BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of Milani Construction, LLC	*	
Under SHA Contract No. BA0385180	*	**Docket No. MSBCA 3206**
Appearance for Appellant	*	**Sean Milani-nia, Esq.**
		Fox Rothschild LLP
	*	**Washington, D.C. 20006**
	*	**Dana Reed, Esq.**
		Baltimore, Maryland 21239
	*	
Appearance for Respondent		**Craig H. DeRan, Esq.**
	*	**Gary S. Posner, Esq.**
		Assistant Attorneys General
	*	**Baltimore, Maryland 21202**

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OPINION AND ORDER BY CHAIRMAN CHO

Appellant Milani Construction LLC ("Milani") seeks to compel the production of a corporate designee of Respondent State Highway Administration ("SHA") to provide testimony concerning certain change orders issued by SHA in construction contracts that are not part of this appeal. For the reasons explained below, Appellant's motion to compel is denied.

BACKGROUND FACTS

Milani seeks to recover damages arising from utilities relocation delays during its performance of SHA Contract No. BA0385180. Appellant broadly alleges that SHA's various failures to carry out its responsibilities in establishing an appropriate time frame for Verizon Business to perform the utilities relocation work and to adequately monitor the relocation work caused a delay in project completion by Appellant. It claims further that Respondent misrepresented and/or withheld facts about the utilities relocation that were critical for Appellant to know in preparing the bid and to complete the project on time. Appellant seeks compensation in the amount of $1,508,083 in delay costs and a time extension of 250 calendar days.

As relevant here, Appellant filed a motion to compel on July 5, 2023 ("First Motion to Compel"), relating to its request for production No. 27 and Respondent's objection to it:

> REQUEST NO. 27: Change orders from all SHA construction projects during the previous five years that reflect time extensions, whether compensable or excusable, that were granted by SHA to construction contractors for delays to contract schedules or contract completion that were caused by the relocation of utilities or by work done by utility companies with facilities within the limits of the projects.
>
> RESPONSE TO REQUEST NO. 27: SHA objects to this Request as the information sought is not reasonably calculated to lead to the discovery of admissible evidence; indeed, the Request is seeking information that is irrelevant to the subject matter of this appeal. How previous contracts are administered has no bearing on SHA's position with regard to Milani's claim with regard to the subject Contract or Project, and SHA would not be barred or estopped from taking a particular position in this appeal even if arguably inconsistent with its positions in previous appeals, let alone in previous district-level decisions. SHA further objects to this Request on the grounds that responding to the same would be unduly burdensome, requiring SHA to search the records for every single contract awarded over the past five years, for the requested information, the time and costs of which search cannot be estimated, due to the scope of the Request.

Respondent filed its opposition on July 26, 2023.

On August 9, 2023, counsel for the parties participated in an informal conference with members of the Board in an effort to resolve the First Motion to Compel. As a result, the parties agreed that the Procurement Officer would send an email to SHA District Engineers and Assistant District Engineers, asking each if they recalled any change orders that were responsive to Request No. 27 and, if they identified any such change orders, SHA would produce them subject to its ongoing objection as to relevance. On September 5, 2023, Respondent produced four change orders to Appellant in an email. Thereafter, Appellant withdrew its First Motion to Compel.

On September 23, 2023, Appellant's counsel sent a draft deposition notice to Respondent's counsel requesting the production of a corporate designee to testify concerning a list of topics that included:

> The rationale(s) for instances in which SHA has granted a compensable time extension to contractors for a utility relocation delay, including but not limited to the change orders produced to Milani Construction via email by SHA counsel on September 5, 2023.

On November 8, 2023, SHA responded that it would not produce a corporate designee on the topic of the change orders produced by SHA,[1] stating that "in addition to being irrelevant to the subject matter of this appeal, any information regarding the 'rationale(s)' for any decisions to issue change orders is protected by the deliberative-process privilege." Appellant subsequently filed its second Motion to Compel ("Second Motion to Compel"), which is the subject of this decision.

DECISION

Appellant's Second Motion to Compel revolves around GP-5.05, which is a part of the SHA Standard Specifications that is included in all SHA construction contracts. GP-5.05, commonly referred to as the "no damages for delay clause," states:

> COOPERATION WITH UTILITIES:
>
> It is understood and agreed that the Contractor has considered in his bid all of the permanent and temporary utility appurtenances in their present or relocated positions and that no additional compensation will be allowed for delays, inconvenience, or damage sustained by him due to any interference from the said utility appurtenances or the operation of moving them.
>
> The Contractor shall have responsibility for notifying all affected utility companies prior to the necessity of performing any work on their utilities and shall cooperate with them in achieving the desired result. All damage to utility facilities caused by the Contractor's operations shall be the responsibility of the Contractor.

SHA Standard Specifications for Construction and Materials (July 2008) at 5. Here, SHA contends that GP-5.05 precludes award of any damages to Appellant for delays arising from Verizon Business' utilities relocation on the project.

[1] It appears that Respondent is producing a corporate designee for deposition on other topics identified by Appellant, and that Respondent objects only to testimony concerning the change orders.

Having obtained the change orders it asked for in Request No. 27, Appellant seeks to go a step further and now moves to compel the production by Respondent of a corporate designee to testify about the change orders. Appellant states that, "at this point, neither Milani Construction nor the Board know the contents of the information" Appellant seeks, and that the information "appears reasonably calculated to lead to the discovery of admissible evidence." Respondent objects that information relating to the change orders is not relevant to any issue in this appeal and would not lead to the discovery of admissible evidence.

While the scope of discovery is generally broad, it is not without limits. Parties are permitted to discovery of "any matter, not privileged, which is relevant to the subject matter involved in the appeal," whether admissible or not, "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." COMAR 21.10.06.14A(5).

First, Appellant notes "the fact that SHA has in other contracts awarded damages to contractors for utility relocation delays indicates that SHA has interpreted this provision differently in other instances." Appellant concludes that this inconsistent application or enforcement by SHA of the same contract provision creates an ambiguity in GP-5.05. We disagree.

Under Maryland law, the "interpretation of a contract, including the determination of whether a contract is ambiguous, is a question of law." *Sy-Lene of Washington, Inc. v. Starwood Urb. Retail II, LLC*, 376 Md. 157, 163 (2003). "[A] contract term is ambiguous if a reasonable person could determine that the contract term is susceptible to at least two different meanings." *Cole v. State Farm Mut. Ins. Co*., 359 Md. 298, 317 (2000). Unless and until an ambiguity is determined to exist, extrinsic evidence cannot be introduced to vary the meaning of the contractual language. *Calomiris v. Woods*, 353 Md. 425, 437 (1999) (admission of extrinsic

evidence is barred when the written contractual language is unambiguous); *Baltimore Washington Services*, MSBCA No. 1539 (1990) (the Board will not look outside the bid documents to construe contract language in the absence of ambiguity).

There has been no allegation in this appeal that GP-5.05 is ambiguous and, therefore, neither the change orders that were produced nor any testimony regarding the change orders is relevant to the Board's interpretation of GP-5.05. The record does not reflect that Appellant filed a pre-bid protest concerning any alleged ambiguity, or that the issue was submitted for decision as part of Appellant's claim to the Procurement Officer.

Appellant next argues that "the application of GP-5.05 is not absolute," in that it "may be entitled to damages notwithstanding the provision if there is intentional wrongdoing, misrepresentation, gross negligence, or fraud on the part of the State." *State Highway Administration v. Greiner Engineering Sciences, Inc*., 83 Md. App. 621, 639-641 (1990). *See also Allan Myers MD Inc.*, MSBCA No. 3143 (2020). Appellant alleges that "both gross negligence and misrepresentation on SHA's part are present here," Compl. at ¶ 66, and as a result, "GP-5.05 does not apply to the delay on the Project or preclude Milani's claim for an equitable adjustment on account of the delay." *Id*. at ¶ 72. More specifically, Appellant asserts:

> SHA was grossly negligent in failing to permit or require Verizon Business to complete its relocation work prior to notice to proceed, in issuing a permit that permitted Verizon Business to take one year to perform the work when SHA knew that would result in delay to the project, and in failing to ensure that the work was being timely performed when it was SHA, not Milani, that was monitoring the work and dealing with Verizon Business.
>
> In the Utility Statement in the IFB SHA misrepresented when Verizon Business could have begun its work, the amount of time SHA knew Verizon Business had asserted it would take to complete the work, the fact that SHA had not yet issued a permit to Verizon Business to begin the work, and the fact that SHA intended to issue a permit that allowed Verizon Business to take a year to complete the work.

Id. at ¶¶ 67-68.

This theory might ultimately defeat the application of GP-5.05 in this appeal. Nonetheless, we fail to see how information regarding change orders issued by SHA in other contracts to other contractors under other circumstances can be probative of SHA's conduct in the administration of *this* contract. To the extent that Appellant wished to know if Respondent had taken different positions regarding the applicability of GP-5.05 in other instances, the change orders that were produced by SHA already prove that point, as well as stating the reasons why payments were made in those instances.

In so far as Respondent produced the change orders to resolve Appellant's First Motion to Compel, it never waived its relevance objection to Appellant's request for production of those change orders. We find that the requested testimony of a corporate designee is not relevant to the subject matter in the appeal, and that the testimony sought does not appear reasonably calculated to lead to the discovery of admissible evidence. Although we are mindful of the broad scope of discovery, allowing this appeal as a vehicle to obtain information about what was done in other SHA contracts having no relationship to this one goes beyond the scope of permissible discovery, considering both relevance and burden.

Finally, the Board need not address Respondent's objection based on deliberative process privilege since we are not compelling production of a corporate designee on this specific topic. Additionally, we are not well-positioned to determine whether any privilege applies without knowing the content of the communications over which it is being asserted.

ORDER

Based on the foregoing, it is this 2nd day of February 2024, hereby:

ORDERED that Appellant's Motion to Compel Respondent to Produce a Corporate Designee for Deposition is DENIED; and it is further

ORDERED that a copy of any papers filed by any party in a subsequent action for judicial review shall be provided to the Board, together with a copy of any court orders issued by the reviewing court.

____/s/_____
Sonia Cho, Esq.
Chairman

I concur:

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

DISSENTING OPINION BY MEMBER BRINKLEY

I disagree with the Majority's decision denying Appellant's request to depose a SHA corporate designee on a rather narrow, but important, issue. The Majority's refusal to grant Appellant's request is overly and unnecessarily restrictive, contravenes the spirit and intent of discovery, and ignores the General Assembly's mandate that the Procurement Laws be construed liberally so as to promote the policies and purposes of the Law.

Generally, the scope of discovery is quite broad, with its primary objective being the sharing of information so that all parties to the litigation have access to the same facts, thus avoiding unfair surprises at trial. In short, it creates a level playing field upon which all parties can play the same game using the same rules. It also allows the parties to narrow the focus of the case and streamline the process by focusing the litigation on issues that are actually disputed. In addition, when parties learn more about each other's cases, they are more likely to negotiate and reach settlement agreements, which is universally agreed to be preferred.

The Majority correctly states that parties are permitted to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the appeal "… whether or not the information will be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." COMAR 21.10.06.14A(5). But the Majority overlooks that under the same regulation, parties are also permitted to obtain discovery "… whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of the other party." COMAR 21.10.06.14A(1). Here, the narrow issue on which Appellant seeks discovery is not only directly relevant to the subject matter of the appeal but it also relates to the defense raised by SHA.

The subject matter involved in this Appeal is SHA's denial of Appellant's request for an equitable adjustment to cover costs it incurred when it accelerated its work to meet the project deadline after Verizon failed to relocate utilities in a timely manner. Appellant's Claim is that (i) SHA's conduct constituted a constructive change under the mandatory "Changes" provision (i.e., GP-4.06) of the contract, (ii) the specifications regarding the utility relocation timeframe were misleading and thus defective, (iii) SHA's conduct was grossly negligent in failing to properly supervise the utility relocation work, and (iv) SHA misrepresented to Appellant the timeframe for when the utility relocation work would be completed. Appellant alleges that SHA's refusal to issue an equitable adjustment for this constructive change caused Appellant to incur damages of $1,508,083.00.

The subject matter of this Appeal also involves SHA's *defense* to this Claim, which is that Appellant is not entitled to an equitable adjustment due to the "no damages for delay" provision in the contract (i.e., GP-5.05). Appellant asserts that this provision does not apply here because Appellant is seeking compensation under a theory of constructive change, not damages for delay.

Appellant further asserts that even if GP-5.05 did apply, enforcement of the provision is limited when there is gross negligence or misrepresentation by the agency, which Appellant alleges has occurred here.

Appellant seeks to depose SHA's corporate designee on a very narrow issue: the rationale behind SHA's defense that the "no damages for delay" provision applies in this case, even though it was not applied or enforced in at least four similar cases, as reflected in the four change orders SHA produced. The Majority erroneously concludes that the rationale for SHA's decision to issue change orders and pay delay damages "in other contracts to other contractors under other circumstances [is not] probative of SHA's conduct in the administration of *this* contract.[2]

The Majority acknowledges that the four change orders SHA produced prove that SHA has "taken different positions regarding the applicability of GP-5.05 in other instances." But the reasons why SHA does not apply and enforce this mandatory provision in *all* contracts, against *all* contractors, is, and will thus remain, a secret. Apparently, Respondent does not want Appellant (or the public) to know the factual basis for SHA's defense that this provision applies and must be enforced in *this* case, even though SHA chose not to apply it or enforce it in at least four others. Given the Majority's decision, no one, particularly Appellant in this instance, is permitted to discover why SHA selectively, and perhaps *arbitrarily*, chose to waive enforcement of this provision in disputes with at least four other contractors, yet asserts it as a defense to Appellant's Claim in *this* Appeal.[3]

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[2] The Majority's use of the word "other" to describe the circumstances under which the other four change orders were issued (and delay payments made) is presumably a euphemism for "similar" or "analogous" circumstances given that all four change orders involve issuance of change orders and payment of damages to certain contractors for delays associated with utility relocation.

[3] A question arises as to the standard of review that should be applied when reviewing an agency's actions in the context of a contract claim, an issue that the Board has apparently not opined on before. In fact, only recently did the Supreme Court of Maryland, in affirming the Appellate Court's decision on the issue, establish the standard of review in protest appeals and cancellations thereof. *See Montgomery Park, LLC v. Maryland Dep't of Gen. Servs*.,

There may be legitimate reasons why SHA waived enforcement of the "no damages for delay" provision, issued change orders, and paid delay damages to other contractors under other contracts (e.g., SHA recognized that its conduct caused the delays and compensated the contractor accordingly). There may also be illegitimate reasons, such as SHA prefers some contractors over others and/or treats some contractors differently (i.e., arbitrarily), depending on certain (unknown) circumstances. Why SHA chooses to enforce a contract provision against some contractors but waives enforcement of the same provision with respect to others is troubling, particularly insofar as the answer to this query appears to be shrouded in mystery.

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254 Md. App. 73 (2022), *affirmed*, 482 Md. 706 (2023). The Appellate Court explained that "arbitrary and capricious is the baseline standard for reviewing decisions of administrative agencies." *Id*. at 100. Citing this Board's decision in *MGT Consulting Grp., LLC*, MSBCA No. 3138 (2020), the Appellate Court held that "a procurement officer's decision will be overturned only if it is shown by a preponderance of the evidence that the agency action was biased, or that the action was arbitrary, capricious, unreasonable, or in violation of law." *Id*. at 102. *See also Hunt Reporting*, MSBCA No. 2783 (2012); *Zillion Technologies, Inc*., MSBCA No. 3210 (2022) at 6. This standard of review affords agencies a considerable amount of deference.

Whether the standard of review established in *Montgomery Park* applies to all agency decisions, including contract claims, is unclear. Generally, the Board has historically reviewed contract claims on a *de novo* basis, which provides no deference to the agency's decision. But the question remains: how much weight, if any, is the Board required to give a procurement officer's decision to deny a claim?

What we do know is that this Board is required to conduct its proceedings in accordance with the Administrative Procedures Act, codified at Md. Code Ann., State Gov't., § 10-201, *et seq*. (the "APA"). *See* Md. Code Ann., State Fin. & Proc., § 15-216(b). As the Board explained in *Montgomery Park*, although the APA does not prescribe the standard of review this Board is required to use when reviewing final decisions of an administrative agency, it does prescribe the standard of review that a Circuit Court must apply when reviewing a final decision of an administrative agency. The Board has "adopted this standard of review because the review function performed by this Board closely resembles the review function performed by a Circuit Court when reviewing a final decision of an agency in a contested case under the APA." *Montgomery Park, LLC*, MSBCA No. 3133 at 29, *rev'd on other grounds*, 254 Md. App. 73 (2022), *affirmed*, 482 Md. 706 (2023):

> **Decision. --** In a proceeding under this section, the court may:
> **(1)** remand the case for further proceedings;
> **(2)** affirm the final decision; or
> **(3)** reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:
> **(i)** is unconstitutional;
> **(ii)** exceeds the statutory authority or jurisdiction of the final decision maker;
> **(iii)** results from an unlawful procedure;
> **(iv)** is affected by any other error of law;
> **(v)** is unsupported by competent, material, and substantial evidence in light of the entire record as submitted;
> **(vi)** in a case involving termination of employment or employee discipline, fails to reasonably state the basis for the termination or the nature and extent of the penalty or sanction imposed by the agency; or
> **(vii)** is arbitrary or capricious.

Md. Code Ann., State Gov't, §10-222(h).

Shouldn't Appellant be allowed to discover the factual basis underlying SHA's defense and learn why SHA issued change orders and paid delay damages to other contractors but not to Appellant? Isn't Appellant entitled to discover whether, and, if so, why, SHA is treating it disparately from other contractors in similar or analogous situations? Or should this Board turn a blind eye to the possibility that such conduct has occurred, or is occurring, under the guise that our standard of review for contract claims does not permit us to consider whether an agency's actions are arbitrary or capricious (that is, whether it is treating all contractors the same)?

Appellant's request to depose a SHA corporate designee regarding why SHA issued change orders and paid delay damages to other contractors in at least four instances, but refused to do so in this instance, is directly relevant to the subject matter of this Appeal. It is also directly relevant to SHA's defense—that Appellant is not entitled to an equitable adjustment because application and enforcement of GP-5.05 prohibits SHA from paying damages for delay. Clearly, for reasons that will remain unknown, it does not, as evidenced by the four change orders SHA produced.

Finally, and perhaps most importantly, it is relevant to the issue of whether SHA's selective, and perhaps arbitrary, enforcement of this provision against some, but not all, contractors violates the Procurement Law. Isn't that what the General Assembly has mandated this Board to determine when we review an agency's final decision?

/s/
Bethamy B. Brinkley, 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 No. 3206, Appeal of Milani Construction, Inc. Under SHA Contract No. BA0385180.

Dated: February 2, 2024

/s/
Michael A. Dosch, Jr.
Deputy Clerk