Before the Maryland State Board of Contract Appeals

In the Appeal of	*	
Milani Construction, LLC	*	
	*	**Docket No. MSBCA 3233**
Under SHA Contract No. BA9785226	*	
Appearance for Appellant	*	**John F. Dougherty, Esq.**
		B. Summer Hughes Niazy, Esq.
	*	**Kramon & Graham, P.A.**
		Baltimore, Maryland 21202
	*	
Appearance for Respondent		**Craig H. DeRan, Esq.**
	*	**Douglas G. Carrey-Beaver, Esq.**
		Assistant Attorneys General
	*	**Baltimore, Maryland 21202**

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Opinion and Order by Member Barrolle

Upon consideration of the Motion to Dismiss or, in the Alternative, for Summary Decision as to MSBCA No. 3233 on timeliness grounds (the "Motion") filed by the Maryland State Highway Administration ("Respondent"), the Opposition filed by Milani Construction, LLC ("Appellant"), Respondent's Reply, and oral argument heard on August 9, 2023, the Board grants Respondent's Motion.[1]

Undisputed Facts

In March 2015, Respondent awarded SHA Contract No. BA9785226 (the "Contract") to Appellant for the construction of noise barriers on Maryland Route 295 in Baltimore County. The Contract further included certain landscaping, fencing and maintenance of traffic during construction. The Contract had a Notice to Proceed date of April 20, 2015. The Contract set a completion date of September 30, 2016. Substantial completion of the Contract occurred on

[1] As the Board is dismissing Appellant's entire Appeal as untimely, it need not address Respondent's Motion to Dismiss in Part or, in the Alternative for Partial Summary Decision concerning utility delays, which was argued at the same hearing.

August 24, 2017, with final completion on September 1, 2017. During contract performance, Appellant encountered time delays that it attributed to differing site conditions and to utilities. Respondent issued certain change orders to provide for, *inter alia*, quantity adjustments. Notwithstanding said change orders, the parties had ongoing negotiations as to Appellant's further entitlement to excusable, compensable time delays and interest on retainage.

On September 26, 2018, Appellant sent an e-mail to Respondent's Assistant Engineer which stated the following:

> Thanks for starting the [Change Order] process for the items we agree. Let me know any issue you may have with the additional [Maintenance of Traffic].
>
> With regard to the time portion, it's premature for a final decision as **we were recently trying to reach a global settlement on the time issue, which did not work out**. As we mentioned in our meeting, we need to now package our time-related costs into a request for equitable adjustment and then submit it to SHA for review… SHA should not issue a final decision prior to review of our REA. (emphasis added).

Nearly two years later, on September 23, 2020, Respondent sent a letter indicating its intent to assess Appellant $414,510.00 of liquidated damages for 337 Calendar Days of delay. On October 17, 2020, Appellant sent Respondent a letter opposing liquidated damages and reasserting its alleged entitlement to excusable, compensable time delays. On November 9, 2021, Appellant submitted a request for equitable adjustment ("REA") for 328 days of excusable, compensable time delays. On May 4, 2022, Respondent sent Appellant a rejection letter which stated that Appellant failed to file a timely claim.[2] On May 10, 2022, Respondent sent a second rejection letter reiterating the prior May 4, 2022 letter.

[2] Respondent's rejection letter cited to GP 5.14 of the SHA Contract for failure to file a timely claim.

On May 31, 2022, Appellant submitted a Notice of Claim to Respondent's Procurement Officer (PO), Mr. Stephen Bucy, for compensable time as per its REA, return of retainage and interest on wrongfully held retainage. On July 21, 2022, Appellant submitted a Contract Claim to Respondent. On January 17, 2023, Respondent's PO issued its Final Decision denying Appellant's Claim.

Standard of Review

The Board must grant a dismissal if a contractor fails to meet the applicable filing deadline for the notice of claim.[3] *See Brawner Builders, Inc. v. State Highway Admin.,* 476 Md. 15, 35 (2021); *see* COMAR 21.10.04.02C; *see also* COMAR 21.10.05.06C.

The Board may grant a motion for summary decision if after granting all reasonable inferences in favor of the party against whom the motion is asserted, there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. *See Id.* at 31; *see Clea v. City of Baltimore*, 312 Md. 662, 678 (1988); *see also* COMAR 21.10.05.06D(2). The standard of review for granting or denying summary decision is the same as for granting or denying summary judgment under Md. Rule 2-501(a). *See, Beatty v. Trailmaster Prod., Inc.,* 330 Md. 726 (1993). 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 a motion for summary decision, the opposing party must show that there is a genuine issue of material fact by proffering facts that would be admissible in evidence. *See Beatty,* 330 Md. *at 737-738*.

[3] Notwithstanding the mandatory requirement to dismiss an appeal based on an untimely filed notice of claim, the appropriate legal motion to achieve that result is a Motion for Summary Decision, not a Motion to Dismiss. *See Engineering Management Services, Inc. v. Maryland State Highway Administration*, 375 Md. 211, 241 (2003).

Decision

The issues before the Board are when Appellant knew or should have known the basis for its claim against Respondent, and whether Appellant timely filed its notice of claim. Maryland's procurement law broadly defines a claim as "a complaint by a contractor or a procurement agency relating to a contract subject to [Title 21 – State Procurement Regulations]." COMAR 21.10.04.01B(1). There are statutorily prescribed deadlines that a contractor must follow when pursuing a claim. "Unless a lesser period is prescribed by law or by contract, a contractor shall file a written notice of claim relating to a contract with the appropriate procurement officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier." MD. CODE ANN., STATE FIN. & PROC., §15-219(a); *see also* COMAR 21.10.04.02A. Moreover, "[a] notice of claim … that is not filed within the time prescribed in Regulation .02 … shall be dismissed." COMAR 21.10.04.02C. [4]

Appellant argues that Respondent had to reject Appellant's REA to trigger its claim. Appellant further argues resolving all inferences in its favor, the Board must find that there is no evidence it knew or should have known the basis for its claim prior to when its REA was rejected. The Board, having drawn all reasonable inferences in Appellant's favor, disagrees.

The undisputed facts show that Appellant knew the basis for its claim on September 26, 2018 when it e-mailed Respondent about their mutual effort(s) to reach a global settlement on the time issue [delay damages] and characterized such effort(s) as an activity that did not work out. Moreover, Appellant's statement that Respondent should not issue a final decision until it received Appellant's REA also shows that it knew the basis for its claim at that time.

[4] "Contemporaneously with or within 90 days of the filing a notice of claim on a construction contract, or 30 days of this filing on a nonconstruction contract, but no later than the date that final payment is made, a contractor shall submit the claim to the appropriate procurement officer…." COMAR 21.10.04.02B.

In addition to Appellant's acknowledgement that a global settlement failed, an adverse action by Respondent showed that Appellant knew the basis of the claim not later than September 23, 2020. Specifically, on said date, Appellant received written notice that Respondent intended to assess significant liquidated damages for time overruns, the same time overruns that Appellant was seeking excusable and/or compensable time delays for. Maryland's Supreme Court has found a claim untimely based on evidence showing the latest date the contractor was aware of the need to file a claim. *See Brawner Builders*, 248 Md. App. at 663–64 (2021). Similarly, we have a latest date of September 23, 2020 that Appellant knew the basis of its claim and from which it had 30 days to file its notice of claim.

Submitting a REA does not toll the statutory time limit for filing a notice of claim until 30 days after Respondent issues a final decision on the REA. The statutory scheme requires that a contractor will file the notice of claim within 30 days of the knowledge of the basis of claim. *See* COMAR 21.10.04.02.B. [5] The Board finds that Appellant had actual knowledge of the basis for its claim when it sent Respondent the September 26, 2018 e-mail stating that global settlement negotiations regarding time delays had failed. Accordingly, Appellant was required to file its notice of claim within 30 days from that date. Alternatively, the Board finds that at the very latest, Appellant had actual knowledge of the basis for its claim on September 23, 2020, when it received the notice of liquidated damages assessment letter from Respondent and that it

[5] Addressing an untimely claim filing after protracted negotiations, the Board recently stated in *Joseph B. Fay Co.*, MSBCA Nos. 3165, 3219 & 3229, p. 9 (2023), "[c]urrently, there is no regulation that … tolls the time requirements for filing notice of claims or claims while the parties engage in [an informal dispute resolution process]." In Fay, the Board also reiterated its warning from *A-Del Construction, Inc.,* MSBCA Nos. 3127 & 3128 fn. 5 (2022): "[B]oth contractors and State agencies should be mindful of the risk associated with pursuing informal 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."

had 30 days from that date to file its notice of claim. Under both scenarios, the Board finds Appellant's May 31, 2021 notice of claim is untimely.

Having found that there are no genuine issues of material fact, and that Respondent is entitled to prevail as a matter of law, the Board grants Respondent's Motion for Summary for Decision.

ORDER

Based on the foregoing, it is this 21st day of November 2023, hereby:

ORDERED that Respondent's Motion to Dismiss or, in the Alternative, for Summary Decision is GRANTED; 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/
Senchal Dashiell Barrolle, Esq., Member

I concur:

/s/
Lawrence F. Kreis, Jr., Esq., Member

DISSENTING OPINION BY CHAIRMAN BRINKLEY

I do not believe that Respondent is entitled to a summary decision in its favor as a matter of law. In my view, several material facts are in dispute that must first be resolved before determining when Appellant knew it had a basis for a claim.[6] The Majority either overlooks or ignores these disputed facts and, in doing so, fails to draw reasonable inferences in Appellant's favor, as we are required to do in the context of a motion for summary decision. Worse yet, the Majority makes several findings of fact, ultimately, and dispositively, interpreting Respondent's September 23, 2020 letter as an adverse action by Respondent that vested in Appellant actual knowledge that its request for time-related compensation was in dispute and thus the basis of a claim, a finding we are not authorized to make at this time.

In my opinion, the motion should have been denied and this Appeal should have proceeded to a merits hearing for further evidence on at least two disputed factual issues that are material to determining whether Appellant acquired actual knowledge that it had the basis for a claim: (i) when Appellant actually learned that Respondent was no longer willing to compensate it for its time-related delay costs, and (ii) whether Respondent waived the timing requirements for filing a notice of claim and/or whether Respondent should be estopped from asserting a timeliness defense in light of conduct that induced Appellant to believe there was no dispute regarding Appellant's request.

The Board routinely grapples with the issue of determining when a contractor knew or should have known it has a basis for a claim.[7] It is irrelevant when an agency believes a

[6] The Majority's decision to grant summary decision is based on the conclusion that Appellant had *actual* knowledge of the basis of a claim, not on when Appellant *should have known* it had the basis for a claim. Accordingly, the analysis in my dissenting opinion focuses only on when Appellant acquired actual knowledge of the basis of its claim.

[7] It is worth noting that the term "contractor" as used throughout includes prime- and sub-contractors, including minority business enterprises ("MBEs").

contractor has a basis for a claim—the issue is when the *contractor* knows it has the basis for a claim.[8] Unfortunately, it is often difficult to ascertain when a contractor acquires such knowledge because State agencies are not always transparent about when a request for payment is, or becomes, *disputed*, which is when a claim actually arises. *See Manekin Constr., Inc. v. Md. Dept. of Gen. Servs*., 233 Md. App. 156, 175 (2017). When agency officials request that a contractor provide additional information to support a request for compensation, engage in discussions and negotiations with the contractor about the request, then later deny the request because it was not timely submitted, they create confusion as to when the request actually became a dispute and thus when a notice of claim should be filed.[9]

For example, failure to reach agreement is not the equivalent of a dispute. Appellant's counsel aptly illustrated this point at the hearing: he and his wife sometimes fail to reach agreement on a critical issue—what should they have for dinner? Their failure to reach agreement, however, is not a dispute; discussion of the available options is likely to lead to an agreement, not an argument or a divorce.

In my view, a dispute does not arise until the parties reach an impasse and one party *unequivocally* conveys to the other that it is unwilling to discuss the matter further. Until then, it is reasonable for a contractor to believe that continued discussions and negotiations will lead to an agreement rather than a dispute and a claim. To find otherwise is to promote the resolution of disputes through litigation rather than negotiation and settlement. I simply cannot support that

[8] Respondent's counsel acknowledged this at the hearing: "what's important is the, is the knowledge of the contractor." H'rng. Trans. p. 13, ll. 1-2.

[9] At the hearing, there was considerable discussion as to how a "dispute" should be defined, and whether a "disagreement" between the parties is actually a dispute. Respondent's position was that a dispute must be "confrontational," a term used by the Board in *Info Sys. & Networks Corp*., MSBCA No. 2225 (2004), wherein the Board held that the appellant timely filed a notice of claim and claim upon receipt of the denial of the requested change order, which denial was "confrontational" and placed the appellant on notice that it must file a claim. *See id*. at 13.

messaging. Therefore, I believe a contractor does not have actual knowledge that it has the basis of a claim until it has submitted a formal request for payment (whether it be a change order or a request for equitable adjustment), with any supporting documentation requested by the agency, and the request is actually **denied**, a position that I believe is in accordance with Maryland law. *See*, e.g., *Info Sys. & Networks Corp*., MSBCA No. 2225 (2004) at 13.

Under COMAR 21.07.02.05-1(D), our analysis necessarily begins by considering whether Appellant knew it had the basis for a claim more than 30 days before it submitted its notice of claim to the procurement officer. According to the Appellate Court of Maryland, "[t]o apply this provision correctly, the Board [is] required to make a finding of fact, accurately identifying 'a *basis* for a claim' pursuant to COMAR 21.07.02.05-1." *Manekin*, 233 Md. App. at 175 (emphasis in original). Under COMAR 21.07.02.05-1(C), a "request for payment that is not in dispute when submitted is not a claim" but if it is "disputed as to liability or amount, it may be converted to a claim…." *Id*.

The facts in the *Manekin* appeal are extraordinarily similar to the facts in this Appeal. *See Manekin*, 233 Md. App. 156. There, when Manekin encountered difficulties during the project that it attributed to delays caused by the Department of General Services ("DGS"), it submitted numerous proposed change orders ("PCOs") requesting compensation for costs incurred by the delays. *Id.* at 159. On December 7, 2011, Manekin submitted PCO #68, requesting compensation for its time-related costs associated with various conditions and anticipated changes identified in a previous letter to DGS on November 2, 2011. *See id*. The parties discussed PCO #68 at three subsequent progress meetings, resulting in the PCO being designated as "void" in the minutes of the meetings and in the PCO Log. *See id*. Despite these notations, however, minutes of the

progress meetings also reflected that DGS was requesting "fragnets" for PCO #68.[10] *See id*. at 163.

Once the project was completed, Manekin sent a "Request for Equitable Settlement" seeking compensation for its time-related costs incurred by the delays, as referenced in PCO #68. *See id*. at 159. On April 3, 2013, DGS denied Manekin's request and advised that it could pursue the matter further in accordance with COMAR 21.10.04 and the Dispute Resolution procedures in the Contract Documents. *See id*. Seven (7) days later, on April 10, 2013, Manekin submitted its notice of claim to the procurement officer, who denied the claim on the grounds that the notice of claim was not timely submitted. *See id*.

At the hearing on the merits, the Board stopped the proceedings and granted DGS's pending Third Motion for Summary Decision, finding that Manekin knew the basis for a claim no later than March 1, 2012, more than 30 days before it submitted its notice. The Appellate Court reversed the Board's decision on numerous grounds, both procedural and substantive. Initially, the Court was careful to clarify confusion created by the Board at the hearing, emphasizing that when Manekin submitted PCO #68, it did not have the basis for a claim. The Court advised that "[a] contractor's knowledge of the basis for requesting payment that is not in dispute when submitted 'is not the same as having knowledge of the basis of a "claim."' *Id.* "Once a request for payment is disputed, however, a claim arises." *Id*.

The Court discussed three Board decisions that it found were consistent with its conclusion and with its decision to reverse the Board's decision in *Manekin*, all of which focused on the Board's findings that a claim arose once a request for payment was *rejected* or *denied*. In *Info Sys. & Networks Corp.*, MSBCA No. 2225 (March 4, 2004), the Board concluded that the

[10] "A fragnet is a detailed analysis of how particular factors impacted the construction project, such as when and how the contractor lost scheduled time." *Manekin*, 233 Md. App. at 163.

limitations period did not begin to run until the appellant received the procurement officer's letter *denying* a request for a change order. *See Manekin*, 233 Md. App. at 176-77 (citing *Info Sys.* at 13). The Court highlighted the Board's statement that "until [the procurement officer's] letter of July 23, 1999 rejecting Appellant's change order request, Appellant had no reason to believe that its change order was in dispute." *Id*.

In a later case, the Board found that "the contractor's notice of claim was not timely because the contractor admitted that he had actual notice of the agency's *rejection* of his proposal more than 30 days before filing the notice." *Manekin*, 233 Md. App. at 177 (citing *David A. Bramble, Inc*., MSBCA No. 2823 (July 5, 2013))(emphasis in original). And in yet another case, the Court upheld the Board's conclusion that "a dispute triggering the limitations period did not arise prior to the procurement officer's decision that the agency's additional reporting directives to the contractor were within the scope of the underlying contract" after the contractor had previously refused to comply without an approved change order. *Id*. (citing *Syscom, Inc.*, MSBCA No. 2268 (July 5, 2002)).

More relevant to the analysis, and more troubling given that I believe the same error has occurred here, is the Court's conclusion that in *Manekin*, the Board improperly made findings of fact regarding how to interpret the word "void" in the PCO Log and the significance of DGS's request for additional information (i.e., fragnets). *See id*. at 178-180. The Court concluded that the "Board erred, on a motion for summary decision, in determining whether the notation of 'void' indicated that Manekin knew or should have known that DGS had rejected PCO No. 68, and thus, that the basis of a claim had arisen more than thirty days before Manekin submitted its notice of claim." *Id*. at 180.

Finally, and most pertinent, is the Court's ultimate conclusion that the 30-day limitations period began "the moment Manekin knew or should have known that DGS **rejected** or **denied** the request contained in PCO No. 68." *Id*. at 182 (emphasis added). Significantly, the Court explained that the point in time when Manekin knew or should have known of a denial of its request "involves a disputed material fact, which the Board was not authorized to resolve via summary decision." *Id*. Instructive in the context of this Appeal is the Court's determination that the Board's task was "first, to determine if there existed any 'issue[s] of material fact,' after resolving all reasonable inferences in favor of Manekin … [and] to hear the merits of the case and apply the appropriate meaning of 'a basis for a claim' under COMAR 21.07.02.01-1 in its final determination." *Id*.

I do not believe the Majority's decision comports with Maryland law as set forth in *Manekin* and in *Info Sys*. Further, I believe the Majority erred in concluding that the "undisputed facts" show Appellant knew it had a basis for a claim as early as September 26, 2018, or as late as September 23, 2020.

Appellant's Email to Respondent Dated September 26, 2018

The Majority selectively recites only those "undisputed" facts that support its determination that Appellant knew it had the basis for a claim as early as September 26, 2018, basing its determination on a single statement made by Mr. Ira Kaplan (on behalf of Appellant) at 10:12 a.m. on September 26, 2018 that was plucked from an email string of discussions between Mr. Kaplan and Mr. Jesse Free, the Assistant Engineer for Respondent: "it's premature for a final decision as we were recently trying to reach a global settlement on the time issue, which did not work out." From this isolated statement, and without providing any context surrounding the parties' discussions of Appellant's numerous proposed change orders requesting

compensation, not only for its direct costs, but also for the time-related costs, the Majority interprets Mr. Kaplan's statement as an "acknowledgment" that Appellant knew that its request for time-related costs was in dispute.

Stated differently, the Majority interprets Mr. Kaplan's statement as Appellant's acknowledgement that the parties were unable to reach a "global settlement" on *all* of Appellant's requests for delay compensation (both direct costs and time-related costs) in a single change order (i.e., Change Order No. 11, or "CO #11"); therefore, the request for time-related costs, which had not been incorporated into CO #11, must be in dispute.[11]

Setting aside for the moment the Majority's unauthorized fact-finding when it interpreted Mr. Kaplan's statement as acknowledgment of a dispute, conspicuously absent from the Majority's Opinion are undisputed facts that simply do not support the Majority's interpretation. The Majority ignores (i) statements made by Mr. Free, both prior to and in response to Mr. Kaplan's statement, as well as (ii) language inserted by Respondent into CO #11 providing that Appellant's request for time-related costs *will be addressed in a separate change order* after the project has been completed. These undisputed facts, which are missing from the Majority's opinion, provide insight into what Appellant actually knew as of late September 2018.

Discussions Between Mr. Kaplan and Mr. Free in Late September 2018

On September 25, 2018, Mr. Kaplan sent Mr. Free an email confirming their discussions of the previous day and listing certain line items to be included in the change order(s) Respondent would be preparing to compensate Appellant for its extra work and the increases in quantities Respondent had required. Early the next day, on September 26th, Mr. Free responded to Mr. Kaplan's email, summarizing where he believed the parties stood after their discussions:

[11] In fact, twenty-two (22) of the proposed change orders submitted by Appellant requesting compensation for its direct costs incurred by the delays were ultimately resolved in favor of Appellant and consolidated into CO #11.

> We are in agreement with most of the listing below except for the time and MOT. After looking at the schedule we are still at the 60 days compensable as originally discussed and the remaining time we can offer a non-compensable time extension. We will take a second look at the MOT and see where the additional lane closures where [sic] needed outside of the normal contract work.

Mr. Free closed with the following statement: "[w]e will follow up with a final decision letter within the next two weeks outlining the information noted." The Majority interprets Mr. Free's reference to a "final decision letter" as undisputed evidence that Appellant knew its request for time-related costs was now in dispute.[12] Although Mr. Free may have believed his reference to a final decision letter signified an end to their discussions, his belief is irrelevant. *See* discussion *supra*. It is Appellant's knowledge—of whether its request for compensation was disputed—that is determinative, not Respondent's belief.[13]

After receiving Mr. Free's early morning email, Mr. Kaplan responded, emphasizing that it was "premature for a final decision" because they "need to now package our time-related costs into a request for equitable adjustment and then submit it to SHA for its review." Two hours later, Mr. Free responded that **"we will be reviewing the additional time and await for you [sic] REA cost breakdown."**

How Mr. Free's early-morning statement was interpreted by Appellant is a disputed material fact. The Majority errs in fact-finding that Mr. Free's statement notified Appellant that its request for payment was disputed, then further errs in concluding that this fact is undisputed. On the contrary, Mr. Free's closing statement to Mr. Kaplan merely a few hours later is evidence that Appellant's request for time-related compensation was *not* in dispute and that Mr. Free had not *rejected* or *denied*, Appellant's request. Appellant is entitled to the reasonable inference that Mr. Free's response was confirmation that negotiations would resume once the project was

[12] A final decision letter was not actually issued until years later—on January 17, 2023.
[13] There is no evidence before us at this juncture to show what Mr. Free actually believed, nor does it matter.

completed and Appellant provided additional information to support its request (i.e., the TIA and the REA), not as a dispute giving rise to a claim.

Change Order for Time-Related Costs Referenced in Change Order No. 11

The events immediately following Mr. Free's September 26, 2018 email were later summarized by the procurement officer, Mr. Stephen Bucy, (the "PO") in his final decision letter dated May 21, 2021 denying Appellant's claim for interest on the alleged late payment of CO #11: discussions between the parties began in September 2018 regarding Appellant's "proposed compensation for certain additional work on the Contract;" on October 1, 2018, Appellant confirmed its understanding that Respondent would be initiating CO #11 for its direct costs; and CO #11 was fully executed more than one year later, on November 11, 2019, after Respondent had obtained all the required signatures.[14]

Although the narrative portion of CO #11 describes it as a "Global Settlement," it clearly provided at the beginning of the narrative that **"[t]here will be an additional time change order being submitted by the contractor upon completion of this work."** At the end of the narrative, CO #11 further provided that **"[t]ime is being negotiated and shall be processed upon completion of the remaining work."** Both parties acknowledged, by their signatures on CO #11, that compensation for the time-related costs would be handled in a separate change order that would be negotiated in the future once the project was completed.

It is impossible to overlook the obvious—the carve-out language in CO #11 undermines the Majority's conclusion that Appellant knew its request for compensation was disputed, thus providing the basis for a claim on September 26, 2018—four days *before* CO #11 was even initiated, and long before it was fully executed on November 11, 2019. It simply cannot be

[14] These undisputed facts are consistent with the findings of fact set forth in *Milani Construction, LLC*, MSBCA No. 3181 (2022).

disputed that as of November 11, 2019, when CO #11 was fully executed and became effective, *there was no dispute regarding compensation for Appellant's time-related costs, and certainly no basis for a claim*.

The language in CO #11 coupled with Mr. Free's statement on September 26, 2018 that "we will be reviewing the additional time and await for you [sic] REA cost breakdown" are, at best, undisputed facts evidencing the absence of any dispute over Appellant's time-related costs. Yet they are conspicuously absent from the Majority's opinion.

At the very least, they are disputed facts from which must be drawn the reasonable inference that what Appellant *actually knew* in late September, 2018 and continuing until at least November 11, 2019 was that (i) Appellant's request for time-related costs would be negotiated in a separate change order once the project was completed, (ii) there was no dispute that it would be compensated for its time-related costs, and (iii) the next step in preparing a change order for the time-related costs was to prepare a formal change order or REA with supporting documentation (i.e., a TIA) after the project was completed, which Respondent would need to consider in determining how it would apportion the compensable and non-compensable time.[15] The Majority erred in finding as a fact that Mr. Kaplan's statement was an "acknowledgement" of a dispute.

Respondent's Notice Letter Dated September 23, 2020

Recognizing the weakness of its conclusion that Appellant knew in late September 2018 that its request for time-related compensation was in dispute, the Majority offers an alternative scenario to support its determination that Appellant's notice of claim was not timely filed. The

[15] Further evidence that Respondent consistently indicated to Appellant that its request for compensation of its time-related costs were not in dispute is found in the emails sent to Mr. Kaplan by Mr. Michael Akers, the Assistant Area Engineer who replaced Mr. Free on the project after Mr. Free retired on September 28, 2018. *See Milani Construction, LLC*, MSBCA No. 3181 at 3-4. (2022). On February 3, 2020, Mr. Akers stated: "[p]lease submit your request so we can move forward with both the time and the interest." And again, on February 11, 2020, Mr. Akers stated: "[p]lease do not forget to submit your time request as indicated below."

Majority interprets Respondent's September 23, 2020 letter as "an adverse action by Respondent that showed that Appellant knew the basis of the claim not later than September 23, 2020."

The September 23, 2020 letter was not an "adverse action" by Respondent; it served as the requisite written notice under the Contract that Respondent believed it had the basis for its own affirmative claim for liquidated damages (the "September 23rd notice letter") and that Respondent would be withholding this amount from the retainage being released to Appellant until the delay issues had been finally resolved. As discussed *supra*, Respondent's belief as to whether it intended the September 23rd notice letter to be an "adverse action" and whether it fully intended to assess liquidated damages is irrelevant. It is Appellant's knowledge, that is, the knowledge that Appellant acquired from having received and read the letter, that is important: Appellant believed this letter had been sent in error because there had never been any dispute regarding its request for compensation.

The Majority, however, interprets the September 23rd notice letter as conclusive evidence that Appellant, upon receipt of the letter, believed its contents to be true and accurate and that Appellant thereby acquired actual knowledge that it had a basis for its own claim. Appellant's interpretation of the September 23rd notice letter and the context in which it was sent are factual disputes that are material to determining whether, and when, Appellant acquired the requisite knowledge that its request for time-related compensation was in dispute and that it thus had a basis for a claim. The Majority's interpretation of the knowledge Appellant acquired when it received this letter was improper fact-finding in the context of a motion for summary decision. *See Manekin*, 233 Md. App. at 180.

If anything, the September 23rd notice letter is evidence of some confusion on Respondent's part about the status of the project, likely due to the revolving door of staff

changes that occurred over the course of the project, beginning in late September 2018 when Mr. Free retired and Mr. Bruce Cain took over the project, through the summer of 2019 when Mr. Michael Akers took over the project, and then when Mr. Abraham Kidane took over the project in late September 2020. *See Milani Construction, LLC*, MSBCA 3181 at 3-5 (2022). The September 23rd notice letter was not sent by Mr. Free, with whom Appellant had been having discussions relating to Appellant's delay compensation, nor by Mr. Cain, nor by Mr. Akers. Rather, it was sent by Mr. Kidane, an Assistant District Engineer, on behalf of Wendy Wolcott, the Metropolitan District Engineer, neither of which had worked on the project while the work was being performed, after the project had changed hands several times, and two years after CO #11 had been initiated.

Appellant disputes the purported "undisputed" fact that the September 23rd notice letter resulted in Appellant acquiring actual knowledge that its request for compensation was in dispute. Appellant contends that Mr. Kidane sent the letter in error because he did not have a complete understanding of the status of the project and the parties' discussions and agreements. Moreover, prior to this time (and certainly as late as November 11, 2019 when CO #11 was fully executed and became effective), Appellant had never been given any reason to believe that its request for time-related costs would later be denied.

Mr. Kidane's September 23rd notice letter invited Appellant to "respond within 30 days should you disagree with our assessment," which appeared to re-open the door for discussions regarding liability for the delays—an issue that Appellant believed had already been resolved via CO #11. Mr. Kaplan responded to Mr. Kidane's invitation in a letter dated October 17, 2020, attempting to set the record straight. Mr. Kaplan stated that he was "quite surprised to see that [Respondent] intends to assess liquidated damages for the entire contract time overrun. As you

know, [Respondent] has previously acknowledged that [the parties] agreed that [Appellant] should submit a [REA] and [TIA] to identify the compensable portion of the delay and costs associated with it." Mr. Kaplan also referenced the carve-out language in CO #11 that clearly contemplated a change order for time-related costs to be negotiated in the future once the work was done and stated that Respondent had already acknowledged that Appellant "was entitled to additional time, and that [Appellant] would be submitting its request for additional time when the time impact analysis was complete."

Mr. Kaplan explained that due to the complexity of the delays and accounting for the costs thereof, Appellant had hired a third-party consultant to prepare the TIA and REA and planned to submit it for review in approximately 90 days. Mr. Kaplan emphasized that Appellant's answer to the question whether it disagrees with the assessment of liquidated damages "is certainly yes, and **[Respondent] itself has acknowledged that this is incorrect**." (Emphasis added).

The Majority fails to address Mr. Kaplan's October 17th letter, which clearly demonstrates the existence of a material fact that is genuinely in dispute—what Appellant believed and knew to be true when it received the September 23rd notice letter. Moreover, it is also undisputed evidence that Appellant believed the September 23rd notice letter was sent in error by someone unfamiliar with the history of the project and the parties' agreements. Even Respondent's counsel acknowledged this at the hearing.

Mr. Kidane's November 6, 2020 letter responding to Mr. Kaplan, which is also ignored by the Majority, is further evidence that there is a genuine dispute of material fact as to what Appellant knew when it received the September 23rd notice letter. Mr. Kidane advised Appellant that Respondent "has never received a letter from [Appellant] seeking compensation for time

delay. Please provide proof that [Respondent] agreed to give compensation for time delay and a time impact analysis of the delay along with associated cost if any."[16] These statements are evidence that support Appellant's contention that Mr. Kidane sent the September 23rd notice letter in error because he was not fully aware of everything that had transpired on the project.

At the hearing, Board Member Barrolle astutely questioned whether the possibility that the September 23rd notice letter was sent in error was a material fact in dispute, thereby precluding summary decision. She also queried whether Mr. Kidane's November 6th letter requesting proof that Respondent had agreed to compensate Appellant for the delay might also be evidence that Mr. Kidane sent the letter in error. In response to her queries, Respondent simply asserted that "it is not relevant whether [Appellant] believes it was. Clearly, they do, they did believe it was erroneous."

What Appellant believed to be true when it received the September 23rd notice letter is not only relevant to whether Appellant knew that its request for compensation was in dispute, but it is also a material fact that is genuinely in dispute. The Majority engages in improper fact-finding by interpreting the letter as "an adverse action that showed that Appellant knew the basis of the claim not later than September 23, 2020," rather than drawing the reasonable inference in Appellant's favor that there was no dispute regarding its request for compensation because the letter was sent in error by someone unfamiliar with the project after a parade of staff changes on the project.

No evidence has been offered to show that Respondent ever revoked Mr. Free's previous offer of 60 days compensable delay with the remainder as excusable but non-compensable delay,

[16] Mr. Kidane was perhaps unaware that CO #11 included conspicuous language demonstrating that Appellant had requested compensation for the delays; otherwise, why would Respondent have included such language in the change order? Mr. Kidane was also apparently unaware that Mr. Free had already offered to compensate Appellant with 60 days compensable time and the rest in a non-compensable time extension.

nor is there any evidence that any of Respondent's representatives notified Appellant that Respondent was no longer willing to compensate it for its time-related costs. Quite the contrary—the evidence before the Board demonstrates the opposite. Even Mr. Kidane's November 6th letter requested that Appellant "provide … a time impact analysis of the delay along with associated cost if any." *Why ask for this information if Respondent had already determined that it was no longer willing to compensate Appellant for its time-related costs?*

As I mentioned at the beginning of my dissent, contractors encounter considerable confusion and question the fairness of how they are treated when they receive requests for information such as this, believing that discussions and negotiations of their requests for compensation are ongoing, but are later informed that their requests have been denied on the grounds that they were untimely submitted. How is a contractor, minority or other non-minority, to know when its request for compensation is transformed into a dispute, thus putting it on notice that it needs to file a notice of claim?

Absent some *unequivocal* notification by Respondent to Appellant that Respondent had changed its position and was no longer willing to compensate Appellant for the time-related costs of the delays (such as language that generally appears in an agency's "final agency action" letter *denying* a contractor's request), it is reasonable to infer, and the Majority should have inferred, that Appellant had absolutely no reason to believe the issue was in dispute and every reason to believe it would be compensated for its time-related costs.

Whether the September 23rd notice letter was sent in error by someone unfamiliar with the parties' discussions and agreements, and whether Appellant interpreted the letter as "an adverse action by Respondent" that provided Appellant with actual knowledge that Respondent was now disputing Appellant's request for compensation are questions of material fact that

should not be resolved by summary decision. They are genuinely disputed facts that are material to determining whether, and when, Appellant discovered that Respondent was no longer willing to compensate Appellant for its time-related costs and that Appellant thus had a basis for a claim.

Waiver/Estoppel

The Majority also fails to address Appellant's assertion that Respondent should be estopped from asserting a timeliness defense. In my view, Respondent's representations and actions throughout the project—the carve-out language inserted by Respondent in CO #11, Respondent's multiple reminders that Appellant needed to submit its REA and TIA so that Respondent could prepare the change order for time-related costs referenced in CO #11, Respondent's knowledge that Appellant had hired a third party to prepare its TIA and REA, Respondent's failure to give Appellant any notification that it had changed its position and was no longer willing to compensate Appellant for its time-related costs, and Respondent's request as late as November 6, 2020 for the TIA and proof that Respondent had agreed to compensate it for its time-related costs—are evidence that Respondent induced Appellant to believe there was no dispute as to whether it would be compensated, and thus no need to file any notice of any claim.

Such inducement, even if unintentional, is the basis for an equitable estoppel defense. In *Engineering Management Services, Inc. v. Maryland State Highway Administration*, 375 Md. 211 (2003), the Supreme Court of Maryland found that the Board had erroneously concluded that the time for filing a claim "may not be waived expressly, and therefore the failure to make a timely claim necessarily precludes all circumstances where the existence of a valid claim might rise…." *Id*. at 240-41. The Court pointed out that the Board had "overlooked … the possibility of equitable estoppel." *Id*. The Court emphasized that a statute of limitations, such as the one at issue there, and here, "can be waived if there is sufficient evidence of inducement, estoppel,

fraud or waiver." *Id*. (quoting *Ohio Cas. Ins. Co. v. Hallowell*, 94 Md. App. 444, 459 (1993)). The Court then concluded that "the issue of untimely notice would be a defense and a factual question to be determined during the course of a full hearing on the merits…." *Id*. But sadly, that did not happen here.

We have repeatedly cautioned contractors in a number of our recent opinions to beware of agency actions that might lead a contractor to believe that participating in some internal dispute resolution process will toll the notice and claim filing requirements of COMAR 21.10.04.02, and we have warned them to file notices of claim(s) at the earliest indication of any perceived dispute.[17] But these warnings, in my opinion, have done little to quell conduct that induces contractors to postpone filing notices of claims in the hope and/or belief that continuing discussions and negotiations at the District level will lead to settlement rather than litigation.

At some point, I believe it is incumbent upon this Board, by considering an equitable estoppel defense under such circumstances, which should have occurred here, if not the Legislature and/or the Board of Public Works, to put a stop to this type of conduct, particularly if the State wants to encourage contractors to do business with this State and obtain the best goods and services at the lowest cost. As it is, seasoned contractors who have chosen to continue doing business with the State are likely covering their bets—boosting their bids as high as competitively possible to ensure against the potential for significant financial losses once the work, including additional work required by the agency, is all done.

[17] The likely result of this advice, if heeded, will be a dramatic increase in the number of notices and claims filed—if every disagreement may later be construed by an agency (or its attorneys) as a dispute creating the basis for a claim, then contractors should file notices of claims in every single instance in which an agency expresses any disagreement with a contractor, no matter how small or insignificant that disagreement might be, and no matter how many notices per day or per week it must file to protect its interests.

In addition, I believe the Board, through its jurisprudence over the years, has lost sight of the purpose of requiring notices of claims. As our predecessor entity, the MD Dept. of Transportation Board of Contract Appeals, held in one of its earliest appeals, a notice of claim "is intended to protect the public against stale claims and permit the Engineer to make a timely investigation of damages…." *Calvert Gen. Contractors, Corp*., MDOT No. 1004 (1981). There, the Board concluded that despite the appellant's failure to provide the requisite notice of its claim, "reasonable and adequate notice was provided" because the agency had actual notice of the claim "prior to the incurrence of costs and was provided an itemized breakdown of the claim prior to the completion of the work." *Id*. at 27.

Here, Respondent was well aware of the delays caused when Appellant encountered site conditions that differed from those Respondent provided in the specifications. Respondent was also well aware of the delays caused by Respondent's numerous changes and additions in the scope of the work that had to be performed. Respondent had already agreed to, and did, compensate Appellant for its direct costs related to these delays (although it took over a year to do so), and gave Appellant every indication that it would compensate Appellant for its time-related costs as well, as clearly reflected in CO #11, once the work was completed and Appellant provided its TIA and REA (i.e., sufficient information for Respondent to evaluate and apportion the compensable and non-compensable delays). Respondent was certainly on actual notice that Appellant was seeking payment for these time-related costs, and Respondent had every opportunity to investigate any of Appellant's allegations and costs. Respondent has not suffered any prejudice as a result of the time it took Appellant to prepare its TIA and REA for submission.[18]

[18] Actually, it is Appellant that has suffered prejudice in having to hire a third party to prepare its TIA and REA due to the complexity and overlapping of the delays—a task that resulted in a digital report of over 1,000 pages that took

Finally, I do not believe our jurisprudence over the years with regard to the filing of timely claims (and protests) comports with the intent of the Legislature as set out in Division II, MD. CODE ANN., STATE FIN. & PROC., § 11-201(b), which provides that "[u]nless otherwise indicated, this Division II shall be construed ***liberally*** and applied to promote the purposes and policies enumerated in subsection (a) of this section." (emphasis added). Our jurisprudence regarding the timeliness defense has admittedly been *strictly* construed, not *liberally* construed,[19] and I believe that it has resulted in decreased competition for government contracts and the unfair and inequitable treatment of contractors. I also believe it has called into question the quality and integrity of the government's expenditure of taxpayer dollars when agencies and/or their taxpayer-funded lawyers choose to litigate rather than resolve and settle legitimate claims. Contractors are not being heard regarding potentially legitimate complaints, and many have likely lost faith in the dispute resolution process.

/s/
Bethamy B. Brinkley, Esq., Chairman

nearly a year to prepare, not to mention the retainage held (and now being kept) by Respondent while such work was being done, and the costs associated with litigating this Appeal.

[19] Although I agree that the number of days for filing protests and notices/claims should be strictly construed (i.e., 30 days is 30 days, not 31), issues regarding when a contractor acquires knowledge of a fact should **always** be liberally construed, especially in the context of summary decision.

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. 3233, Appeal of Milani Construction, LLC. Under SHA Contract No. BA9785226.

Date: November 21, 2023

/s/
Ruth W. Foy
Clerk