowledged receipt of Fay’s letter “for intent to file a claim.” He added:

As [SHA] Office of Construction understands, the claim is a request for extension of time and equitable adjustment due to differing site condition.

Please submit the claim as required in the Standard Specifications for Construction and Materials dated July 2008, in GP-5.14 FILING OF CLAIM BY CONTRACTOR (b)[:]

Contemporaneously with or within 90 days of the filing of a notice of claim, but no later than the date that final payment is made, a contractor shall submit the claim to the appropriate procurement officer.

Fay’s claim will be reviewed as soon as all the documents are submitted to support this claim. ...

The PO also included an outline entitled “Structure of a Claim Submittal” for use in preparing the claim for submission.⁶

On September 9, 2019, Mr. Concannon sent a letter to Appellant stating that Respondent had “completed its review of the Stage 1 Delay Analysis” submitted by Appellant, provided SHA’s

⁶ This letter from the PO was sent to Appellant approximately six (6) months after Appellant’s February 14, 2019 letter seeking an extension of the deadline to April 17, 2019 to submit the required documents supporting the claim.

response to Appellant's analysis, and granted a compensable extension of one-hundred nineteen (119) calendar days, and an excusable non-compensable extension of sixty-eight (68) calendar days.

Appellant then emailed to Mr. Bucy another letter dated October 17, 2019, providing "an update on the status of the Differing Site Conditions (DCS) Claim package," and stating that the claim would be submitted "as soon as completed."

On July 28, 2020, Fay submitted its "Stage 1 Differing Site Conditions – Rock Impacts Claim" ("Claim") to Mr. Bucy, who acknowledged receipt by signature dated the same day.

On January 21, 2021, Mr. Bucy issued his Procurement Officer's Final Decision denying Fay's claim in its entirety, based on the untimeliness of the Claim as well as on the merits.

STANDARD OF REVIEW

The Board may grant a motion for summary decision if: "(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." COMAR 21.10.05.06D(2). This legal 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." *Crickenberger v. Hyundai Motor Am.*, 404 Md. 37, 45 (2008) (internal quotation marks and citation omitted). To defeat the motion for summary decision, "the non-moving party must produce admissible evidence demonstrating a dispute." *Brawner Builders, Inc.*, 476 Md. at 31..

DECISION

The Board grants Respondent's Motion because the undisputed facts demonstrate that Appellant did not file a timely claim as required by Maryland procurement law.

"[A] contractor shall file a written notice of claim relating to a procurement contract for construction within 30 days after the basis for the claim is known or should have been known." MD. CODE ANN., STATE FIN. & PROC., § 15-219(a); *see also* COMAR 21.10.04.02A ("[A] contractor shall file a written notice of a claim relating to a contract ... within 30 days after the basis for the claim is known or should have been known, whichever is earlier."). Additionally, "[u]nless extended by the unit, within 90 days after submitting a notice of a contract claim under a procurement contract for construction, a contractor shall submit to the unit a written explanation." *Id.* at § 15-219(b); *see also* COMAR 21.10.04.02B.

These statutory time limits are mandatory. *Browner Builders, Inc.*, 476 Md. at 34-35; *Manekin Constr., Inc. v. Maryland Dep't of Gen. Servs.*, 233 Md. App. 156, 197 (2017) (stating that "contract claims arising out of state procurement contracts are subject to statutorily-prescribed administrative procedures."). The governing regulation mandates that "[a] notice of claim or a claim that is not filed within the time prescribed in Regulation .02 ... *shall be dismissed.*" COMAR 21.10.04.02C (emphasis added).

Additionally, General Provision ("GP") 5.14 – Filing of Claim by Contractor – in the 2018 Standard Specifications for Construction and Materials is the contract provision that parallels the statutory requirements for filing notices of claims and claims.

Here, Respondent seeks summary decision in its favor as to all components of Appellant's Claim in MSBCA 3165, asserting that Fay submitted untimely notices of claim, untimely claims, and/or both.

Appellant asserts that “the basis for Fay’s claim arose from the October 23, 2018 letter where SHA denied Fay’s request for equitable adjustment” and “expressly advised that the 30 days’ notice clock started with SHA’s denial.” Therefore, according to Fay, its November 19, 2018 notice of claim (“Notice”) filed with the PO was timely because it was filed within 30 days of the October 23, 2018 letter.

Respondent argues that the basis for Appellant’s Claim became known earlier than October 23, 2018, and that there were actually three different dates by which the bases for the various components of Appellant’s Claim should have been known.⁷ Respondent does not dispute, however, that Appellant filed at least one notice of claim dated November 19, 2018, although it does not necessarily agree with the scope of the additional work covered by the Notice.⁸

Appellant confirms that it submitted its Claim to the PO on July 28, 2020, which was more than 90 days after its November 19, 2018 Notice.⁹ To explain the long delay, Appellant first argues that the parties’ “course of conduct” in mutually engaging in informal dispute resolution at the District Office level amounted to a waiver of the statutory and/or contractual requirement.

⁷ Respondent argues that Appellant knew or should have known the basis for its claim by September 5, 2018 with respect to (1) Storm drain run from ES-1101 to MH-1104; (2) Storm drain run from ES-905 and MH-906; and (3) Stage One Support of Excavation; by November 14, 2018 with respect to Crestwood Boulevard Potomac Edison Conduit Installation and Interstate 270 Highway Lighting; and by December 19, 2018 with respect to Waterline Relocation at Crestwood Boulevard. Accordingly, Respondent asserts that the corresponding deadlines for the three different notices of claim were November 20, 2018, December 18, 2018, and July 28, 2020, respectively. Because we accept Appellant’s dates for purposes of the timeliness analysis, however, Respondent’s suggested dates are not material to our decision.

⁸ Appellant contends that its November 19, 2018 Notice served as notice of claim of a differing site condition for all locations.

⁹ Respondent asserts that Appellant submitted a claim for the first three locations on July 28, 2020 and a claim for Aldridge Electric, Inc.’s work on April 23, 2020, but that Fay did not file a claim at all for Franco’s Liberty Bridge work at Waterline Relocation at Crestwood Boulevard. Appellant counters that the different locations identified in MSBCA 3165 were intended to be addressed together (as had been done in its November 19, 2018 Notice) and, accordingly, filed just one claim for all locations on July 28, 2020.

The Board is well-aware of the confusion created by Respondent's continued practice of requiring contractors to engage in an internal informal dispute resolution process prior to filing any notices of claims with the PO. Currently, there is no regulation that authorizes such a process, nor is there one that tolls the time requirements for filing notices of claims or claims while the parties engage in that process. Because the Board is confronted frequently with the issue of timeliness of claims in appeals involving SHA construction claims, we issued this warning in *A- Del Construction, Inc.*, MSBCA 3127 & 3128 fn. 5 (2022):

[B]oth contractors and State agencies should be mindful of the risk associated with pursuing informal internal dispute resolution processes without first filing a timely notice of claim once the basis for a claim is known, or should have been known, whichever is earlier. To the extent there is a conflict as to when and with whom a notice of claim or claim should be filed, the requirement set forth in COMAR will always take precedence over any conflicting directive issued by an agency.

Here, COMAR trumps any understanding Appellant might have had based on the parties' "course of conduct."

Furthermore, a waiver must be written, clear and explicit. In particular, "waivers of sovereign immunity, which are in derogation of common law, are strictly construed in favor of the State." *Browner Builders, Inc.*, 476 Md. at 32. In this case, Appellant has not presented any evidence that Respondent waived the statutory and contractual notice requirements for filing claims. To the contrary, the only evidence in the record points to the opposite conclusion – that Respondent expected Appellant to follow the claims process, as indicated in its letters to Appellant outlining the steps and timeline for doing so.

Appellant also argues that its Claim was timely filed because Respondent had granted extensions of time to do so. Appellant, however, has not presented the Board with any admissible evidence of extensions granted by the PO, who is the only person with actual authority to do so under MD. CODE ANN., STATE FIN. & PROC., § 15-219(b). When pressed at oral argument,

Appellant's counsel indicated that he had relied on his own conversations with Appellant's representatives that some unidentified representatives of SHA had orally granted extensions. Counsel's belief and argument are not evidence.

Resolving all reasonable inferences in favor of Appellant, and accepting Appellant's assertion that its November 19, 2018 Notice was timely filed, the Board nevertheless finds that the July 28, 2020 Claim was filed far outside the 90-day mandatory period required by MD. CODE ANN., STATE FIN. & PROC., § 15-219(b) and COMAR 21.10.04.02B and, therefore, was not timely. Because we reach this conclusion based on the undisputed facts, we need not decide the question of when the Claim accrued, or whether Appellant's Notice was timely.

Accordingly, there are no genuine issues of material fact, and Respondent is entitled to summary decision as a matter of law.

ORDER

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

ORDERED that Respondent's Motion for Summary Decision as to MSBCA 3165 on Timeliness Grounds is GRANTED; 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.

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Sonia Cho, Esq., Member

I concur:

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Bethamy B. Brinkley, Esq., Chairman

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Senchal D. Barrolle, 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 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 Nos. 3165, 3219 & 3226, Appeal of Joseph B. Fay Company, under SHA Contract No. FR3885171.

Dated: 8/3/2023

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Michael A. Dosch, Jr.
Deputy Clerk