

In the Appeal of	*
Joseph B. Fay Company	*
Under SHA Contract No. FR3885171	Docket Nos. MSBCA 3165, 3219 & 3226
Appearance for Appellant	Dirk Haire, Esq. Fox Rothschild LLP Washington, DC 20005
Appearance for Respondent	Craig H. DeRan, Esq. Justin E. Fine, Esq. Assistant Attorneys General Office of the Attorney General Contract Litigation Unit Baltimore, Maryland 21202
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Upon consideration of the Motion for Summary Decision as to MSBCA 3165 on Timeliness Grounds (“Motion”) filed by Respondent, Maryland State Highway Administration (“SHA”), the Opposition filed by Appellant, Joseph B. Fay Company (“Fay”), Respondent’s Reply, and oral argument heard on July 26, 2023, the Board grants Respondent’s Motion.

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

15/
Michael A. Dosch, Jr.
Deputy Clerk

IN THE MATTER OF

JOSEPH B. FAY COMPANY

IN THE

CIRCUIT COURT

FOR

ANNE ARUNDEL COUNTY

Case No.: C-02-CV-23-001712

* * * * *

MEMORANDUM OPINION

This case arises from Joseph B. Fay Company's ("Fay") appeal of a decision made by the Maryland State Board of Contract Appeals ("MSBCA") regarding a procurement contract for road construction between Fay and the Maryland State Highway Administration ("SHA"). Fay contests MSBCA's decision to grant summary disposition in favor of SHA on the grounds that Fay failed to file its claim within the mandatory 90-day statutory period.

In October 2017, Fay entered a contract with SHA for certain bridge and infrastructure work in Frederick, Maryland. On January 21, 2018, after the construction was already underway, Fay encountered subsurface rock conditions at various project locations that Fay contends were materially different from the boring data provided by SHA with the bid documents. Fay notified SHA of the conditions in May 2018 and submitted a request for equitable adjustment based on the differing site conditions ("DSC") on September 4, 2018. The parties met on September 20, 2018 to further discuss Fay's request for an equitable adjustment but did not reach a resolution. On October 23, 2018, SHA issued a final decision denying the existence of the DSC and Fay's request for equitable adjustment. In its final decision, SHA expressly directed Fay to file a notice of claim within 30 days. On November 20, 2018, Fay timely submitted its notice of claim to the SHA acting procurement officer ("PO").

On February 14, 2019, four days before the expiration of the 90-day statutory period for filing a claim, Fay emailed a letter to the acting PO requesting that the time be extended to April 17, 2019. The acting PO did not respond to Fay's request for an extension, and Fay did not submit its claim by the February 18, 2019 statutory deadline or its proposed April 17, 2019 deadline. On May 6, 2019, an SHA employee other than the acting PO sent Fay an email acknowledging Fay's request and stating that SHA would review the claim once submitted. On August 21, 2019, Fay forwarded another letter to SHA promising to submit documents related to cost and schedule for the DSC by October 18, 2019. On August 22, 2019, the acting PO sent a letter acknowledging Fay's August 21st letter and directing Fay to submit the claim within the 90-day period "as required in the Standard Specifications for Construction and Materials." As of October 18, 2019, Fay had yet to file the claim. However, on that date Fay emailed a "status update" to the PO stating that it received information from SHA on September 9, 2019 that was necessary to complete the claim and that the claim would be submitted "as soon as completed." Later that day, another SHA employee, again not the acting PO, sent an email to Fay acknowledging receipt of Fay's "status update on the DSC claim submittal" and advising that he would "have it on file while we await the claim submission." Fay did not file the claim until July 28, 2020.

On January 21, 2021, the PO denied Fay's claim, citing Fay's failure to file the claim within the statutory 90-day period as one of the reasons for the denial. Fay appealed the claim denial to MSBCA on February 18, 2021. On August 3, 2023, MSBCA granted SHA's Motion for Summary Decision and dismissed Fay's claim on the ground that the claim was not timely filed. Specifically, MSBCA found that Fay did not present any evidence that SHA waived the statutory and contractual notice requirements for filing claims. MSBCA further found that Fay did not present any admissible evidence of extensions granted by the PO.

Fay timely filed a Petition for Judicial Review in the Circuit Court for Anne Arundel County.

I. QUESTION PRESENTED

Did the Maryland Board of Contract Appeals err by granting summary disposition on the ground that Fay's claim was not timely filed?

II. STANDARD OF REVIEW

Judicial review of a decision of the Maryland State Board of Contract Appeals ("MSBCA") is governed by Title 10, Subtitle 2 of the State Government Article, Md. Code Ann., State Fin. & Proc. § 15-223(a). Section 10-222(a)(1) of the State Government Article provides that "a party who is aggrieved by the final decision in a contested case is entitled to judicial review of the decision." Md. Code Ann., State Gov't § 10-222(a)(1). Under § 10-222(h), the reviewing court may take the following actions:

- (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).

Judicial review of an administrative agency action is narrow. *United Parcel Serv., Inc. v. People's Counsel for Balt. Cnty.*, 336 Md. 569, 576 (1994). In reviewing an administrative

agency's decision, a court is "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Id.* at 577. A reviewing court will "afford great weight to [an] agency's legal conclusions when they are premised upon an interpretation of the statutes that [it] administers and the regulations promulgated for that purpose." *Frey v. Comptroller of Treasury*, 422 Md. 111, 138 (2011). However, courts "owe no deference to an agency's erroneous conclusions of law." *Manekin Constr., Inc. v. Md. Dep't of Gen. Servs.*, 233 Md. App. 156, 172 (2017).

As explained by the Supreme Court of Maryland, "the propriety of granting a motion for summary disposition is a legal question which [the court] review[s] *de novo*." *Brawner Builders, Inc. v. State Highway Admin.*, 476 Md. 15, 30-31 (2021). Thus, the court "must step into the shoes of the MSBCA and determine whether summary disposition was proper." *Id.* at 31. "The legal standard for granting summary disposition is the same as that for granting summary judgment under Maryland Rule 2-501(a)." *Id.* Thus, summary disposition is proper where, "[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 a "party is entitled to prevail as a matter of law." COMAR 21.10.05.06(D)(2)(a)-(b); *Brawner*, 476 Md. at 31. The moving party has the initial burden of demonstrating sufficient grounds for summary judgment. *Brawner*, 476 Md. at 31. The burden to "produce admissible evidence demonstrating a dispute" then shifts to the party opposing summary judgment. *Id.*

III. DISCUSSION

Fay contends that MSBCA erred in granting summary disposition in favor of SHA on the ground that Fay's submission of its claim was untimely. Specifically, Fay argues that the 90-day

limitation on filing a claim can be waived if there is sufficient evidence of inducement, estoppel, fraud or waiver and that there are genuine issues of material fact as to whether SHA's actions and inactions resulted in waiver or estoppel.

SHA contends that summary disposition was appropriate because it is undisputed that Fay filed its claim well beyond the 90-day deadline and the procurement officer did not grant an extension. SHA argues that the 90-day deadline cannot be waived because it is a condition precedent to the waiver of the State's sovereign immunity and thus the establishment of Fay's claim. SHA alternatively argues that even if estoppel may be asserted against the State, summary decision was proper because "MSBCA correctly found that there were no disputes of fact giving rise to either an estoppel or waiver that would prevent SHA from enforcing Fay's 90-day deadline for filing a claim."

"Maryland courts have long applied the doctrine of sovereign immunity in actions against the State." *ARA Health Servs., Inc. v. Dep't of Pub. Safety and Corr. Servs.*, 344 Md. 85, 91 (1996). Under the doctrine of sovereign immunity, no contract action "may be maintained against the State unless specific legislative consent has been given." *Baltimore Police Dep't v. Cherkes*, 140 Md. App. 282, 305 (2001) (quoting *Catterton v. Coale*, 84 Md. App. 337, 345-46 (1990)). "In Maryland the doctrine of sovereign immunity is applicable not only to the State itself, but also to its agencies and instrumentalities." *Katz v. Washington Suburban Sanitary Comm'n*, 284 Md. 503, 507 (1979). The State Highway Administration is a unit of the Department of Transportation, which was "established as a principal department of the State government." Md. Code Ann., Transp. §§ 2-101, 2-107. Therefore, SHA is a State agency entitled to sovereign immunity. *Browner*, 476 Md. at 31-32.

The Maryland legislature has given its consent for contract actions to be brought against the State and its agencies through the enactment of § 12-201 of the State Government Article. Md. Code Ann., State Gov't § 12-201(a). Section 12-201(a) provides:

Except as otherwise expressly provided by a law of the State, the State, its officers, and its units may not raise the defense of sovereign immunity in a contract action, in a court of the State, based on a written contract that an official or employee executed for the State or 1 of its units while the official or employee was acting within the scope of the authority of the official or employee.

Id. Thus, SHA is not immune from contract actions.

“In connection with the limited waiver of immunity for contract claims pursuant to SG § 12-201, the Legislature has enacted a comprehensive set of laws governing procurement contracts.” *Browner*, 476 Md. at 32. Among these laws are “statutorily-prescribed administrative procedures” for bringing claims arising out of state procurement contracts. *Manekin*, 233 Md. App. at 174. This is a four-part procedure:

First, the dispute must be submitted to the agency procurement officer for attempted resolution. Second, the agency head may approve, disapprove, or modify the procurement officer's decision. Third, the decision of the agency head may be appealed to the [MSBCA]. Fourth, the MSBCA's decision is subject to judicial review under the contested case provisions of the Maryland Administrative Procedure Act.

Eng'g Mgmt. Servs., Inc. v. Md. State Highway Admin., 375 Md. 211, 215-16 (2003).

Here, the dispute revolves around the first step in the procedure. Namely, whether Fay timely submitted its claim to the SHA procurement officer within the time prescribed under COMAR 21.10.04.02 and § 15-219 of the State Finance and Procurement Article.

To initiate the mandatory claims process applicable to Fay's claim, the regulations dictate that “a contractor shall file a written notice of a claim . . . within 30 days after the basis for the claim is known or should have been known, whichever is earlier.” COMAR 21.10.04.02(A); Md. Code Ann., State Fin. & Proc. § 15-219(a). Then, “within 90 days of the filing of a notice of a

claim on a construction contract, . . . a contractor shall submit the claim to the appropriate [PO]” unless the PO grants an extension of time. COMAR 21.10.04.02(B); Md. Code Ann., State Fin. & Proc. § 15-219(b). Under stated conditions, a PO may extend the time for filing a claim. COMAR 21.10.04.02(B) provides:

On conditions the [PO] considers satisfactory to the unit, the [PO] may extend the time in which a contractor . . . must submit a contract claim under a procurement contract for construction. An example of when a [PO] may grant an extension includes situations in which the [PO] finds that a contemporaneous or timely cost quantification following the filing of the notice of the claim is impossible or impractical.

A claim that is not timely filed “*shall* be dismissed.” COMAR 21.10.04.02(C) (emphasis added).

It is undisputed that Fay timely filed its notice of claim on November 20, 2018. It is also undisputed that Fay did not submit its substantive claim until July 28, 2020, far beyond the 90-day deadline. Thus, this case turns on whether strict compliance with the 90-day filing deadline was a condition precedent for the pursuit of Fay’s claim or rather a statute of limitations that can be extended by waiver or estoppel.

In *State v. Sharafeldin*, the Supreme Court of Maryland held that § 12-202 of the State Government Article is not “a mere statute of limitations, waivable at will by State agencies or their respective attorneys.” *State v. Sharafeldin*, 382 Md. 129, 140 (2004). Rather, § 12-202 is a condition precedent to the waiver of sovereign immunity and the contract action itself that cannot be waived by a State agency’s failure to raise the defense. *Id.* at 141, 148-49.

SHA relies on the holding in *Sharafeldin* to support its argument that the 90-day filing requirement for procurement contract claims is a condition precedent that cannot be waived. However, this reliance is misplaced. In *Sharafeldin*, the Supreme Court of Maryland’s holding that § 12-202 is a condition precedent is based on the wording of the statute. *Sharafeldin*, 382 Md. at 140-41. Specifically, the Court noted that “SG § 12-202 is not worded like the traditional statutes

of limitations, which normally state only that an action ‘shall be filed within’ the allowable period” and “say nothing about an untimely action being ‘barred.’” *Id.* Indeed, the Court found that:

SG § 12-202 states that a claim under the subtitle “is barred” unless suit is filed within one year. That, we believe, was intended to preserve the effect of sovereign immunity itself, which barred the action entirely. In using that language, the Legislature could not have intended to permit subordinate agencies, or counsel for those agencies, to be able to permit an action that the Legislature expressly declared “barred” to proceed nonetheless, by simply omitting to raise the defense. That would effectively allow sovereign immunity to be waived by subordinate agencies or the attorneys who represent them which, as noted, we have consistently held they are not empowered to do.

Id. at 141.

Unlike § 12-202, COMAR 21.10.04.02 and § 15-219(b) of the State Finance and Procurement Article say nothing about a claim being “barred” unless it is filed within 90 days. Instead, by stating that the claim “shall” be submitted within 90 days after filing a notice of the claim and that an untimely claim “shall be dismissed,” the regulation and statute are “worded like the traditional statutes of limitations” which “state only that an action ‘shall be filed within’ the allowable period.” *Sharafeldin*, 382 Md. at 140. Further, these provisions explicitly grant SHA the authority to extend the time within which a claim must be filed. *See* COMAR 21.10.04.02(B) (“[T]he procurement officer may extend the time in which a contractor . . . must submit a contract claim.”); Md. Code Ann., State Fin. & Proc. § 15-219(b) (“Unless extended by the unit, within 90 days . . . a contractor shall submit [the claim].”).

Additionally, the Supreme Court of Maryland has found that the 30-day notice of claim requirements under COMAR 21.10.04.02(A) and § 15-219(a) of the State Finance and Procurement Article are waivable by SHA. *Eng’g Mgmt. Servs.*, 375 Md. at 236-41. In *Engineering Management Services*, the Court rejected MSBCA’s conclusion “that the notice requirement was a condition precedent to the existence of a claim, and thus to its exercise of

jurisdiction” because such a conclusion “overlooks . . . the possibility of equitable estoppel.” *Id.* at 240. The Court explained:

[A] statute of limitations which is substantive and creates the right [a condition precedent] “can be waived if there is sufficient evidence of inducement, estoppel, fraud or waiver.” Because a condition precedent can be met by estoppel, and estoppel is a factual matter which can be determined only upon a full hearing on the merits, it is inappropriate to view a statute [of limitations] which exists as a condition precedent to a claim in a summary judgment context to be a matter of subject matter jurisdiction to which issues of estoppel and waiver may not be considered [under Maryland administrative law]. We conclude, therefore, 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, and not a jurisdictional bar to the pursuit of a contractor's claim.

Id. at 241 (quoting *Ohio Cas. Ins. Co. v. Hallowell*, 94 Md. App. 444, 456-59 (1993)) (alterations in original) (citation omitted).

In light of the foregoing, the court finds that the 90-day claim filing requirement subject to scrutiny here is a limitation and should be regarded as not denying a claimant’s right to bring a procurement contract claim, but rather limiting the exercise of that right. Consequently, the untimely submission of the claim is a defense which may be waived through estoppel.

We, therefore, must examine the propriety of summary disposition in the face of an estoppel argument. Maryland follows “the general rule that it is often inappropriate to grant summary disposition where there are factual issues related to knowledge, motive, or intent because such issues may require ‘greater than usual factual development.’” *Browner*, 476 Md. at 42 (quoting *Berkey v. Delia*, 287 Md. 302, 306 (1980)). However, “this general rule is not absolute.” *Browner*, 476 Md. at 42. The Supreme Court of Maryland has observed that “summary judgment may be appropriate notwithstanding the presence of factual issues concerning knowledge, motive, or intent so long as there are ‘no genuine issue[s] of material fact,’ and the facts are not susceptible ‘to inferences supporting the position of the party opposing summary judgment.’” *Id.* at 42-43

(quoting *Berkey*, 287 Md. at 306; *Clea v. Mayor of Balt.*, 312 Md. 662, 677 (1988)) (alterations in original) (citation omitted). Analogizing equitable estoppel to these factual determinations, the Court has further observed:

[E]quitable estoppel is not a procedural panacea that spares all litigants who utter the phrase from summary disposition. To the contrary, equitable estoppel, like factual determinations related to knowledge, intent, or motive, is a factual matter, the resolution of which should generally follow a full hearing on the merits. This does not mean, however, that summary disposition is precluded in every instance that a party raises equitable estoppel. Indeed, just as summary disposition may be appropriate on issues related to knowledge, motive, or intent where there are neither any disputes as to material facts nor facts susceptible to inferences supporting the party opposing summary judgment, so too may summary disposition be appropriate in matters involving equitable estoppel as long as material facts are not in genuine dispute and such facts are not susceptible to inferences drawn in favor of the party opposing summary disposition.

Browner, 476 Md. at 43.

According to MSBCA, Fay did not present “any evidence that [SHA] waived the statutory and contractual notice requirements for filing claims” or “any admissible evidence of extensions granted by the PO.” MSBCA states in its Opinion and Order that “the only evidence in the record points to the opposite conclusion – that [SHA] expected [Fay] to follow the claims process, as indicated in its letters to [Fay] outlining the steps and timeline for doing so.” However, this conclusion is in direct conflict with one Member of the MSBCA’s observations on the issue at the time of the hearing. The hearing transcript reveals that an MSBCA Member expressed concern that SHA’s letters to Fay could be construed as “lulling [Fay] into believing they’ve still got time to . . . file their claim” and pointed to “this letter that kind of confuses the record . . . and then potentially induce[s] reliance on this date as the 90-day time clock[.]” Transcript of MSBCA Motions Hearing at 25.

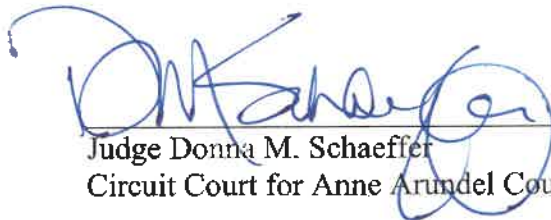
Based on the record, the court finds that there is a genuine dispute as to whether SHA waived or is estopped from asserting the 90-day filing limitation and that the facts are susceptible

to differing inferences. On summary disposition those inferences must be drawn in Fay's favor. Therefore, summary disposition was inappropriate. The court will remand the matter for further proceedings in light of this Opinion.

IV. CONCLUSION

For the reasons set forth herein, MSBCA erred in granting summary disposition on the ground that Fay's claim was untimely. Therefore, the court shall remand the matter to MSBCA for further proceedings in accordance with this Opinion.

3/13/24
Date


Judge Donna M. Schaeffer
Circuit Court for Anne Arundel County

Circuit Court for Anne Arundel County
Case No.: C-02-CV-23-001712

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 142

September Term, 2024

IN THE MATTER OF JOSEPH B. FAY
COMPANY

Berger,
Tang,
Kehoe, Christopher
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, Christopher, J.

Filed: August 25, 2026

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Md. Rule 1-104(a)(2)(B).

This appeal involves a dispute between the Joseph B. Fay Company (“Fay”) and the Maryland Department of Transportation’s State Highway Administration (the “SHA”¹), regarding Fay’s claim for compensation for additional work undertaken by Fay as part of its performance of a highway construction contract. The SHA’s procurement officer² denied the claim. Fay appealed the decision to the Maryland State Board of Contract Appeals (the “Board” or the “MSBCA”). In the proceeding before the Board, the SHA filed a motion for a summary decision. Among other contentions, the SHA asserted that it was entitled to a decision in its favor because Fay had failed to file its explanation of the factual basis of its claim within ninety days of the filing of its notice of claim, as required

¹ In the briefs and documents in the extract, the parties use a number of acronyms.

In this opinion, we will refer to the Maryland Department of Transportation State Highway Administration as the “SHA.” We will use “procurement officer” instead of “PO,” “Time Impact Analysis” instead of “TIA,” “Differing Site Condition” instead of “DSC,” “Maintenance of Traffic” instead of “MOT,” and “Support of Excavation” instead of “SOE.” Additionally, we will use the terms “General Provision” and “Information for Bidders” when discussing the contract documents in lieu of “GP” and “IFB.” To avoid clutter, we will make these substitutions without brackets when quoting from documents in the record.

² A “procurement officer” is “any person authorized by a procurement agency in accordance with law or regulations to formulate, enter into, or administer contracts or make written determinations and findings with respect to them. The term also includes an authorized representative acting within the limits of authority.” COMAR 21.01.02.01B(67).

by Md. Code, State Fin. & Proc. § 15-219(a)³ and COMAR 21.10.04.02B.⁴ The Board granted the motion.

³ State Fin. & Proc. § 15-219 states in pertinent part:

- (a) . . . [A] contractor shall file a written notice of a claim relating to a procurement contract for construction within 30 days after the basis for the claim is known or should have been known.
- (b) *Unless 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 that states:*
 - (1) the amount of the contract claim;
 - (2) *the facts on which the contract claim is based;* and
 - (3) *all relevant data and correspondence that may substantiate the contract claim.*
- (c)(1) Subject to paragraph (2) of this subsection, the head of the unit engaged in procurement of the construction shall review the contract claim.
- (2) If the unit is part of a principal department or other equivalent unit, the Secretary of the principal department or the equivalent official shall review the contract claim, unless review has been delegated by regulation to the head of the unit.
- (d) *The person who reviews a contract claim under subsection (c) of this section shall:*
 - (1) *investigate the contract claim;* and
 - (2) *give the contractor written notice of a resolution of the contract claim[.]*

(Emphasis added.)

State Fin. & Proc. § 15-219 was extensively amended by Chapter 395 of the Laws of 2026. However, § 2 of Chapter 395 states that the amended version of the statute “does not apply to claims or protests arising . . . before the effective date of this Act[.]” which is October 1, 2026.

⁴ COMAR 21.10.04.02 states in relevant part:

- .02. Filing of Claim by Contractor.
- A. Unless a lesser period is prescribed by law or by contract, a contractor shall file a written notice of a 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.

(continued...)

Fay filed a petition for judicial review. The Circuit Court for Anne Arundel County reversed the Board’s decision. Observing that “the facts are susceptible to differing inferences[,]” the court concluded that “there is a genuine dispute as to whether [the] SHA waived or is estopped from asserting” that Fay’s claim had been untimely filed. The court remanded the case to the Board for further proceedings. The SHA has appealed the circuit court’s judgment.

Between them, the parties present several issues, which we have consolidated and reworded:

1. Did the Board correctly decide that Fay did not file its claim within ninety days of the date that Fay filed its notice of claim?

B. Contemporaneously with or within 90 days of the filing of a notice of a claim on a construction contract . . . a contractor shall submit the claim to the appropriate procurement officer. On conditions the procurement officer considers satisfactory to the unit, the procurement officer may extend the time in which a contractor, after timely submitting a notice of claim, must submit a contract claim under a procurement contract for construction. An example of when a procurement officer may grant an extension includes situations in which the procurement officer finds that a contemporaneous or timely cost quantification following the filing of the notice of claim is impossible or impractical.

* * *

C. A notice of claim or a claim that is not filed within the time prescribed in Regulation .02 of this chapter shall be dismissed.

(Emphasis added.)

2. Did the Board correctly decide that the doctrines of waiver and equitable estoppel did not preclude it from awarding a summary decision to the SHA?^{5,6}

For the reasons that follow, we conclude that the Board did not err when it granted the SHA's motion for summary decision. Explaining why this is so requires us to examine in detail a factually and procedurally complex record. We ask for the reader's patience, aware that we will try it before our task is complete.

A STATUTORY AND REGULATORY OVERVIEW

Maryland has waived its sovereign immunity “in a contract action, in a court of the State, based on a written contract that an official or employee executed for the State or 1 of its units while the official or employee was acting within the scope of the authority of

⁵ The SHA presents the following issues:

1. Did the Board correctly decide that Fay filed its claim too late, where the undisputed facts showed that the procurement officer did not extend or waive the 90-day condition precedent to the State's waiver of its sovereign immunity?
2. Did the Board correctly decide that equitable estoppel did not preclude it from awarding summary decision to the Administration, where Fay presented no genuine dispute of material fact as to whether it had detrimentally relied on any conduct by the Administration?

⁶ Fay articulates its questions presented as follows:

1. Did the Board err by holding that the COMAR “trumps any understanding that a party to a contract may have based on conduct?”
2. Did the Board err in granting summary decision where the record contains evidence that SHA waived, or is estopped from enforcing, the 90-day time limitation on filing a claim?
3. Did the Board err in granting a summary decision that creates poor public policy for Maryland public agencies and the contractors who work for those agencies?

the official or employee.” *Maryland State Highway Admin. v. Brawner Builders, Inc.*, 248 Md. App. 646, 658 (2020) (quoting Md. Code, State Gov’t § 12-201(a)), *aff’d*, 476 Md. 15 (2021). Because “the Legislature may impose conditions and limitations, both substantive and procedural,” on the State’s waiver of sovereign immunity, the General Assembly “has enacted a comprehensive set of laws governing . . . the processing of contract claims” in the State Finance and Procurement Article. *Id.* at 659. “The purposes and policies” of this statutory framework include:

- (1) providing for increased confidence in State procurement;
- (2) ensuring fair and equitable treatment of all persons who deal with the State procurement system;
- (3) providing safeguards for maintaining a State procurement system of quality and integrity;
- (4) fostering effective broad-based competition in the State through support of the free enterprise system;

* * *

- (8) simplifying, clarifying, and modernizing the law that governs State procurement;
- (9) allowing the continued development of procurement regulations, policies, and practices in the State; and
- (10) promoting development of uniform State procurement procedures to the extent possible.

State Fin. & Proc. § 11-201(a).

“Unless otherwise indicated,” these statutory requirements “shall be construed liberally and applied to promote the purposes and policies enumerated in subsection (a) of this section.” State Fin. & Proc. § 11-201(b).

A “contract claim” is “a claim about the performance, breach, modification, or termination of the procurement contract.” State Fin. & Proc. § 15-215(b)(2).⁷ Contract claims “shall be submitted within the time required under regulations adopted by the primary procurement unit responsible for the procurement.” State Fin. & Proc. § 15-217(b).⁸ Within this statutory and regulatory framework, our focus is on “the procurement officer, who is the individual authorized by the agency . . . to enter into, administer, and make determinations and findings with respect to [the] procurement contract.” *Brawner Builders*, 248 Md. App. at 660 (cleaned up).

An important aspect of this appeal is the claim filing process set out in the State Finance and Procurement Article⁹ as implemented in Title 21, Subtitle 10 of the Code of Maryland Regulations. COMAR 21.10.04.02 states in pertinent part:

⁷ The procurement process “includ[es] the process of buying or otherwise obtaining supplies, services, construction and construction related services as well as the solicitation and award of procurement contracts and all phases of procurement contract administration.” *Brawner Builders*, 248 Md. App. at 659 (cleaned up).

⁸ The term “procurement” includes the processes of:

- (i) leasing real or personal property as lessee; or
 - (ii) *buying or otherwise obtaining . . . construction, construction related services, architectural services, [and] engineering services . . .*
- (2) “Procurement” includes the solicitation and award of procurement contracts and all phases of procurement contract administration.

State Fin. & Proc. § 11-101(n) (emphasis added).

⁹ State Fin. & Proc. § 15-219 states in pertinent part:

- (a) Except to the extent a shorter period is prescribed by regulation governing differing site conditions, *a contractor shall file a **written notice***

(continued...)

A. Unless a lesser period is prescribed by law or by contract, a contractor shall file a written *notice of a 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.

B. Contemporaneously with or *within 90 days of the filing of a notice of a claim on a construction contract*, . . . *a contractor shall submit the claim to the appropriate procurement officer*. On conditions the procurement officer considers satisfactory to the unit, the procurement officer may extend the time in which a contractor, after timely submitting a notice of claim, must submit a contract claim under a procurement contract for construction. An example of when a procurement officer may grant an extension includes situations in which the procurement officer finds that a contemporaneous or timely cost quantification following the filing of the notice of claim is impossible or impractical. The claim shall be in writing and shall contain:

- (1) An explanation of the claim, including reference to all contract provisions upon which it is based;
- (2) The amount of the claim;
- (3) The facts upon which the claim is based;
- (4) All pertinent data and correspondence that the contractor relies upon to substantiate the claim; and
- (5) A certification by a senior official, officer, or general partner of the contractor . . . that, to the best of the person's knowledge and belief, the claim is made in good faith, supporting data are accurate and complete, and

of a claim relating to a procurement contract for construction within 30 days after the basis for the claim is known or should have been known.

(b) Unless 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 that states:

- (1) the amount of the contract claim;
- (2) the facts on which the contract claim is based; and
- (3) all relevant data and correspondence that may substantiate the contract claim.

(Emphasis added.)

the amount requested accurately reflects the contract adjustment for which the person believes the procurement agency is liable.

(Emphasis added.)

Absent a decision by the procurement officer to extend the thirty-day/ninety-day filing deadlines, “a claim that is not filed within the time prescribed in Regulation .02 of this chapter shall be dismissed.” COMAR 21.10.04.02C.

With these public contracting principles in mind, we will set out the factual basis of Fay’s claim for additional compensation.

FACTUAL BACKGROUND

The Contract

In July 2017, the SHA requested bids for the reconstruction of the intersection of Maryland Route 85 and Interstate Highway 270 in Frederick, Maryland. The work consisted of road widening; demolishing and rebuilding multiple bridges; relocating water and sanitary services; resurfacing roadways and bridges; installing utility conduits, medians, sidewalks, ramps, signals, lighting, drainage; and landscaping. Before it solicited bids, the SHA obtained data regarding subsurface geologic conditions by drilling test wells at approximately 170 locations within the project area. The SHA included the results of this testing in its Information for Bidders. After a bidding and procurement process, the SHA selected Fay to perform the work.

The contract was signed on October 3, 2017. The contract price was \$56,967,508.20, subject to adjustments for variations in unit prices for materials. The deadline for

completing the project was December 31, 2021. If Fay failed to meet that deadline, it was subject to a late fee of \$4,040 per diem. Additionally, the contract stated that:

It is distinctly understood and agreed that no claim for extra work or materials, not specifically herein provided, done or furnished by the Contractor, will be allowed by the State Highway Administration . . . unless the same is ordered in writing by the Engineer [of the SHA].

The SHA's review and decision-making process in this case occurred at two levels.

First, Fay was obligated to attempt to resolve issues as they arose with the SHA's District 7¹⁰ engineering staff. At the times relevant to this case, the procurement officer for the SHA District 7 was District Engineer John M. Concannon. Second, if Fay was not satisfied with the decision of the District 7 Engineer, Fay had the right to seek further review by the SHA's Office of Construction, with the SHA's procurement officer acting as the ultimate decision-maker. At the times relevant to this case, the SHA's procurement officer was Stephen A. Bucy, the Director of the SHA's Office of Construction. When Bucy was absent from work,¹¹ Victor Grafton served as acting procurement officer. In addition to Messrs. Bucy and Grafton, the following individuals in the SHA's Office of Construction were involved in the review process that culminated in the procurement officer's decision: Robin J. Linton, Division Chief of the Engineering Support Section;

¹⁰ The SHA has divided Maryland into seven regional districts for administrative purposes. Frederick is located in District 7.

¹¹ At times, Bucy was absent from work in order to fulfill his obligations as a member of the National Guard.

Adetutu Onamade, Assistant Division Chief, Engineering Support Division; and Natacha Valentin.¹²

The “Partnering Charter”

Several weeks after the contract between Fay and the SHA was finalized, employees of Fay and the SHA’s District 7 office signed a document titled “Building Partnerships,” which the parties refer to as the “Partnering Charter.”

In the Partnering Charter, the signatories committed to have “open, honest, clearly defined communications that generates trust and respect” between them. The Partnering Charter called for “Problem Solving Discussions” to address, among other matters, “Differing Site Conditions” by:

- i. Collect[ing] all info concerning the condition (documentation, photos, etc.)[;]
- ii. Collectively determin[ing] a way to solve [the] issue considering both schedule and budget[;]
- iii. Mak[ing] sure that all parties that need to provide input are involved in the decision[;]
- iv. Tak[ing] steps to facilitate a resolution as quickly as possible[; and]
- v. [Obtain[ing] i]nput from Contractor as to what resources are available towards a solution[.]

As we will discuss later, the Partnering Charter was a matter of controversy at the Board’s hearing. However, there is nothing in the Partnering Charter that purports to modify any provision of Fay’s contract, the relevant COMAR regulations, or the pertinent provisions of the State Finance and Procurement Article.

¹² Valentin’s job title is not clear from the materials in the extract.

Fay's Differing Site Conditions Claim

Just months after it commenced work, Fay informed the SHA that it was encountering subsurface rock conditions that were not consistent with the data provided by the SHA in its Information for Bidders. Fay identified six locations where it or its subcontractors encountered underground rock conditions that Fay contended differed materially from the representations made by the SHA in the bid and contract documents, including the boring data shared with prospective bidders.¹³

The evidentiary bases for the parties' contentions are the letters, emails, occasional telephone conversations, and face-to-face meetings between officials and employees of the parties. We summarize the relevant evidence in the following timeline:

¹³ As described by Fay, the following six sites presented differing site conditions requiring additional work that was performed by Fay and/or its subcontractors:

- (1) Storm Drain Installation Between ES-I 101 and MH-1104 [direct claim by Fay];
- (2) Storm Drain Installation Between ES-905 and MH-906 [direct claim by Fay];
- (3) Stage One Support of Excavation ("SOE") [for additional drilling costs] [hybrid claim – hybrid claim for work performed by Fay and subcontractor Amelie Supply and Construction, LLC];
- (4) Waterline Relocation at Crestwood Boulevard [claim for work performed by subcontractor Franco's Liberty Bridge];
- (5) Crestwood Boulevard Potomac Edison Conduit Installation [claim for work performed by subcontractor Aldridge Electric, Inc.]; and
- (6) I-270 Highway Lighting [claim for work performed by subcontractor Aldridge Electric].

April 27, 2018: Thomas McFall, P.E., a Senior Project Manager for Fay, notified John M. Concannon, the SHA’s District 7 Engineer, that Fay was encountering subsurface rock conditions that differed materially from the boring data that the SHA had provided to potential bidders. In a document titled “Notice of Impact – Rock Elevations[.]” McFall stated:

The Contract documents include boring logs [providing] information on the subsurface conditions across the project site. Rock elevations, when encountered, are included in the borings, and were the basis of our bid for the project. Fay Company has encountered rock at elevations significantly higher than those shown in the borings. These subsurface conditions differ materially from those indicated in the Contract documents. To date, this condition has been encountered in [three] locations[.]

* * *

The rock elevations shown in the [information supplied by the SHA] do not accurately depict the existing conditions in the field. Given the actual conditions in the field are significantly different from those shown in the borings, *we will be submitting a request for an equitable adjustment for cost and time associated with this differing site condition.*

This letter serves as notification of this matter. We are preparing a detailed analysis of each of the areas showing the elevations rock was presented in the borings against the actual elevations encountered in the field. We are also compiling the cost impacts associated with the three areas listed above and will forward them for your review.

(Emphasis added.)

May 11, 2018: By letter to McFall, District Engineer Concannon “acknowledge[d] receipt” of Fay’s April 27, 2018 letter. Concannon acknowledged that Fay “believes there is a subsurface condition that differs materially from the contract documents.” He also noted that Fay was in the process of “preparing a detailed analysis of the alleged differing site condition[s] and associated cost impacts” and that the SHA “will evaluate the

submittal in accordance with GP 4.05 Differing Site Conditions when [Fay’s submittal is] received.” Concannon also stated that “[i]f further information is needed, please contact Ross Clingan, MDOT SHA’s [District 7] Area Engineer[.]”

July 5, 2018: Fay provided a document titled “Time Impact Analysis 2” to the SHA. No part of this document is in the record extract, but it appears that Fay sought an extension of the time for performance of the contract based upon the difficulties it had been experiencing as a result of what Fay asserted was the inaccurate drilling data provided by the SHA.

August 9, 2018: By letter to District 7 Engineer Concannon, McFall responded to the SHA’s review of Fay’s revised Time Impact Analysis 2. McFall stated that Fay’s progress on the project:

has been impacted by differing site conditions (actual rock elevations higher than those depicted in the Contract borings). These impacts are also included in TIA2R1. The analysis and resulting schedule impacts for the RR1 work were developed based on an anticipated Notice to Proceed of August 13, 2018. Any delays in issuance of a Notice to Proceed beyond this date will further impact the schedule.

Based on the results of TIA2R1, the project schedule has been impacted by a total of 257 calendar days due to the issuance of RR1 and the differing site conditions presented by the on-site rock elevations. *Fay hereby requests a compensable time extension to extend the Contract Completion Date to October 26, 2022.*

(Emphasis added.)

August 16, 2018: District 7 Engineer Concannon sent a letter to McFall in response to the latter’s letter of August 9, 2018. Concannon stated in pertinent part:

The Maryland Department of Transportation State Highway Administration (MDOT SHA) acknowledges receipt of Joseph B. Fay Company (JBFC)

letter dated August 9, 2018, wherein JBFC has submitted Time Impact Analysis (TIA) No. 2R1 for Redline No. 1 and differing site conditions for rock impacts. JBFC is requesting a compensable 257 day time extension and a new contract completion date of October 26, 2022.

MDOT SHA is reviewing TIA 2R1 and will respond shortly. If further information is needed, please contact Ross Clingan, MDOT SHA's Area Engineer[.]

August 31, 2018: Fay submitted its "Rock Impact Justification," in which Fay asserted that it:

encountered rock across the project site at elevations that are significantly different from the information provided in the Contract Documents. SHA was notified of this in Fay Letter 1002-29 Notice of Impact – Rock Elevations, dated April 27, 2018, which detailed three specific areas of this occurrence. . . . This letter 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 conditions encountered at these locations differed materially from those indicated in the contract[.] Fay could not have reasonably known of the conditions, and the impacts are directly associated with the rock. As such, the cost and schedule impacts are therefore compensable.

* * *

During the bid process, Fay performed a site investigation, reviewed the information presented by the drawings and specifications, and satisfied themselves as to the quality and quantity of subsurface materials based on the available information. That effort meets all of the contractual requirements . . . with respect to the quantity of rock anticipated to be encountered during construction.

During the progress of work, the subsurface conditions at the locations detailed below were materially different from those indicated in the Contract Documents[.]

* * *

SHA is responsible to furnish adequate and sufficient design and bid documents. In a competitively bid project, the information included in the bid documents are provided with the intent that bidders rely on it when

formulating their bid. *Bidders are not responsible for defects in those documents. Since the soil borings in the areas detailed above did not align with the existing conditions, a Differing Site Conditions exists.*

(Emphasis added.)

September 5, 2018: By letter to McFall, SHA District 7 Engineer Concannon “acknowledge[d] receipt” of Fay’s letter regarding differing site conditions that “meet[] the requirements” for “an equitable adjustment.” However, Concannon stated that the “SHA does not agree that a differing site condition exists” because “[t]he borings taken [by the SHA] for the project indicate that there was rock present in the field.”

Additionally, Concannon drew Fay’s attention to the following provision in the Invitation for Bids (formatting in original):

“201.01.03 Rock – The Contractor shall note that auger refusal and rock was encountered in the project. The Contractor 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.”

If further information is needed, please contact Ross Clingan, MDOT SHA’s Area Engineer[.]

September 20, 2018: At the District 7 office, representatives of the SHA and Fay “met . . . to discuss” Fay’s request for reconsideration of the “SHA’s denial of [Fay]’s request for an equitable adjustment.”

October 23, 2018: By letter to McFall, and referencing the August 31 and September 5 correspondence as well as what was said at the September 20 meeting, District Engineer Concannon notified Fay that

SHA believes that the rock encountered on the project does not constitute a differing site condition under [the Contract,] . . . [because t]he project borings and Invitation for Bids (IFB) alert the contractor to the presence of rock on the project and to consider rock when pricing excavation and storm drain items. MDOT SHA denies this request for additional compensation.

Regarding next steps, Concannon stated:

This is the final decision from this office regarding this issue; it is not the final decision of MDOT SHA. . . . [Y]ou have 30 days from the date of this letter to file a written notice of claim with the Procurement Officer. That claim may be submitted to: Mr. Victor Grafton, Acting – Director, Office of Construction If further information is needed, please contact Ross Clingan, MDOT SHA’s Area Engineer[.]

(Emphasis added.)

November 20, 2018¹⁴: By letter to the SHA’s Acting Procurement Officer Victor Grafton, Fay Senior Vice President James McNelis submitted Fay’s “Notice of Claim – Differing Site Conditions, Rock Impacts,” detailing “Fay’s justification for a Differing Site Condition due to rock elevations.” Citing “Specification GP-5.14 in the 2008 Standard Specifications for Construction and Materials,”¹⁵ McNelis stated:

[P]lease accept this letter as formal written notice of claim for extension of time and equitable cost adjustment. We are assembling the required information and will be forwarding to your office as outlined in GP 5.14.

(Emphasis added.)

¹⁴ The letter was dated November 19th but was delivered on November 20, 2018.

¹⁵ This documents is not in the record extract.

On the same day, Acting Procurement Officer Grafton emailed McNelis, thanking him “for the . . . heads up.” Grafton stated that “[w]e’ll start evaluating this claim, following the holiday.”

December 10, 2018: McFall wrote to Concannon and Neil Haines, respectively the SHA’s District 7 Engineer and Assistant District Engineer, regarding Fay’s “Time Impact Analysis TIA2R2.” The letter referenced a meeting between representatives of Fay and District 7 to discuss “the rejection of [Fay’s] Time Impact Analysis No. 2 Revision 1[.]” As a result of the meeting, Fay submitted revisions to that document, and requested:

a compensable time extension of 213 calendar days with a revised project completion date of September 12, 2022. Fay is compiling a breakdown of our daily General Conditions costs. The costs will be provided shortly under separate cover.

We look forward to your concurrence on this TIA.

February 14, 2019: Three days before the expiration of the ninety-day deadline for filing Fay’s claim, McNelis emailed Acting Procurement Officer Grafton, asking him “to extend the 90 day time frame for submission of final documents supporting [Fay’s] differing site conditions claim.” McNelis stated that Fay was “not ready to make final submittal of all of the required documents.” In support of this request, McNelis pointed to:

- the amount of data required to support the differing site condition is significant,
- the area of the project [a]ffected by the differing site condition has increased, and
- it was not until January 17, 2019, before the District approved Fay’s requested logic revisions for incorporation into the schedule of record. (The schedule of record is critical in determining the time impact.)

Fay hereby requests that the 90 day time frame for submission of the claim be adjusted to start as of January 17, 2019. Fay will have all documents related to the cost and schedule impacts submitted to your office no later than April 17, 2019.

(Emphasis added.)

There was no immediate response to this letter.

May 4, 2019: Grafton (of the SHA) emailed Natacha Valentin (of the SHA), asking her if Robin Linton (also of the SHA) had responded to McNelis’s February 14, 2019 request that the SHA grant Fay an extension of time to file its claim. Grafton stated: “For your files. Did [R]obin ever reply?” Grafton’s query elicited prompt action. On May 6, 2019, Linton sent the following email to Fay’s Senior Vice President McNelis:

This email is to acknowledge the time extension request as per our telephone conversation pertaining to the Differing Site Conditions (Rock) Notice of Claim on FR3885171. *Once you have submitted the Claim package, SHA will acknowledge and begin the analysis.*

(Emphasis added.)

June 17, 2019: By letter to District Engineer Concannon and Assistant District Engineer Haines, McNelis discussed the “Notice of Impact – Rock at Westview & Stage 2 Support of Excavation.” McNelis stated that Fay “has encountered rock at elevations materially different from those depicted in the Contract Documents during its installation of the storm drain from structures MH-202 to MH-203 and the Stage 2 support of excavation[.]” Pointing out that “Fay is currently pursuing a claim with the MDOT SHA Office of Construction in regards to differing rock elevations encountered throughout the project site[.]” McNelis stated:

We understand reconciliation of this matter may be impacted by the resolution [of] the prior issues. Regardless, notification is being given and Fay will pursue this matter accordingly. Fay will submit a request for an equitable adjustment for costs and schedule impacts associated with the subject areas upon resolution of said claim.

July 23, 2019: By letter to SHA District 7 Engineer Concannon, McFall reported on Fay’s “Stage 1 Delay Analysis[,]” asserting that “Multiple Excusable Delays have pushed the project schedule past the current Contract completion date.” Fay requested “a compensable time extension of one-hundred sixty two (162) calendar days to account for the impacts to the Stage 1 completion date” and

an additional time extension of sixty-eight (68) days with compensable eligibility to be determined by the MDOT SHA Office of Construction. A detailed Equitable Cost Analysis will be prepared and submitted as soon as all costs are quantifiable.

August 21, 2019: McNelis emailed Acting SHA Procurement Officer Grafton, with copies to Valentin at the SHA. In the email, McNelis stated:

Attached is the status update on the DSC [Differing Site Condition] submittal.

We have recently completed Stage 1 [Maintenance of Traffic] of the project. During this stage four separate time and cost impacts occurred, one of which was the rock DSC. [The SHA District 7] directed Fay to submit a retrospective TIA [Time Impact Analysis] schedule with time apportioned between each of the contributing delays. This schedule has been submitted, we have not received acceptance nor rejection at this time. We are hoping to have this shortly. With this, an agreed upon time frame will be allocated to the rock DSC. More in the letter. . . .

Original copy being sent by mail.

The letter referenced in the email was also dated August 21, 2019 and was from McNelis to Grafton, the Deputy Director of Field Operations at the SHA’s Office of

Construction, and the acting procurement officer for the SHA. The letter stated in pertinent part:

We are writing to provide you with an update on the status of the Differing Site Conditions (DSC) Claim package to be submitted to your office for the MD 85/I270 Interchange Reconstruction project.

On May 8th Fay completed Stage 1 Maintenance of Traffic (MOT). Multiple impacts, including the DSC, caused Stage 1 to be completed one-hundred sixty two (162) calendar days late. Fay recently submitted [a] letter . . . dated July 23, 2019 to the MDOT SHA District 7 project staff The letter summarized and apportioned the following Excusable Delays as related to their impact on the Stage 1 MOT completion milestone:

- 1- DSC Unanticipated Rock,
- 2- Redline Revision No. 1,
- 3- Stage 1 Micropiles, and
- 4- Stage 1 Paving across Ramp 3.

Prior to this submittal, the District had accepted two separate schedule Time Impact Analyses (TIA). Although[] the District accepted the TIA's they would not issue a Contract time extension because the TIA's were prospective. The District maintained they would only extend time for actual Excusable impacts retrospectively. Fay disagrees with the approach, but moved forward per the District's direction.

At the completion of Stage 1 MOT [Maintenance of Traffic,] the District requested that the total days of impacts be retrospectively apportioned between each of the contributing delays referenced above. The schedule impacts caused by the [Differing Site Condition] Rock, encountered throughout 2018, were included in the analysis. Once the District has reviewed our analysis and agreement is reached on the apportioned time between the multiple impacts, the DSC package will be submitted to your office.

We have also attached letter 1002-103 Notice of Impact - Rock at Westview & Stage 2 SOE. This letter notified the District of additional areas where rock was encountered at significantly different elevations from those shown on the plans. At this time, we are providing this letter for your information. Fay has submitted this to the District as a DSC.

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.

Should you have any questions or require any additional information, please contact me.

/s/ James McNelis

(Emphasis added.)

August 22, 2019: By letter to McNelis, SHA Procurement Officer Bucy

“acknowledge[d] receipt of [Fay’s] letter for intent to file a claim on the above referenced project, dated August 21, 2019.” Bucy further stated:

the claim is a request for extension of time and equitable cost 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 . . . , 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. Attached for Fay[’s] convenience is a copy of the structure outline for this claim submittal. Please contact Ms. Adetutu Onamade, Engineering Support Section, Office of Construction, if there are any questions.

(Emphasis added.)

September 9, 2019: In a letter to Fay Project Manager Bellal Shaaban, SHA District 7 Engineer Concannon reported that, after reviewing Fay’s “Stage 1 Delay Analysis” requesting 162 days of compensable delay and sixty-eight days of excusable time extensions, the SHA:

will grant Fay a compensable extension of one hundred nineteen (119) calendar days and an excusable, non-compensable extension of sixty-eight (68) calendar days, adjusting the contract completion date to August 17, 2022. The remaining fifteen (15) calendar days of slippage experienced during Stage I were solely caused by unplanned rock removal activities and are inexcusable.

October 18, 2019: By email to Onamade in the SHA’s Office of Construction, Fay’s Project Manager Shaaban continued the email string that began with McNelis’s November 19, 2018 “heads up” email alerting Grafton to Fay’s Notice of Claim. Shaaban stated: “As discussed, please see attached status update on the DSC Claim submittal concerning Contract FR3885171” and “let me know if there are any questions.”

Attached to this email was a letter dated October 17, 2019, from McNelis to Procurement Officer Bucy, providing “an update on the status of the Differing Site Conditions (DSC) Claim package[.]” Citing correspondence following its completion of Phase 1 on May 8, including its July 23 time impact analysis and the SHA’s September 9 response, McNelis asserted that Fay’s claim had been delayed while the SHA’s decision on the Stage 1 delays was pending:

The District’s analysis did not recognize any delays associated by the rock DSC.

The District’s formal position on Stage 1 was needed before we can complete our DSC submittal. Now that we have this information, we will continue to diligently compile all documents related to cost and schedule for the rock DSC and will submit to your office as soon as completed.

On the same day, Onamade replied to Shaaban by email, stating:

I acknowledge receipt of the status update on the DSC claim submittal for contract FR3885171. I will have it on file while we await the claim submission.

July 24, 2020: By letter to SHA Procurement Officer Bucy, McNelis submitted Fay’s “claim for extension of time and equitable cost adjustment due to Differing Site Conditions (DSC) encountered in Stage 1 of the . . . Project[.]” prepared “[i]n accordance with GP 5.14 Filing of Claim by Contractor[.]” Fay’s claim totaled \$2,267,053.64. Fay detailed the scope of the claim, including itemized accountings with cost breakdowns and supporting data for seven components, ranging from “Extended Performance” to “Storm Drain Installation” (in two areas), “Support of Excavation,” “Winter Concrete Impacts,” “Waterline Relocation,” and “Highway Lighting and . . . Conduit Installation.”

Additionally, Fay disputed the SHA District 7’s denial of its “requests for extension of time and equitable cost adjustments . . . based on its belief that the rock encountered on the project does not constitute” a Differing Site Condition “as defined by GP 4.05.” Fay asserted that, in the process of preparing its bid, it followed the “Site Investigation” standards (GP 2.04) and that it “reviewed the information presented by the Contract Documents[.]” including the “exploratory work done by MDOT SHA” with 175 “boring logs[.]”

Fay acknowledged that Special Provision Section 201.01.03 provided:

The Contractor shall note that auger refusal and rock was encountered in the project.

The Contractor 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.)

However, Fay contended that it “could not have reasonably expected that the relief granted to it by GP 4.05 would be eliminated by the Special Provision clause” because “TC 3.01 Governing Order of Contract Documents state[s] that General Provisions will govern over all Contract Documents unless *expressly* provided for in the Contract.” GP 4.02 “state[s] that the General Provisions prevail over any other provision of the Contract Documents in the event of a conflict unless such other provision *expressly* provide[d] to the contrary.” In Fay’s view, “[n]othing in the Contract Documents *expressly* provide[d] that any other provisions regarding DSC govern or prevail over GP 4.05.”^[16]

July 29, 2020: Procurement Officer Bucy sent a letter to McNelis, acknowledging receipt of Fay’s “claim dated July 24, 2020” and recognizing that Fay was seeking “[an] equitable adjustment based on differing site conditions – rock impacts, in the amount of \$2,267,053.64 and [an] 83 Calendar Day time extension.” Stating that the “SHA will begin the analysis immediately and will contact Fay if needed to discuss this matter[,]” Bucy again directed Fay to “contact Ms. Adetutu Onamade, Assistant Division Chief, Engineering Support Division, Office of Construction, if there are any questions.”

January 21, 2021: Procurement Officer Bucy issued the SHA’s Final Decision on Fay’s Differing Site Condition claim filed on July 24, 2020. Bucy stated that Fay’s claim was “barred pursuant [to] COMAR 21.10.04.02.C”¹⁷ and that “[t]he claim is denied in its entirety for” three reasons, which we will now summarize:

¹⁶ None of the relevant contract documents are included in the record extract.

¹⁷ COMAR 21.10.04.02.C states: “A notice of claim or a claim that is not filed within the time prescribed in Regulation .02 of this chapter shall be dismissed.”

First, Bucy stated that the claim failed because Fay had not provided a timely notice of its claim arising out of the “Alleged Differing Site Conditions”:

Fay was required, in accordance with GP-4.05(a),^[18] to “promptly, and before such conditions are disturbed,” provide notice to MDOT SHA of each of the alleged differing site conditions. GP-4.05(b), in turn, provides that “[n]o claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in [GP-4.05(a)].” As explained below, Fay failed to provide the required “prompt” notice as to all the alleged site conditions that are the subject of this claim. The claim is therefore barred pursuant to GP-4.05(b).

Second, Bucy reviewed Fay’s notice of claim, its request for an extension of the ninety-day period for submitting that claim, Fay’s ensuing updates and correspondence, and Fay’s full claim package detailing the required information. Regarding the-timeliness of the first three components of Fay’s claim, *i.e.*, the Differing Site Conditions affecting two storm drains and Support of Excavation, Bucy stated:

(1) Regarding Fay’s February 14, 2019 extension request, “[t]he Office of Construction neither granted or denied Fay’s request . . . and *Fay did not submit the claim documents as promised by April 17, 2019.*” (Emphasis added.)

(2) Regarding Fay’s August 21, 2019 letter “promising that ‘[d]ocuments related to cost and schedule for the rock DSC are diligently being compiled and will be submitted to your office by October 18,’ that “letter was acknowledged by the Office of Construction on August 22, 2019, and mistakenly referred to as another notice of claim.”

But in any event, “the claim was not filed as promised.” Instead, Fay “forwarded yet another letter . . . on October 18, 2019,” in which “Fay . . . contended that the claim could not be submitted until this ‘response’ from District 7 had been completed” but “*Fay made no attempt to reconcile this contention with the representation made in its February 14, 2019 letter that the claim would be filed*

¹⁸ GP-4.05 is not in the record extract.

by April 17, 2019, given that Fay’s requested logic revisions to the schedule had been approved.” (Emphasis added.)

In addition, Bucy stated that Fay “failed to explain why the claim still remained outstanding over five weeks after its receipt of District 7’s September 9, 2019 ‘response.’” Instead, Fay simply “stated that the claim would be submitted ‘as soon as completed.’”

Bucy stated that:

The Office of Construction acknowledged receipt of Fay’s October 18, 2019 “status update” and indicated that it will be “on file while we await the claim submission.” Fay did not thereafter file the claim until over nine months later, on July 28, 2020.

In summary, then, Fay submitted a notice of claim to the Office of Construction on or about November 20, 2018, after SHA District 7’s denial of its claim for differing site conditions relating to the storm drain installation between ES-1101 and MH-1104, the storm drain installation between ES-905 and MH-906, and the Stage 1 SOE installation. The claim with respect to these three issues was therefore due to be filed by February 17, 2019, and Fay did not file its claim by that date and never received an extension of time for the filing of the claim. Even assuming that extensions had been properly requested and granted, Fay failed to comply with the extended deadlines. Accordingly, the claim is barred as untimely pursuant to COMAR 21.10.04.02.C to the extent it relates to the above-referenced storm drain installations and the Stage 1 SOE installation.

(Footnote omitted.)

As to the waterline relocation component of Fay’s Differing Site Condition claim, Bucy concluded that, after the SHA denied Fay’s request for a change order by letter dated December 19, 2018, Fay “failed to file any notice of claim or claim . . . for equitable adjustment until over 19 months later” when Fay did so as part of its claim filed on July 28, 2020.

Bucy pointed out that Fay had received a notice of claim on November 15, 2018 from a subcontractor regarding increased costs associated with the installation of electrical conduits. However, Fay did not forward the notice to the SHA’s District 7 staff until December 18, 2018 and then did so by email, “meaning that it was without legal force and effect because neither the solicitation nor the contract authorize the use of electronic means for conducting procurement transactions.”

Bucy further found that the Differing Site Condition aspect of Fay’s claim was not filed until July 28, 2020, when it was included in the claim filed with the Office of Construction.

As to the installation of lighting on I-270, Bucy rejected Fay’s claim for work that “was allegedly impacted by unanticipated rock . . . from the week of February 3, 2019 to the week of May 5, 2019” on the ground that Fay “did not first provide written notice of an alleged differing site condition” claim until it filed its July 28, 2020 claim.

Bucy stated that Fay’s allegations that the subsurface rock conditions that Fay had encountered in each site “differed materially from boring log information contained in the solicitation” to be “without merit” because Fay and other bidders were:

on notice when preparing their bids that (1) virtually none of the borings in the solicitation fell within the limits of the particular work areas that form the basis of the claim, (2) the rock elevations throughout the project were highly irregular, variable, and inconsistent, and (3) they should account for the presence of rock accordingly when preparing their bids because no additional compensation would be allowed for rock excavation.

Bucy also pointed out that SP-202.01.03 of the contract stated:

The Contractor shall note that auger refusal and rock was encountered in the project. The Contractor 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.

In summary, Bucy concluded that:

[Fay’s] claim fails in all respects because Fay did not act as a reasonable, prudent contractor in interpreting the solicitation and did not reasonably rely upon the indications of the subsurface rock conditions as contained in the solicitation. The subsurface rock conditions that Fay and its subcontractors encountered did not differ materially from those indicated in the solicitation and were reasonably foreseeable at the time of bidding. As such, the claim fails to satisfy the required elements of a differing site conditions claim as set forth by the Maryland State Board of Contract Appeals in *Richard F. Kline, Inc.*, MSBCA No. 2092 (2000).^[19]

Because he had denied Fay’s Differing Site Conditions claims, Bucy also denied Fay’s claim for “an 83-calendar day compensable time extension” based on those conditions.²⁰ Bucy concluded:

¹⁹ The issue in *Richard F. Kline, Inc.* was whether the contractor in a road construction project was entitled to additional compensation for its difficulties in drilling through diabase, which is an extremely dense and resilient form of igneous rock. The geological data provided by the SHA to potential contractors did not indicate that diabase rock was present at the construction site. The evidence presented to the Board showed that the diabase rock strata presented exceptional difficulties and significant additional expenses to the contractor. The District Engineer denied Kline’s request for an equitable adjustment to the contract price. The MSBCA ruled that Kline was entitled to additional compensation.

²⁰ Additionally, Bucy decided that the documentary support marshaled by Fay in support of its claim was inadequate. He explained that, as to each of the “alleged differing site condition[,]” Fay had failed:

to include project records or other documents substantiating (1) the calculation of the anticipated rock elevations during bid preparation, (2) the
(continued...)

This decision is the final action of this agency. This decision may be appealed to the Maryland State Board of Contract Appeals . . . within 30 days[.]

The Proceedings Before the Board

Fay timely appealed the procurement officer’s decision to the Board.²¹ In its complaint to the Board, Fay pled counts for equitable adjustment, extension of time, and breach of contract.

In response and relevant to the issues raised in this appeal, the SHA asserted that Fay’s claims were “barred by [Fay’s] failure to provide prompt notice of the alleged differing site conditions” and its failure to “file timely notices of claim and/or timely claims.”

On March 3, 2023, Fay and the SHA submitted a proposed “Joint Schedule in Consolidated Appeals,” setting deadlines for “Proof of Costs Statements as to Rock Claims 1, 2, and 3” before June 16, 2023; for designations of expert witnesses before July 21, 2023; for discovery by December 1, 2023; and for dispositive motions by December 29, 2023, with additional deadlines through February 2024 but with no date for a motions

calculation of anticipated rock excavation, where applicable, (3) the actual rock elevations encountered, and (4) the quantity of actual rock excavation. The same is true with respect to original documents from which the claimed costs are calculated.

²¹ Fay filed three separate appeals, which were docketed by the Board as MSBCA Docket Nos. 3165, 3219, and 3226. Although the Board’s order is not included in the record extract, it appears that, at some point, the Board consolidated the appeals. The proceedings in both the circuit court and this Court encompass all three cases.

or a merits hearings. The chairperson of the Board approved the schedule on March 3, 2023.

On May 17, 2023, that is, more than six months prior to the scheduled date for close of discovery, the SHA filed a “Motion for Summary Decision as to MSBCA 3165 on Timeliness Grounds.” In its motion, the SHA asserted that both Fay’s notice of claim and its subsequent submission of that claim were untimely under COMAR’s thirty-day deadline for filing a notice of claim and its ninety-day deadline for filing claims.²² The SHA contended that Fay’s failures to comply with these deadlines were fatal to its requests for relief from the Board.

Fay did not agree. It asserted that all of the delays associated with its filing a notice of claim and a claim were the result of:

²² See COMAR 21.10.04.02:

A. Unless a lesser period is prescribed by law or by contract, *a contractor shall file a written notice of a 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.*

B. *Contemporaneously with or within 90 days of the filing of a notice of a claim on a construction contract, . . . a contractor shall submit the claim to the appropriate procurement officer.* On conditions the procurement officer considers satisfactory to the unit, the procurement officer may extend the time in which a contractor, after timely submitting a notice of claim, must submit a contract claim under a procurement contract for construction. An example of when a procurement officer may grant an extension includes situations in which the procurement officer finds that a contemporaneous or timely cost quantification following the filing of the notice of claim is impossible or impractical.

(Emphasis added.)

(i) the “SHA’s failure to provide timely feedback and approvals on critical matters [that] impacted Fay’s analysis of costs and schedule impacts attributed to its differing site conditions claim”;

(ii) the SHA’s responsibility for “delay to Fay in preparing its claim by failing to respond to Fay’s submittals”; and

(iii) the SHA’s “repeated assurances that it would review Fay’s claim after Fay explained the reasons [why] it needed additional time.”

In support of these assertions, Fay cites *Engineering Management Services, Inc. v. Maryland State Highway Administration*, 375 Md. 211 (2003), for the following propositions:

The first is that it “is inappropriate [for the Board] to view a statute of limitations which exists as a condition precedent to a claim in a summary judgment context to be a matter of subject matter jurisdiction to which issues of estoppel and waiver may not be considered.” *Id.* at 241 (cleaned up).

The second is that a condition precedent ““can be waived if there is sufficient evidence of inducement, estoppel, fraud or waiver.”” *Id.* at 241 (quoting *Ohio Cas. Ins. Co. v. Hallowell*, 94 Md. App. 444, 459 (1993)).

The third is that “the 90-day limitation on filing the claim . . . ‘can be waived if there is sufficient evidence of inducement, estoppel, fraud or waiver.’” (Quoting *Eng’g Mgmt. Servs.*, 375 Md. at 241.)

The fourth is that:

Because a condition precedent can be met by estoppel, and estoppel is a factual matter which can be determined only upon a full hearing on the merits, it is inappropriate to view a statute of limitations which exists as a

condition precedent to a claim in a summary judgment context to be a matter of subject matter jurisdiction to which issues of estoppel and waiver may not be considered under Maryland administrative law. We conclude, therefore, 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, and not a jurisdictional bar to the pursuit of a contractor’s claim.

Id. (cleaned up).

Based on these propositions, Fay contends:

[The Board] incorrectly held that “COMAR trumps any understanding [Fay] might have had based on the parties’ course of conduct.” The [Board’s] holding cannot be reconciled with *Engineering Management* where the Court . . . held that the COMAR time frames can be waived or subject to estoppel. Moreover, Maryland law is clear that both waiver and estoppel can be effectuated by the conduct of a party. Accordingly, [the Board’s] holding is incorrect, and the ruling in the [Board’s] Order should be reversed.^[23]

Fay also asserted that the Board’s decision in the *A-Del Construction, Inc.*, MSBCA Nos. 3127 and 3128 (filed January 4, 2022) (“*A-Del*”), is distinguishable from the present case because *A-Del* did not concern the timeliness of a notice or a claim and was decided by the Board after a hearing on the merits and not upon a motion for summary decision.²⁴

²³ As we will later explain, the Supreme Court of Maryland has clarified this passage in *Engineering Management Services*.

²⁴ We agree with Fay that *A-Del* is procedurally and factually distinguishable from the case before us. The Board’s decision in *A-Del* is nonetheless significant because the Board expressed concerns about what it termed the SHA’s “internal informal dispute resolution process.” *A-Del*, at 5 n.5. The Board explained:

[The SHA] continues to implement an internal informal dispute resolution process. Although the Board understands that such an internal process may help in resolving issues short of filing a formal claim, there is no current regulation that provides for such a process or that stays the time

(continued...)

In reply, the SHA contended that the Board’s decision should be affirmed because Fay did not file its notice of claim “within 30 days after it knew that SHA’s District 7 Office . . . disputed Fay’s contention that it had encountered differing site conditions[.]”²⁵ The SHA asserted that District 7 Engineer Concannon’s letter dated September 5, 2018, “unequivocally stat[ed] (and repeat[ed])” that it did “not agree that a differing site condition exists.” (Quotation marks omitted.)

Additionally, the SHA contended that the subsequent discussions and the meeting between Fay and the SHA District 7 officials on September 20, 2018, which resulted in Procurement Officer Bucy’s October 23, 2018 letter conveying SHA’s “final decision,” did not extend the filing deadline.²⁶

requirements for filing a notice of claim . . . while this internal process is pursued.

* * *

[We] do believe it is necessary nonetheless to offer this word of caution: *both 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 requirements set forth in COMAR will always take precedence over any conflicting directive issued by an agency.*

Id. (emphasis added).

²⁵ Fay and the SHA disagree as to whether Fay’s notice of claim was timely filed. We need not address the parties’ contentions on this issue because, as we will later explain, the Board concluded for the purposes of its analysis that Fay’s notice of claim was timely filed.

²⁶ The SHA maintained that Fay’s notice of claim covered only the claims it made for work it performed on the two storm drains and Support of Excavation. The SHA asserted
(continued...)

With respect to the timeliness of Fay’s claim submission, the SHA argued that (1) there was no factual dispute over “inducement, waiver, or estoppel” issues because the doctrine of estoppel “does not apply against a State agency performing its duties in its governmental, public or sovereign capacity”; and (2) “Fay would have to identify some representation or other action by SHA upon which Fay relied to its detriment[,]” but “Fay makes no allegation, much less offers admissible evidence, that SHA took some action that misled Fay into not filing the claim in a timely fashion.” According to the SHA, the contention that it “caused delay to Fay in preparing its claim by failing to respond to Fay’s submittals” does not fit the elements of estoppel and was otherwise “refuted by the record” because the “exchange[s] between Fay and SHA District 7 relating to delays encountered during Stage 1 of the project . . . did not involve the SHA Office of Construction and . . . did nothing to prevent Fay from submitting the claim based solely on its own contemporaneous analysis of the rock delay.”

Additionally, the SHA pointed out that “Fay’s characterization of SHA District 7’s conduct” was not based “on affidavits or other record evidence,” nor on a proffer of “facts admissible in evidence[,]” but instead, were “‘mere allegations’ taken from [Fay’s] Complaint” in one of its three cases, MSBCA 3165, regarding the storm drain and Support of Excavation claims. Nor did Fay raise a factual dispute about whether the

that Fay did not file a separate notice about the three claims for other site work performed by subcontractors until it filed its claim in July 2020. However, this was not an issue that drew the attention of the parties or the Board at the Board’s hearing and was not addressed in the Board’s opinion.

ninety-day claim filing period was extended or waived through its course of dealing with the SHA officials because Fay missed deadline extensions that Fay itself set, in April and October 2019, then waited “another nine months” to file its claim in July 2020.

Finally, the SHA addressed the Partnering Charter that had been signed by employees of Fay and the SHA District 7. The SHA asserted that:

Fay’s failure to file a timely notice of claim is not excused by any alleged effort on its part to comply with the terms of the Partnering Charter. *The Partnership Charter was an informal, aspirational document created by the parties that did not and could not impact the obligations of the parties under the contract, including Fay’s obligations pertaining to claim submissions.* Furthermore, the excerpt from the Partnership Charter included in its Opposition has nothing to do with “avoiding costly claims and disputes.” It consists of a list of recommended steps to be taken on the project upon discovery of a potential differing site condition, not how to proceed with a claim relating thereto.

(Cleaned up; emphasis added.)

The Board’s Hearing

At the Board’s hearing on July 26, 2023, the Board Members focused on how the SHA’s policy and practice of informal dispute resolution affected the thirty-day and ninety-day filing deadlines for contractors. Specifically, Board Members expressed concerns that the SHA’s communications to contractors could confuse them about whether and when to file notices of claim and claims. When counsel for the SHA argued that “acknowledgement e-mails and letters” from the procurement officer and other SHA officials “do not amount to grants of extensions or any sort of assurances that they need not worry about a deadline for filing a claim[,]” Board Members cited the potential

“lulling” effect of the SHA’s acknowledging and accepting Fay’s filings with no mention of deadlines:

[Board Member Cho]: Can I ask you a question? Why does SHA send out those acknowledgement letters? What is the point?

[Counsel for the SHA]: I guess simply to acknowledge that . . . whatever they sent was not lost in . . . the MDOT e-mail system or otherwise lost. It’s just to say that we received . . . it. . . .

[Board Member Cho]: Is it a letter that gets generated in response to every letter that’s received?

[Counsel for the SHA]: I don’t know about every letter, but I believe that it appears that at least in recent years Office of Construction has had a . . . policy for sending out very peremptory type of acknowledgement, correspondence that says, okay, we’ve received what you got.

[Board Member Cho]: Okay.

* * *

[Counsel for the SHA]: So that [first acknowledgement] was May of 2019. . . . The next time Fay sends a letter is August 21, and on August 22, SHA sends an acknowledgment letter. This [letter] comes from Stephen Bucy, who is the procurement officer

[In the August 22nd letter], *Mr. Bucy specifically reminds Fay of its obligation to file a claim within 90 days. There’s no hint that in that letter . . . that SHA is inclined to grant an extension then or at any other time.* Again, it says, reinforces [that Fay had] to file a claim within 90 days.

So even if the 90 days had started running . . . in August 2019, there would still be no filing of a claim for nearly a year.

[Board Chair]: *But isn’t it a little disingenuous for Bucy to be writing a letter . . . reminding [Fay of its obligation to file a claim within ninety days] when the position of SHA is that the claim deadline had passed back . . . [on] February 19th of that year?*^[27] I mean, isn’t that when the claim would have

²⁷ We do not agree with the Board Chair’s characterization of Bucy’s response as “disingenuous.” Certainly, as the procurement officer for the SHA, Bucy had the authority to waive the ninety-day deadline for filing a claim. *See* COMAR 21.10.04.02B (continued...)

been due? . . . So here we are six months later, and Stephen Bucy is saying you got to make sure you file your claim within the right . . .

And then the same thing with the October 23rd letter from Mr. Concannon[.]^[28]

* * *

It's a little disingenuous. You know where I'm going, because we have this issue with SHA all the time. We've addressed it in many of our opinions. It continues to happen. That's their internal policy. We don't get to say anything about that except what we can say here. It's just bad messaging.

* * *

[T]his keeps happening, . . . and we can't change COMAR, we can't change the statute. But the SHA can hopefully hear what we have to say. I mean, we've said it. We're going to keep saying it. Maybe they listen, maybe they don't. But why can't the procurement officer . . . just be straightforward and up front about it, and say we've received your notice of claim. Based on COMAR 21.10 whatever it is, you have 90 days. That deadline is X and such. Let the – *why not let the contractor know what the deadline for filing their claim is?*

* * *

[W]e have no mechanism for expressing to [the SHA] except through [counsel] the bad messaging that they're sending when they do what they're doing here. And all I'm saying is, let's just be transparent about this instead of playing the gotcha game at the end of the day after they've been purportedly lulled into thinking they've still got time.

* * *

[A]t this point in time, most contractors haven't engaged counsel. And by the time they get this letter, and they realize – they're relying on this letter

(“On conditions the procurement officer considers satisfactory to the unit, the procurement officer may extend the time in which a contractor, after timely submitting a notice of claim, must submit a contract claim under a procurement contract for construction.”).

That Bucy eventually decided not to waive the ninety-day filing deadline does not change the fact that he had the authority to do so.

²⁸ John M. Concannon was the SHA's District 7 Engineer.

rightly or wrongly, it still . . . sends the message that they have time to file their notice of claim.

* * *

[W]hat you can do is go back to your client and say . . . this is what the Board thinks, and you might want to think about how this is impacting contractors and the [S]tate of . . . Maryland moving forward trying to get contractors to come in and bid on contracts.

(Emphasis added.)

When counsel for the SHA pointed out that “the message has been received . . . after the *A-Del* opinion in the footnote[,]”²⁹ the Board again questioned why, if the SHA’s position was that the ninety-day deadline had already passed in February 2019, the procurement officer wrote, on August 22, 2019, that Fay had to file its claim within ninety days:

[Board Member Cho]: On the Chairman’s point though, . . . I do agree with . . . what she said, but I also want to say that I do recognize that it’s kind of a tricky situation for the . . . State in the sense that you don’t want to necessarily put yourself in a position of sort of being an advocate for the contractor or giving some sort of legal advice that induces some additional reliance, right? I . . . get all of that, but if we’re going back to the point about *the letter by the procurement officer on [August 22, 2019], that was maybe six months past the actual due deadline, and here he is saying we acknowledge that we got your letter, and I’m going to remind you that you have an obligation to file your claim within 90 days. I mean, the 90 days had already passed.*

So why are you writing this letter that kind of confuses the record, right, for yourself, and then, and then potentially induce reliance on this date as the 90-day time clock is ticking from this point forward? It’s the writing of this . . . letter that I have more of an issue with than the previous letter saying, okay, we acknowledge receipt of your letter. Because that really confuses

²⁹ As the Board later explained in its decision, this is a reference to *A-Del Construction, Inc.*, MSBCA 3127 & 3128 n.5 (2022).

the – I mean, I think that goes to the heart of all these disputes that have to do with when was it due, when was the claim due, when was the notice of claim due, right? So stop writing these letters. . . .

[Counsel for the SHA]: I understand.

[Board Chair]: Well, I mean, and *that goes to the lulling that I was referring to. It lulls the contractor into believing they’ve still got time to file their notice, time to file their claim.* Just be up front and honest with them about it. Or just don’t put that in there.

(Emphasis added.)

Later in the hearing, the Board Chair again pointed to the SHA’s October 2019 correspondence as problematically “lulling” Fay into believing it had additional time to file its claim:

[Board Chair]: So you’ve got two letters, both of which suggest to the contractor that there’s still time to do what they need to do to be in compliance with COMAR. And whether we’re talking about the notice or whether we’re talking about the claim, *that language that’s included in each of those letters is bad messaging*, and doesn’t necessarily even need to be in there.

And so what [Board Member Cho] is saying is why do you put that in there at all if it’s just an acknowledgement of receipt? Just acknowledge receipt, and let it go at that.

* * *

I mean, we did this in *A-Del*. We had very similar issues in *A-Del*. It’s just this internal dispute resolution process that SHA goes through. And believe me, everybody encourages settlement. We want settlement. But it also creates a problem because . . . in the background COMAR’s clock is going tick, tick, tick, tick, tick, and you guys can work on settling all you want to, and we certainly encourage that.

But at the same time, there’s got to be some sort of reminder, and it’s not . . . the State’s obligation . . . to remind them what the law is. But to go beyond that, and affirmatively represent in at least two instances here that they still have time under the law to do what they are trying to do is just . . . *I think disingenuous is putting it softly.*

(Emphasis added.)³⁰

When counsel for Fay addressed the Board, he immediately proffered that “if Mr. Bucy and Mr. McNelis from Fay were here or were being deposed, I *think* what they would both say under oath is that Fay followed the COMAR process, and SHA extended the time for the 90 days.” (Emphasis added.) Pointing to the “thousands of pages in these claims” and the SHA’s “27 exhibits and a chart with 30 something data points to prove that there’s no dispute[,]” Fay argued “there are enough issues here relative to intent, and motive, and knowledge among all the parties, SHA, Fay, the subcontractor that . . . gets well beyond in a motion for summary disposition.”

Fay also argued that the ninety-day deadline for filing its claim was extended “multiple times.” Although “there’s no letter in the file that says we are hereby extending[,]” when “you read the e-mails, they’re absolutely extending. It’s oral extension. And there’s no requirement for a written extension. . . . [T]his explains the two-year delay as well.” Fay’s counsel asserted that:

I think it’s expressed. I think if you were deposing Stephen Bucy, he’d say he extended it. . . .

[T]his explains the whole issue with the time. . . . So on August 21, 2019, Mr. McNelis, Fay’s president [sic], follows-up with Victor [Grafton]. You can tell from below that on, on November [sic] 19th at 4:20 p.m., Mr. Grafton from SHA and Mr. McNelis had had a phone call. *So right there is a factual issue as to what was said in the phone call.* And Mr. McNelis, two days later, summarizes, Victor, attached is the status update on the DSC submittal. We have recently completed stage one, maintenance of traffic of the project. During this stage four separate . . . time and costs impacts

³⁰ The Board Chair also pointed out that the Board’s decision in *A-Del* was filed on January 4, 2022, which was several years after the operative facts in this case occurred.

occurred; one of which was the rock DSC [T]he [SHA] [D]istrict directed Fay to submit a retrospective TIA schedule of time apportioned between each of the contributing delays. . . . There's only a dispute here in this case on one of four issues that were going on. But SHA directed Fay to do a time assessment [that] combined all the issues. That's why it took so long. Because SHA was telling Fay I don't want to see you just break out the delay for the differing site conditions claim. There are massive utility delays, and utility disruption and relocation issues that are involved with these other three delays.

What the [SHA] was telling Fay is you got to . . . put all your delays into one time impact analysis, and that's why it took so long. Because Fay is going back and forth with the [SHA], and also with its schedule consultants, to try and apportion the impacts from multiple causes.

So . . . , I *would assume* Mr. Bucy, if he was testifying, would say, well, yeah, that's why we . . . told them to keep coming back.

(Emphasis added.)

When Board Members asked for evidence supporting Fay's contention that the procurement officer had extended the claim-filing deadline, Fay's counsel acknowledged there was nothing written, but proffered that, consistent with the course of dealing in the written communications, and in oral communications that were still subject to discovery, the procurement officer would testify if deposed that he extended the ninety-day claim deadline:

[Board Member Cho]: Can you point to something that says that Mr. Bucy or Mr. Grafton acting as the procurement officer at that time granted an extension on . . . [filing] Fay's claim?

[Counsel for Fay]: Well, *I don't think that's necessary at this stage.*

[Board Member Cho]: I think it is. . . . [I]s there something from the procurement officer back to Fay saying we grant you an extension on the filing of your [claim?]

[Counsel for Fay]: . . . *I have not seen anything in writing that says an extension. I have also not seen anything in writing that says an extension was denied.* . . . But if you look at the pattern of practice and the back and forth, you can see that somehow some way – and this gets to the discussion of these letter writings that the course of conduct between the parties was clearly supporting the fact that an extension was granted. Why in the world . . . would SHA issue a procurement officer’s final decision on a claim that it believed it hadn’t given a 90 days extension to? There would be no reason for that.

(Emphasis added.)

In closing, Fay argued that “the entire course of conduct going all . . . the way back to January [20]18 through July of 2020” constituted “ample evidence . . . that the State operated in a manner to waive” any untimeliness defense. Rather than invoking the ninety-day deadline before August 2019, Fay asserted that the procurement officer started the clock from that date. In October 2019, the SHA continued its pattern and practice of acknowledging and accepting Fay’s status updates, explaining the difficulties that Fay was having in quantifying and documenting costs attributable to each different DSC, before ultimately accepting the claim for substantive analysis in July 2020.

To fill in the blanks between the written communications, counsel for Fay asserted that:

it would be helpful to get some discovery . . . because I think what you would hear in terms of what the knowledge and intent of the SHA folks actually was in connection with this two-year period . . . would align more with what Fay is saying from a procedural standpoint.

Although Fay’s counsel proffered that the SHA would “disagree . . . that Fay is entitled to money for this[,] . . . I don’t think they would disagree with the procedure . . . we’re talking about here.”

In rebuttal, counsel for the SHA expressed his concerns about the Board “tak[ing] that bait as it were[,]” because “[t]here have been no affidavits” or “anything other than what we have put in the record,” even though “there has been extensive . . . written discovery . . . where hundreds of thousands of documents have changed hands, including e-mails and . . . other written discovery.” Counsel asserted that “[i]t would be inappropriate . . . for the Board to consider conjecture as to what a . . . witness might say” because “it’s incumbent on the non-moving party to provide *evidence* of disputes of fact.” (Emphasis added.)

The Board’s Decision

The Board unanimously granted the SHA’s motion for a summary decision. The Board concluded Fay’s “July 28, 2020 Claim was filed far outside [of] the 90-day mandatory period required by [State Fin. & Proc.] § 15-219(b) and COMAR 21.10.04.02B, and, therefore, was not timely.” In reaching this conclusion, the Board explained that it:

is well-aware of the confusion created by [the SHA’s] continued practice of requiring contractors to engage in an internal informal dispute resolution process prior to filing any notices of claims with the [procurement officer]. 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 [that Fay] 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.” *Brawner Builders, Inc. [v. State Highway Administration]*, 476 Md. [15,] 32 [(2021)]. In this case, [Fay] has not presented any evidence that [the SHA] 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 [the SHA] expected [Fay] to follow the claims process, as indicated in its letters to [Fay] outlining the steps and timeline for doing so.*

[Fay] also argues that its Claim was timely filed because [the SHA] had granted extensions of time to do so. [Fay], 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).^[31] When pressed at oral argument, [Fay]’s counsel indicated that he had relied on his own conversations with [Fay]’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 [Fay], and accepting [Fay]’s assertion that its November 19, 2018 Notice [of Claim] was timely filed, *the Board nevertheless finds that the July 28, 2020 Claim was filed far*

³¹ See COMAR 21.10.04.02B, which states in pertinent part:

Contemporaneously with or within 90 days of the filing of a notice of a claim on a construction contract, . . . but no later than the date that final payment is made, a contractor shall submit the claim to the appropriate procurement officer. *On conditions the procurement officer considers satisfactory to the unit, the procurement officer may extend the time in which a contractor, after timely submitting a notice of claim, must submit a contract claim under a procurement contract for construction.*

(Emphasis added.)

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.^[32]

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

(Emphasis added.)

Because any waiver of sovereign immunity is “in derogation of common law,” the Board emphasized that a notice of claim and the claim itself “must be written, clear and explicit.” The Board concluded that “the only evidence in the record” indicates that the SHA “expected [Fay] to follow the claims process, as indicated in its letters to [Fay] outlining the steps and timeline for doing so.”

The Judicial Review Proceeding

Fay timely filed a petition for judicial review. After a hearing, the circuit court concluded that:

there is a genuine dispute as to whether SHA waived or is estopped from asserting the 90-day filing limitation and that the facts are susceptible to differing inferences. On summary disposition those inferences must be drawn in Fay’s favor. Therefore, summary disposition was inappropriate. The court will remand the matter for further proceedings in light of this Opinion.

The SHA noted this timely appeal.

The Parties’ Appellate Contentions

In its brief, the SHA asserts that:

³² Elsewhere in its decision, the Board stated that it accepted Fay’s “assertion that its November 19, 2018 Notice [of Claim] was timely filed[.]”

[T]he Board was correct to grant the Administration’s motion for summary decision because the undisputed facts demonstrate that Fay did not file a timely claim as required by Maryland procurement law, and without dispute, the Administration did not extend or waive the claim deadline. Rather, as the Board explained, the only evidence in the record points to the opposite conclusion—that the [SHA] expected Fay to follow the claims process, as indicated in its letters to Fay outlining the steps and timeline for doing so.

(Cleaned up.)

The SHA acknowledges that Fay argues that the agency “extended or waived the 90-day condition precedent for filing a claim ‘through repeated assurances’ that the procurement officer would review the claim after Fay submitted it.” The SHA does not agree; it asserts that this contention “overlooks the requirements that COMAR 21.10.04.02B sets forth to extend the 90-day condition precedent.”^[33] The SHA also points out that our Supreme Court has stated that “waivers of sovereign immunity, which

³³ COMAR 21.10.04.02 states in pertinent part (emphasis added):

B. Contemporaneously with or within 90 days of the filing of a notice of a claim on a construction contract, . . . but no later than the date that final payment is made, a contractor shall submit the claim to the appropriate procurement officer. *On conditions the procurement officer considers satisfactory to the unit, the procurement officer may extend the time in which a contractor, after timely submitting a notice of claim, must submit a contract claim* under a procurement contract for construction. An example of when a procurement officer may grant an extension includes situations in which the procurement officer finds that a contemporaneous or timely cost quantification following the filing of the notice of claim is impossible or impractical.

* * *

C. A notice of claim or *a claim that is not filed within the time prescribed in Regulation .02 of this chapter shall be dismissed.*

are in derogation of common law, are strictly construed in favor of the State.” *Brawner Builders, Inc. v. State Highway Admin.*, 476 Md. 15, 32 (2021); *see also Proctor v. Washington Metro. Area Transit Auth.*, 412 Md. 691, 709 (2010) (“If the State chooses, by legislative action, to waive its sovereign immunity, this Court strictly construes the waiver in favor of the State.”). Sovereign immunity “is not waived if executive branch officials simply give their consent to a particular suit[.]” *Dep’t of Pub. Safety & Corr. Servs. v. ARA Health Servs., Inc.*, 107 Md. App. 445, 460–61 (1995), *aff’d*, 344 Md. 85 (1996)).

The SHA contends that:

In the specific context of construction-related contract claims, a procurement officer has the authority to extend the claim deadline, i.e., to waive the strict 90-day condition precedent to bringing a claim against the State. COMAR 21.10.04.02B. *The procurement officer is the only State official whom the regulation permits to extend or waive the 90-day condition precedent. Id.*

An extension of the 90-day condition precedent must be affirmative and must include satisfactory conditions: “*On conditions the procurement officer considers satisfactory to the unit*, the procurement officer may extend the time in which a contractor, after timely submitting a notice of claim, must submit a contract claim under a procurement contract for construction.” COMAR 21.10.04.02B.

(Emphasis added.)

The SHA raises two additional matters. The first is that procurement officers do not have the authority to “preemptively deny” a claim. Instead, says the SHA, a procurement officer is required to “‘review the substance’ of the ‘contract claim’ after ‘receipt’ of the claim from a contractor.” (Quoting State Fin. & Proc. § 15-218(b)(1)(i).) We do not read

Fay’s brief as asserting otherwise and, in any event, it is clear that the procurement officer thoroughly assessed the merits of Fay’s claim in his decision.

Second, the SHA argues that its “communications with Fay did not extend or waive the 90-day condition precedent to filing a contract claim against the State.” This contention is based on the following interactions between Fay and the SHA regarding the claim deadline:

The first communication was a letter from James McNelis, Fay’s Senior Vice President, to Victor Grafton, who was the Acting Procurement Officer for the SHA in the absence of Stephen Bucy, dated February 14, 2019, which stated:

Please accept this letter as Fay’s request to extend the time for formal submission of the claim referenced in our letter dated November 19, 2018, Notice of Claim – Differing Site Conditions, Rock Impacts (Letter No: 1002-70).

Although we have been diligently compiling the required information to support the claim, *we are not ready to make final submittal of all of the required documents*. The following are the major reasons supporting our request:

- the amount of data required to support the differing site condition is significant,
- the area of the project effected by the differing site condition has increased, and
- it was not until January 17, 2019, before the District approved Fay’s requested logic revisions for incorporation into the schedule of record. (The schedule of record is critical in determining the time impact.)

Fay hereby requests that the 90 day time frame for submission of the claim be adjusted to start as of January 17, 2019. *Fay will have all documents related to the cost and schedule impacts submitted to your office no later than April 17, 2019.*

Thank you for your attention to this matter. If you have any questions[,]
please do not hesitate to call.

(Emphasis added.)

The SHA did not immediately reply to the letter. Fay did not provide the documents in question by April 17, 2019.

The second communication was Robin Linton’s email to McNelis dated May 6, 2019, which stated:

Hi Jim,

This email is to acknowledge the time extension request as per our telephone conversation pertaining to the Differing Site Conditions (Rock) Notice of Claim *Once you have submitted the Claim package, SHA will acknowledge and begin the analysis.*

If you have any questions or concerns, please feel free to call me or Natacha Valentin.

Thanks,

Robin

(Emphasis added.)

The third was Adetutu Onamade’s email dated October 18, 2019 to Bellal Shaaban, a project manager for Fay, stating;

I acknowledge receipt of the status update on the DSC claim submittal for contract FR3885171. *I will have it on file while we await the claim submission.*

Thank you

(Emphasis added.)

The SHA asserts that these communications do not support an inference that it extended or waived the ninety-day condition precedent to its waiver of sovereign immunity.

Fay disagrees for several reasons.

First, Fay contends that “[w]ell-settled Maryland law holds that the 90-day-limitation on filing a claim ‘can be waived if there is sufficient evidence of inducement, estoppel, fraud or waiver.’” (Quoting *Eng’g Mgmt. Servs.*, 375 Md. at 241.) Fay argues that the facts of this case present issues of both estoppel and waiver.

Second, Fay argues that the Board erred in granting the SHA’s motion for a summary decision because, by its “actions and inactions,” the SHA “waived, or is estopped from enforcing, the 90-day time limitation on filing a claim[.]”

Third, Fay contends that the SHA “cannot assert sovereign immunity” as a defense to Fay’s claim because:

The sovereign immunity defense is not applicable to Fay’s rock claim. To determine whether the doctrine of sovereign immunity is applicable to an action against a state entity, Maryland courts ask two questions: “(1) whether the entity asserting immunity qualifies for the protection; and, if so, (2) whether the legislature has waived immunity either directly or by necessary implication, in a manner that would render the defense of immunity unavailable.”^[34]

³⁴ We can dispose of this contention quickly. In its reply brief, the SHA states:

The State has waived sovereign immunity as to procurement contract claims by authorizing the claim process described in State Finance & Procurement § 15-219(a)-(b) and COMAR 21.10.04.02. *Browner*, 476 Md. at 32-35. To take advantage of the limited waiver, the contractor must meet the 90-day deadline for filing a claim with the procurement officer; it also permits the procurement officer to extend that deadline. COMAR 21.10.04.02B. *In arguing that the Administration has “waived” the deadline by some means other than granting an extension in the manner prescribed by law — e.g., by a non-procurement officer’s email stating the claim would be reviewed when received — Fay is proposing that the*

(continued...)

Fourth, Fay argues that “the Board err[ed] in granting a summary decision that creates poor public policy for Maryland public agencies and the contractors who work for those agencies[.]”

Elaborating on these contentions, Fay asserts that the Board’s decision was “based on an incorrect understanding of Maryland law” because the Board concluded that “COMAR trumps any understanding Fay might have had based on the parties’ course of conduct.” According to Fay:

the Board misstated the law, and its holding is incorrect. Well-settled Maryland law holds that the 90-day limitation on filing a claim “can be waived if there is sufficient evidence of inducement, estoppel, fraud or waiver.” *Eng’g Mgmt. Services, Inc. v. Maryland State Highway Admin.*, 375 Md. 211, 241 (2003). Put simply, to the extent that the government’s conduct amounts to inducement, estoppel, fraud, or waiver, the COMAR time requirements can be “trumped” by the parties’ conduct.

Fay cites *Engineering Management Services* for the proposition that estoppel “is a factual matter which can be determined only upon a full hearing on the merits[.]”³⁵

Administration can expand the State’s sovereign-immunity waiver beyond the limitations in [State Fin. & Proc.] § 15-219 and COMAR 21.10.04.02B.

(Emphasis added.) In other words, the procurement officer is the only official within the SHA who has the authority extend the deadline for filing a claim. Subordinate SHA employees have no such authority. *See State v. Sharafeldin*, 382 Md. 129, 140 (2004) (“State agencies may not, on their own, waive sovereign immunity[.]”).

We agree with the SHA’s interpretation of the statute and the regulation as well as its reading of *Sharafeldin*.

³⁵ As we will explain, we do not fully agree with Fay’s reading of *Engineering Management Services*. Our Supreme Court has clarified this particular aspect of the law in *Brawner Builders*, 476 Md. at 43.

(Cleaned up.) Therefore, reasons Fay, the Board erred in granting the SHA’s motion for summary decision.

Additionally, Fay contends that the Board erred in granting the SHA’s motion for summary disposition “because the record contains evidence that SHA waived, or is estopped from enforcing,” the ninety-day claim filing period. Fay states:

The record contains evidence that SHA waived, or is estopped from enforcing, the 90-day claim filing deadline because of the reasonable and foreseeable reliance drawn from SHA’s responses (and lack of responses) to Fay’s numerous requests for extensions to file its claim and updates regarding the status of the claim submission. At a minimum, there were genuine issues of material fact as to whether SHA’s actions and inactions resulted in a waiver or estoppel, and Fay is entitled to take discovery on these issues. However, the Board improperly foreclosed such discovery with its premature summary decision.

In support of its waiver contention, Fay points to the following “actions and inactions” by SHA personnel:

(1) Fay’s first contention pertains to James McNelis’s February 14, 2019 letter to Victor Grafton, who was the Acting Procurement Officer for the SHA in the absence of Stephen Bucy. McNelis requested an extension of the time for formal submission of Fay’s Differing Site Conditions claim to January 17, 2019 and stated that “Fay will have all documents related to the cost and schedule impacts submitted to your office no later than April 17, 2019.”

The documents were not submitted to the SHA by April 17, 2019, and there was no response to this letter until May 6, 2019, when Robin Linton of the SHA emailed McNelis and stated:

This email is to acknowledge the time extension request as per our telephone conversation pertaining to the Differing Site Conditions (Rock) Notice of Claim *Once you have submitted the Claim Package, SHA will acknowledge and begin the analysis.*

If you have any questions or concerns, please feel free to call me or Natacha Valentin.

(Emphasis added.)

(2) The second letter cited by Fay is a letter dated August 22, 2019 from Bucy, the SHA's Procurement Officer, to McNelis which stated in pertinent part:

This correspondence is to acknowledge receipt of Joseph B. Fay Company['s] . . . letter for intent to file a claim on the above referenced project, dated August 21, 2019. As Maryland State Highway Administration, Office of Construction understands, the claim is a request for extension of time and equitable cost 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 a 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. Attached for Fay['s] convenience is a copy of the structure outline for this claim submittal. Please contact Ms. Adetutu Onamade, Engineering Support Section, Office of Construction, if there are any questions. Ms. Onamade can be reached at

(Emphasis added.)

(3) The third communication cited by Fay is an email dated October 18, 2019 from Adetutu Onamade of the SHA to Bellal Shaaban of Fay, which stated:

I acknowledge receipt of the status update on the DSC claim submittal
I will have it on file while we await the claim submission.

(Emphasis added.)

Fay asserts that, “when all inferences are resolved in favor of Fay,” these communications “created genuine issues of material fact as to whether SHA waived its right to enforce [the] 90-day timeframe for filing the claim.” Fay poses a rhetorical question:

[W]hy would SHA consistently reaffirm its intent to review Fay’s claim “once received,” provide Fay with the format for submitting [a] claim, and provide Fay with the data necessary to prepare the claim, when it actually intended to refuse to consider the claim on the basis of timeliness?

Fay suggests that “[t]here are only a few explanations.” The first, according to Fay, is that the SHA implicitly waived the deadline. Fay asserts:

SHA waived the deadline by voluntarily agreeing to provide an extension of time. SHA did not say “we reject Fay’s request for an extension” or that “Fay’s claim submission was late.” The second explanation was that SHA was attempting to lull, induce, or trick Fay to believe [that] SHA was waiving or extending the deadline in which case SHA should be equitably estopped from enforcing the deadlines.

Alternatively, Fay asserts that the email exchanges “create[d] a genuine issue of material fact as to whether Fay relied on SHA’s communications agreeing to review Fay’s rock claim when it was submitted.”

Next, Fay contends that the Board’s decision “creates damaging public policy” for the SHA and contractors for five reasons:

(1) The Board’s decision “perpetrates confusion created by” the SHA’s “continued practice of requiring contractors to engage in an internal informal dispute resolution process prior to filing any notices of claims with the [procurement officer].” (Quotation marks omitted.) Fay points out that “there is no regulation that authorizes such a process.” Fay characterizes the SHA’s responses to queries

from Fay as “(at best) ambiguous . . . and (at worst) intentionally deceptive responses from those employees representing the State”;

(2) The decision of the Board in the present case “runs contrary to the goals of the Partnering Charter³⁶ and the Maryland Code”;

(3) The Board’s decision “puts Contractors in the untenable position of certifying incomplete claims”;

(4) The Board’s decision “runs afoul of Maryland’s policy of disputes being resolved on the merits”; and

(5) The Board’s decision “incorrectly presumes that a delay in submitting a claim is harmful to the State in all circumstances and creates policy based upon that incorrect presumption.”

³⁶ Several weeks after the contract between Fay and the SHA was finalized, employees of Fay and the SHA’s District 7 office signed a document titled “Building Partnerships,” which the parties refer to as the “Partnering Charter.”

In the Partnering Charter, the signatories committed to have “open, honest, clearly defined communications that generate[] trust and respect” between them. The Partnering Charter called for “Problem Solving Discussions” to address, among many other topics, “Differing Site Conditions” by:

- i. Collect[ing] all info concerning the condition (documentation, photos, etc.)[;]
- ii. Collectively determin[ing] a way to solve [the] issue considering both schedule and budget[;]
- iii. Mak[ing] sure that all parties that need to provide input are involved in the decision[;]
- iv. Tak[ing] steps to facilitate a resolution as quickly as possible[; and]
- v. [Obtain[ing] i]nput from Contractor as to what resources are available towards a solution[.]

We recognize that the SHA’s use of Partnering Charters was a matter of controversy at the Board’s hearing. However, there is nothing in the Partnering Charter that purports to modify any provision of Fay’s contract, the relevant COMAR regulations, or the State Finance and Procurement Article.

Finally, Fay contends that the SHA was under an implied contractual obligation “to timely respond to submittals that were necessary for the preparation of Fay’s claim” and that the SHA failed to do so. Fay points to the delay between its August 9, 2018 request that the SHA consider Fay’s proposed “Time Impact Request Analysis 2R1” and “Differing Site Conditions,” and the SHA’s eventual approval of the revisions on January 17, 2019. The principle of law at issue is the “prevention doctrine.” *See Patriot Constr., LLC v. VK Elec. Servs., LLC*, 257 Md. App. 245, 264 (2023). We will explain why the prevention doctrine does not apply to this case later in this opinion.

Although it frames its appellate contentions differently, the SHA disputes each of the arguments presented by Fay.

For the reasons that follow, we will affirm the Board’s decision.

THE STANDARD OF REVIEW

In *Brawner Builders*, the Supreme Court of Maryland set out the standard of review in cases like the one before us:

[T]he agency decision subject to appellate review is an MSBCA order granting summary disposition in SHA’s favor. It is well-settled that the propriety of granting a motion for summary disposition is a legal question which we review *de novo*. Consequently, we must step into the shoes of the MSBCA and determine whether summary disposition was proper under COMAR 21.10.05.06. The legal standard for granting summary disposition is the same as that for granting summary judgment under Maryland Rule 2-501(a). That is, summary disposition is appropriate if “there is no genuine issue of material fact, and [the moving] party is entitled to prevail as a matter of law.” COMAR 21.10.05.06D(2)(a), (b).^[37]

³⁷ COMAR 21.10.05.06D(b)(2) states in pertinent part:

(continued...)

Even where there are alleged factual disputes, if the factual disputes are irrelevant, they will not prevent the entry of summary judgment. Moreover, once a movant has met its burden of demonstrating sufficient grounds for summary judgment, the party opposing summary judgment must do more than show simply that there is some metaphysical doubt as to the material facts. To defeat a properly supported motion for summary judgment, therefore, the non-moving party must produce admissible evidence demonstrating a dispute.

476 Md. at 30–31 (cleaned up).

Relevant to one of the arguments raised by Fay in the present case, the Court also explained:

Our decision in *Engineering Management Services*^[38] simply restates the general rule that it is often inappropriate to grant summary disposition where there are factual issues related to knowledge, motive, or intent because such issues may require greater than usual factual development. *But this general rule is not absolute*, as we have oft observed summary judgment may be appropriate notwithstanding the presence of factual issues concerning knowledge, motive, or intent *so long as there are no genuine issues of material fact*, and the facts are not susceptible to inferences supporting the position of the party opposing summary judgment.

D. Motion for Summary Decision.

* * *

(2) The Appeals Board may grant a motion for summary decision if the Appeals Board finds that:

- (a) After 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.

³⁸ See *Eng'g Mgmt. Servs.*, 375 Md. at 230 (“[S]ummary judgment generally is inappropriate when matters—such as knowledge, intent or motive—that ordinarily are reserved for resolution by the fact-finder are essential elements of the plaintiff’s case or defense.” (cleaned up)).

Id. at 42–43 (cleaned up; emphasis added).³⁹

Additionally, this Court has “recognize[d] that the MSBCA’s decision is *prima facie* correct and presumed valid, so we review it in the light most favorable to the MSBCA. However, we may only affirm the MSBCA’s decision on the basis of the grounds on which it decided the case.” *In the Matter of Maryland Bio Energy LLC*, 263 Md. App. 215, 234 (cleaned up), *cert. denied*, 489 Md. 287 (2024).

Finally, we note that “[w]aivers of immunity, which are in derogation of common law, are strictly construed in favor of the State.” *Brawner Builders*, 248 Md. App. at 658–59.

³⁹ In its brief, Fay characterizes *Engineering Management Services* as “the seminal Maryland procurement case dealing with the COMAR time frames for filing a notice of claim and claim.” Fay asserts that *Engineering Management Services* stands for the proposition:

Because a condition precedent can be met by estoppel, and estoppel is a factual matter which can be determined *only upon a full hearing on the merits*, it is inappropriate to view a statute of limitations which exists as a condition precedent to a claim in a summary context to be a matter of subject matter jurisdiction to which issues of estoppel and waiver may not be considered under Maryland administrative law. We conclude, therefore, 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[.]

375 Md. at 241 (emphasis added by Fay).

Fay, however, does not acknowledge that our Supreme Court revisited this issue in *Brawner Builders*. *Brawner Builders*, not *Engineering Management Services*, guides our analysis.

ANALYSIS

In its decision, the Board accepted for purposes of analysis that Fay’s November 19, 2018 *notice of claim* was timely filed. Therefore, the dispositive issue in this case is whether the Board was correct when it concluded that Fay’s *claim* was not timely filed. Because our answer to this question is “yes,” and for the reasons that follow, we will affirm the Board’s decision.

1. Waiver and Estoppel

As we have related, the Board granted the SHA’s motion for summary disposition as to all of Fay’s claims “because the undisputed facts demonstrate that [Fay] did not file a timely claim as required by Maryland procurement law.”

In its brief, Fay asserts that the Board erred as a matter of law when it concluded that COMAR 21.10.04.02.B⁴⁰ “trumps any understanding Fay might have had based on the parties’ course of conduct.” (Cleaned up.) Fay states:

⁴⁰ COMAR 21.10.04.02 states in pertinent part (emphasis added):

B. Contemporaneously with or within 90 days of the filing of a notice of a claim on a construction contract, . . . a contractor shall submit the claim to the appropriate procurement officer. *On conditions the procurement officer considers satisfactory to the unit, the procurement officer may extend the time in which a contractor, after timely submitting a notice of claim, must submit a contract claim under a procurement contract for construction.* An example of when a procurement officer may grant an extension includes situations in which the procurement officer finds that a contemporaneous or timely cost quantification following the filing of the notice of claim is impossible or impractical. The claim shall be in writing and shall contain: (1) An explanation of the claim, including reference to all contract provisions upon which it is based;

(continued...)

Well-settled Maryland law holds that the 90-day limitation on filing a claim “can be waived if there is sufficient evidence of inducement, estoppel, fraud or waiver.” *Eng’g Mgmt. Services, Inc. v. Maryland State Highway Admin.*, 375 Md. 211, 241 (2003). *Put simply, to the extent that the government’s conduct amounts to inducement, estoppel, fraud, or waiver, the COMAR time requirements can be “trumped” by the parties’ conduct.*

(Emphasis added.)

Fay’s appellate focus is on the doctrines of waiver and equitable estoppel. For the reasons that we will now explain, we conclude that neither of these concepts is applicable to the present case in the ways that Fay suggests.

We start with two definitions:

First, waiver is ““the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances.”” *Hovnanian Land Inv. Grp., LLC v. Annapolis Towne Ctr. at Parole, LLC*, 421 Md. 94, 122 (2011) (quoting *Food Fair Stores, Inc. v. Blumberg*, 234 Md. 521, 531 (1964)). Waiver rests upon the intention of

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- (2) The amount of the claim;
 - (3) The facts upon which the claim is based;
 - (4) All pertinent data and correspondence that the contractor relies upon to substantiate the claim; and
 - (5) A certification by a senior official, officer, or general partner of the contractor or the subcontractor, as applicable, that, to the best of the person’s knowledge and belief, the claim is made in good faith, supporting data are accurate and complete, and the amount requested accurately reflects the contract adjustment for which the person believes the procurement agency is liable.

C. A notice of claim or a claim that is not filed within the time prescribed in Regulation .02 of this chapter shall be dismissed.

the party, and “acts relied upon as constituting waiver must unequivocally demonstrate that waiver is intended.” *Taylor v. Mandel*, 402 Md. 109, 135–36 (2007). Consistent with this principle, “[t]he intention to waive must be clearly established and will not be inferred from equivocal acts or language.” *Gold Coast Mall, Inc. v. Larmar Corp.*, 298 Md. 96, 109 (1983). Additionally, “waivers of sovereign immunity, which are in derogation of common law, are strictly construed in favor of the State.” *Browner Builders*, 476 Md. at 32 (citing, among other cases, *Proctor*, 412 Md. at 709).

Second, equitable estoppel is:

the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, . . . as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.

Heartwood 88, Inc. v. Montgomery County, 156 Md. App. 333, 368–69 (2004) (cleaned up) (quoting *Mona Elec. Co. v. Shelton*, 377 Md. 320, 334 (2003)).

“Three essential and related elements are generally necessary to establish equitable estoppel: 1) voluntary conduct or representation; 2) reliance; and 3) detriment.” *Gregg Neck Yacht Club, Inc. v. County Comm’rs of Kent County*, 137 Md. App. 732, 773 (2001) (citing *Markov v. Markov*, 360 Md. 296, 307 (2000)).

In its brief, Fay states:

The record contains evidence that SHA waived, or is estopped from enforcing, the 90-day claim filing deadline because of the reasonable and foreseeable reliance drawn from SHA’s responses (and lack of responses) to Fay’s numerous requests for extensions to file its claim and updates regarding the status of the claim submission. At a minimum, there were

genuine issues of material fact as to whether SHA's actions and inactions resulted in a waiver or estoppel, and Fay is entitled to take discovery on these issues. However, the Board improperly foreclosed such discovery with its premature summary decision.

Fay focuses on three statements made by SHA personnel to Fay as the evidentiary basis for its waiver and estoppel contentions:

(1) An email from Robin Linton of the SHA to James McNelis at Fay on May 6, 2019:

This email is to acknowledge the time extension request as per our telephone conversation pertaining to the Differing Site Conditions (Rock) Notice of Claim on FR3885171. Once you have submitted the Claim package, SHA will acknowledge and begin the analysis.

(2) A letter from Stephen Bucy, the SHA's Director of Construction and its procurement officer, to James McNelis, Fay's Executive Vice President, dated August 22, 2019:

This correspondence is to acknowledge receipt of Joseph B. Fay Company[']s . . . letter for intent to file a claim on the above referenced project, dated August 21, 2019. As Maryland State Highway Administration, Office of Construction understands, the claim is a request for extension of time and equitable cost 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 a 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. Attached for Fay[']s convenience is a copy of the

structure outline for this claim submittal.^[41] Please contact Ms. Adetutu Onamade, Engineering Support Section, [SHA] Office of Construction, if there are any questions.

(3) A letter dated October 17, 2019, from McNelis, Fay’s Executive Vice President, to Bucy that stated in pertinent part:

We are writing to provide you with an update on the status of the Differing Site Conditions (DSC) Claim package for the above referenced project.

On May 8, 2019, Fay completed Stage 1 Maintenance of Traffic (MOT). Multiple impacts, including the DSC, caused Stage 1 to be completed two-hundred, thirty (230) calendar days late. On July 23, 2019, Fay submitted its ‘Stage 1 Delay – Time Impact Analysis’ to MDOT SHA District 7. On September 9, 2019 the District completed its review of Fay’s analysis and provided their findings In this response, the District accepted an excusable time extension of one-hundred eighty-seven (187) calendar days,

⁴¹ The “Structure Outline” attached to Bucy’s letter stated:

STRUCTURE OF A CLAIM SUBMITTAL

I. Define the claim (Basis and Amount)

- A. By item or component
- B. Amount (Breakdown by component)
- C. Circumstances (Changed condition, time delay, varied quantities, etc.)

II. Basis of Claim

- A. Indicate relative sections of general specifications for each portion or item of the claim (be specific and brief)
- B. State cause and effect of related activities

III. Rationale for claims (item by item, be specific)

- A. Detailed facts supporting position (correspondence, letter of intent to file claim, daily records, etc.)
- B. Circumstances and time elements

IV. Documentation to support the claim

- A. Witnesses
- B. Pictures
- C. Payrolls, receipts, letters, invoices, equipment costs, etc.
- D. Other pertinent evidence
- E. Certify the claim per GP-5.14, section (b), subsection (5)[.]

with one-hundred nineteen (119) compensable calendar days. The District’s analysis did not recognize any delays associated by the rock DSC.

The District’s formal position on Stage 1 was needed before we can complete our DSC submittal. Now that we have this information, we will continue to diligently compile all documents related to cost and schedule for the rock DSC and will submit to your office as soon as completed.

Should you have any questions or require any additional information, please contact me.

In response to this letter, on October 18, 2019, Adetutu Onamade emailed McNelis and Bellal Shaaban at Fay and stated (emphasis added):

I acknowledge receipt of the status update on the DSC claim submittal for contract FR3885171. *I will have it on file while we await the claim submission.*

Thank you
Adetutu Onamade

In its brief, Fay asserts:

SHA’s statements, when all inferences are resolved in favor of Fay, created genuine issues of material fact as to whether SHA waived its right to enforce [the] 90-day timeframe for filing the claim.

Similarly, these responses created genuine issues of material fact as to whether SHA should be estopped from enforcing the 90-day claim filing requirement. . . . Indeed, why would SHA consistently reaffirm its intent to review Fay’s claim “once received,” provide Fay with the format for submitting [the] claim, and provide Fay with the data necessary to prepare the claim, when it actually intended to refuse to consider the claim on the basis of timeliness?

In response to its rhetorical question, Fay posits that “[t]here are only a few explanations.” First, says Fay, the SHA was waiving the deadline. Fay states that:

This reasonable inference can be drawn from the fact that SHA said that it would review the claim when it was filed. In other words, SHA waived the deadline by voluntarily agreeing to provide an extension of time. SHA did

not say “we reject Fay’s request for an extension” or that “Fay’s claim submission was late.”

Second, Fay states that the “SHA was attempting to lull, induce, or trick Fay to believe SHA was waiving or extending the deadline[,]” in which case the SHA “should be equitably estopped from enforcing the deadlines.” Fay argues that “[t]he facts establish the three elements of equitable estoppel: (1) voluntary conduct; (2) reliance; and (3) detriment.” According to Fay:

SHA, through its voluntary conduct and representations, indicated that it would review the claim when it was submitted. If SHA believed Fay’s claim was untimely or was not agreeing to Fay’s requested extension, SHA could have said so, but SHA did not. Rather, SHA voluntarily chose to acknowledge Fay’s request or update and indicated it would review Fay’s claim when submitted. SHA’s responses were deliberate – not mere acquiescence or lapse of time as suggested by SHA.

Fay argues that “the record contains evidence which, at a minimum, creates a genuine issue of material fact as to whether Fay relied on SHA’s communications agreeing to review Fay’s rock claim when it was submitted.” Fay contends that its reliance was “demonstrated by its continued correspondence and engagement with SHA regarding the status of the rock claim submission and eventual submission of the rock claim.” Moreover, says Fay:

If Fay was not relying on SHA’s communications, why would Fay have continued to provide updates to SHA and eventually submit the rock claim? Indeed, Fay’s status updates were sent prior to expiration of the previously identified and acknowledged extension dates. Fay’s last status update before filing the claim did not provide a new date for submission but rather indicated the rock claim would be submitted when complete. In response, SHA did not object to Fay[’s] proposal or indicate that the claim was dismissed but rather “acknowledg[d] receipt” and said it would “await the

claim submission.” *Fay reasonably relied on SHA’s response and continued to prepare its claim for submission.*

* * *

In sum, when all inferences are resolved in favor of Fay, SHA’s statements, actions, and inactions created genuine issues of material facts as to whether SHA: (1) granted an extension of time to file the claim; (2) waived the 90-day requirement for claim filing, or (3) is estopped from enforcing the 90-day time requirement. Accordingly, the Circuit Court properly found that the Board’s summary decision was inappropriate, reversed the Order, and remanded the case for a trial on the merits.

(Cleaned up; emphasis added.)

We conclude that Fay’s contentions are unpersuasive for the following reasons:

First, as the SHA points out in its reply brief, a statement by an official or employee of the SHA to the effect that the agency would review a claim once it is submitted:

simply reflects the truism that a claim cannot be reviewed until it is submitted. By itself, such a statement does not permit a reasonable inference that the [SHA] agreed that any claim filing would be timely, no matter when Fay filed it.

Second, the SHA points out that “the procurement officer’s statement that he would review the claim once [it is] submitted is consistent with [the procurement officer’s] obligation to review the claim only after it is submitted and not before.” The SHA asserts that “Maryland procurement law does not permit a preemptive or anticipatory claim denial: the procurement officer must wait to receive the claim, and must review it, before

rendering a decision on it.” The SHA is correct. *See* State Fin. & Proc. § 15-219;⁴²
COMAR 21.10.04.03-.04.⁴³

⁴² State Fin. & Proc. § 15-219 states in relevant part:

(b) Unless 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 that states:

- (1) the amount of the contract claim;
- (2) the facts which the contract claim is based; and
- (3) all relevant data and correspondence that may substantiate the contract claim.

* * *

(d) *The person who reviews a contract claim under subsection (c) of this section shall:*

- (1) investigate the contract claim; and*
- (2) give the contractor written notice of a resolution of the contract claim[.]*

(Emphasis added.)

⁴³ COMAR 21.10.04.03 states in pertinent part:

.03. Review and Investigation of Contractor Claim.

Upon receipt of a contractor’s claim, the procurement officer:

- A. Shall investigate and review the facts pertinent to the claim;*
- B. May request additional information or substantiation through any appropriate procedure; and*
- C. Unless clearly inappropriate, shall seek the advice of the Office of the Attorney General.*

(Emphasis added.)

COMAR 21.10.04.04 states in pertinent part:

.04 Disposition of Contractor Claim.

* * *

B. If [settlement] discussions or negotiations are not conducted or if the contractor claim is not settled, *the procurement officer shall prepare a recommended decision on the claim*, which normally should contain:

- (1) A description of the claim;

(continued...)

Third, the SHA states that “Fay’s waiver argument . . . falls short because none of the ‘review-when-received’ statements, even when viewed in Fay’s favor, *unequivocally* demonstrates that the [SHA] intended to waive the claim deadline[.]” (Emphasis added.) In support of this contention, the SHA relies on *Gold Coast Mall*, 298 Md. at 109 (“The intention to waive *must be clearly established and will not be inferred from equivocal acts or language.*” (emphasis added)). Fay does not point to any statement or action by the procurement officer or by subordinates within the SHA that unequivocally shows that the SHA intended to waive the claim deadline.

Fourth, Fay contends that, before he issued his decision, the procurement officer never “raise[d] an issue of timeliness[,] . . . assert[ed] that the time for filing a claim had expired[,]” or “indicate[d] that SHA was not amenable to a time extension.” The SHA points out that that this assertion is inconsistent with “the procurement officer’s August 22, 2019 admonition that Fay must file the claim within 90 days of [the filing of] its notice of claim.”

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- (2) A reference to pertinent contract provisions;
 - (3) A statement of factual areas of agreement or disagreement;
 - (4) A statement of the proposed decision, with supporting rationale; and
 - (5) A paragraph substantially as follows:

“This decision is the final action of this agency. This decision may be appealed to the Maryland State Board of Contract Appeals in accordance with Regulation .09 of this chapter. If you decide to take such an appeal, you must mail or otherwise file a written notice of appeal with the Appeals Board within 30 days from the date you receive this decision.”

Next, the SHA points out that “waivers of sovereign immunity, which are in derogation of common law, are strictly construed in favor of the State.” *Brawner Builders*, 476 Md. at 32 (citing *Proctor*, 412 Md. at 709; *Bd. of Educ. of Balt. County v. Zimmer-Rubert*, 409 Md. 200, 212 (2009)).⁴⁴

Finally, Fay argues that the procurement officer’s authority to address Fay’s contentions was limited by the “prevention doctrine,” which is that: “if one *party* to a contract hinders, prevents or makes impossible performance by the other *party*, the latter’s failure to perform will be excused.” *WSC/2005 LLC v. Trio Ventures Assocs.*, 460 Md. 244, 267 (2018) (cleaned up; emphasis added). Fay is wrong. The prevention doctrine does not apply to this case. This is so because the procurement officer was not a party to the contract between the SHA and Fay; instead, when rendering his decision, the procurement officer was acting in a quasi-judicial capacity. *See, e.g., 1000 Friends of Maryland v. Ehrlich*, 170 Md. App. 538, 549–50 (2006) (“[W]hen a board or agency makes factual determinations, decides contested issues, or reviews applications, it performs a quasi-judicial function.” (cleaned up)).

⁴⁴ Fay raises two additional and related contentions. The first is that the “SHA failed to timely respond to submittals that were necessary for the preparation of Fay’s claim and therefore SHA is estopped from enforcing the 90-day claim filing requirement.” The second is that the SHA imposed onerous burdens on Fay in terms of requiring it to provide information to the SHA.

The problem with both of these arguments is that Fay points to no time standards in COMAR or elsewhere regarding the SHA’s obligation to respond to data requests from contractors. Nor does Fay point to any evidence in the record that the SHA unreasonably delayed its responses to Fay’s requests for data, or that the SHA imposed unreasonably broad or otherwise burdensome requests for information from Fay.

In summary, we agree with each step of the SHA’s analysis of Fay’s waiver and estoppel contentions. We adopt the agency’s reasoning as supplemented by our observations in the preceding paragraphs.

2. The Procurement Officer’s Findings

In the present case, Bucy, the SHA procurement officer^[45] did not find that it was impossible or impractical for Fay to file a claim within the ninety-day window set out in COMAR 21.10.04.02B. Instead, he concluded that Fay had missed multiple filing deadlines, including some that were self-imposed. In his final decision, Bucy explained:

In a letter to the Office of Construction dated February 14, 2019, Fay “request[ed] that the 90 day time frame for submission of the claim be adjusted to start as of January 17, 2019.” . . . Fay promised that “all documents related to the cost and schedule impacts *[will be] submitted to your office no later than April 17, 2019.*”

The Office of Construction neither granted or denied Fay’s request for an extension, and *Fay did not submit the claim documents as promised by April 17, 2019.*

On August 21, 2019, Fay forwarded another letter to the Office of Construction, this time promising that “[d]ocuments related to cost and schedule for the rock DSC are diligently being compiled and *will be submitted to your office by October 18, 2019.*”

* * *

Again, the claim was not filed as promised. Fay instead forwarded yet another letter to the Office of Construction on October 18, 2019, providing “an update on the status of the Differing Site Conditions . . . Claim

⁴⁵ In its brief, Fay argues that “there is also a genuine issue of material fact regarding who the PO was at any given time.” This contention is specious. The record is clear that the procurement officer at the District 7 level was John Concannon, the SHA’s District 7 Engineer. The procurement officer at the SHA level was Stephen Bucy, the Director of the SHA’s Office of Construction. When Bucy was absent from work, Victor Grafton served as acting procurement officer. *See* n.11, *supra*.

package.” Attached to the letter was a letter from MDOT SHA District 7 dated September 9, 2019, setting forth its response to Fay’s “Stage 1 Delay Analysis.” [In that letter,] Fay . . . contended that the claim could not be submitted until [its] “response” from District 7 had been completed. *Fay made no attempt to reconcile this contention with the representation made in its February 14, 2019 letter that the claim would be filed by April 17, 2019, given that Fay’s requested logic revisions to the schedule had been approved. Fay also failed to explain why the claim still remained outstanding over five weeks after its receipt of District 7’s September 9, 2019 “response.”* Fay instead merely stated that the claim would be submitted “as soon as completed.”

The Office of Construction acknowledged receipt of Fay’s October 18, 2019 “status update” and indicated that it will be “on file while we await the claim submission.” *Fay did not thereafter file the claim until over nine months later, on July 28, 2020.*

In summary, then, Fay submitted a notice of claim to the Office of Construction on or about November 20, 2018, after SHA District 7’s denial of its claim for [three] differing site conditions The claim with respect to these three issues was therefore due to be filed by February 17, 2019, and Fay did not file its claim by that date and never received an extension of time for the filing of the claim.^[46]

Even assuming that extensions had been properly requested and granted, Fay failed to comply with the extended deadlines.

(Footnote omitted; emphasis added.)

Fay asserts that the SHA cannot assert sovereign immunity to “prevent[] Fay from asserting that SHA waived the rock claim submission deadline or is estopped from enforcing the claim submission deadline.” For support, Fay points to Procurement Officer Bucy’s August 22, 2019 letter to McNelis, Fay’s Executive Vice President. For the sake of context, we will start with McNelis’s letter to the SHA of the previous day:

⁴⁶ As previously noted, Fay actually filed its Differing Site Conditions claim on July 28, 2020.

August 21, 2019
Mr. Victor Grafton
Deputy Director Field Operations
Office of Construction
Maryland State Highway Administration
7459 Traffic Drive
Hanover, Maryland 21076
Re: MD 85 (Phase 1) at 1-270 Interchange Reconstruction
Contract No. FR3885171
Subject: Documents Related to Rock Claim (Letter No. 1002-70)

Dear Mr. Grafton,

We are writing to provide you with an update on the status of the Differing Site Conditions (DSC) Claim package to be submitted to your office for the MD85/I270 Interchange Reconstruction project.

On May 8th Fay completed Stage 1 Maintenance of Traffic (MOT). Multiple impacts, including the DSC, caused Stage 1 to be completed one-hundred sixty two (162) calendar days late. Fay[’s] recently submitted letter 1002-102 Stage 1 Delay Analysis, dated July 23, 2019 to the MDOT SHA District 7 project staff (attached for reference). The letter summarized and apportioned the following Excusable Delays as related to their impact on the Stage 1 MOT completion milestone:

- 1- DSC Unanticipated Rock,
- 2- Redline Revision No. 1,
- 3- Stage 1 Micropiles, and
- 4- Stage 1 Paving across Ramp 3.

Prior to this submittal, the District had accepted two separate schedule Time Impact Analyses (TIA). Although[] the District accepted the TIA’s they would not issue a Contract time extension because the TIA’s were prospective. The District maintained they would only extend time for actual Excusable impacts retrospectively. Fay disagrees with the approach, but moved forward per the District’s direction.

At the completion of Stage 1 MOT the District requested that the total days of impacts be retrospectively apportioned between each of the contributing delays referenced above. The schedule impacts caused by the DSC Rock, encountered throughout 2018, were included in the analysis. Once the

District has reviewed our analysis and agreement is reached on the apportioned time between the multiple impacts, the DSC package will be submitted to your office.

We have also attached letter 1002-103 Notice of Impact – Rock at Westview & Stage 2 SOE. This letter notified the District of additional areas where rock was encountered at significantly different elevations from those shown on the plans. *At this time, we are providing this letter for your information. Fay has submitted this to the District as a DSC.*

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.

Should you have any questions or require any additional information, please contact me.

Sincerely

/s/James McNelis

(Emphasis added.)

The procurement officer's response was:

August 22, 2019

RE: SHA Contract No. FR3885171

MD 85 (Phase 1) at 1-270 Interchange Reconstruction

Notice of Claim- Differing Site Conditions, Rock Impacts

Mr. McNelis:

This correspondence is to acknowledge receipt of Joseph B. Fay Company['s] ("Fay") letter [of] intent to file a claim on the above referenced project, dated August 21, 2019. As Maryland State Highway Administration, Office of Construction understands, the claim is a request for extension of time and equitable cost 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 a 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. Attached for Fay[’s] convenience is a copy of the structure outline for this claim submittal. Please contact Ms. Adetutu Onamade, Engineering Support Section, Office of Construction, if there are any questions. . . .

Sincerely
Stephen A. Bucy, P.E.
Director
Office of Construction

(Emphasis added.)

In its brief, Fay concedes that, on October 18, 2019, “Ms. Onamade responded to Fay’s status update indicating that [the] SHA had received the update and would ‘await the claim submission.’” Fay asserts that:

[I]f SHA believed Fay’s rock [claim] was already untimely and if SHA was not agreeing to waive the deadline for the rock claim, then why did SHA respond to Fay’s [August 22, 2019] update indicating that SHA was awaiting Fay’s claim submission?

Fay posits that Onamade’s email acknowledging receipt of McNelis’s letter supports the notion that the SHA “waived, or is estopped from enforcing, the 90-day claim filing requirement[.]” In response, the SHA points out that Fay’s estoppel argument “runs up against the procurement officer’s August 22, 2019 admonition that Fay must file the claim within 90 days of its notice of claim.”

We agree with the SHA that, in light of Bucy’s clear and unambiguous instruction that the ninety-day filing limitation was applicable to this case, “Fay cannot reasonably

contend that the [SHA] somehow lulled or misled [Fay] into believing that the claim deadline [would be] waived or extended.”

3. Fay’s Public Policy Contentions

Fay asserts that the Board’s decision establishes “harmful public policy” in five different ways:

- (1) the Board’s decision “perpetuates confusion created by SHA”;
- (2) the Board’s decision “runs contrary to the goals of the Partnering Charter and the Maryland Code”;
- (3) the decision “puts [c]ontractors in the untenable position of certifying incomplete claims”;
- (4) the Board’s decision “runs afoul of Maryland’s policy of disputes being resolved on the merits”; and
- (5) the Board’s decision “incorrectly presumes that a delay in submitting a claim is harmful to the State in all circumstances and creates policy based upon that incorrect presumption.”

We will analyze these matters separately. First, however, we will discuss the concept of “public policy”:

Public Policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.

Assanah-Carroll v. L. Offs. of Edward J. Maher, P.C., 480 Md. 394, 432 (2022) (cleaned up) (citing *Egerton v. Earl Brownlow*, 4 H.L. Cas. 1, 196 (1853)).

Because of the open-ended nature of the concept, Maryland courts have looked to “prior judicial opinions, legislative enactments, or administrative regulations as the chief sources of public policy[.]” *Yuan v. Johns Hopkins Univ.*, 452 Md. 436, 451 (2017)

(cleaned up). Additionally, the “declaration of public policy is normally the function of the legislative branch.” *Id.* (cleaned up); *see also Adler v. Am. Standard Corp.*, 291 Md. 31, 45 (1981) (“We have always been aware, however, that recognition of an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of a given case, and that declaration of public policy is normally the function of the legislative branch.”).

Returning to the case before us, Fay presents five reasons why we should be reverse the decision of the Board on public policy grounds. We will discuss them separately.

1. Confusion Created By The SHA

Fay points out that, in its decision, the Board stated that it is “well-aware of the confusion created by [the SHA’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.” Fay asserts, correctly in our view, that “there is no regulation that authorizes such a process.” From this premise, Fay posits that the SHA is allowed to “skirt accountability for its actions and inactions.” Fay concludes:

[T]he record demonstrates that there were genuine issues of material fact as to whether SHA, by virtue of its actions and inactions, extended the deadline, waived the deadline, or should be estopped from enforcing the deadline for Fay to submit its claim. Therefore, Fay should be given an opportunity through discovery and hearing on the merits to hold SHA accountable.

The fatal difficulty with Fay’s argument is that it had an ample opportunity to engage in discovery when this matter was pending before the Board. The degree to which Fay took advantage of this opportunity is unclear from the parties’ briefs and the extract but it

is not our role to comb through the record to find facts that would support Fay’s contention. *See HNS Dev., LLC v. People’s Couns. for Baltimore County*, 425 Md. 436, 459 (2012) (stating that appellate courts will not ““rummage in a dark cellar for coal that isn’t there”” (quoting *Konover Prop. Tr., Inc. v. WHE Assocs.*, 142 Md. App. 476, 494 (2002))).

2. The “Goals of the Partnering Charter and the Maryland Code”

Fay states that, “[a]t the beginning of the Project, the parties entered a Partnering Charter where they expressly agreed to have ‘open, honest, clearly defined communications that generate trust and respect’” between them.

Fay also points to State Fin. & Proc. § 11-201(a), which states in pertinent part:

- (a) The purposes and policies of this Division II include:
 - (1) providing for increased confidence in State procurement;
 - (2) *ensuring fair and equitable treatment of all persons who deal with the State procurement system*;
 - (3) providing safeguards for maintaining a State procurement system of quality and integrity;
 - (4) fostering effective broad-based competition in the State through support of the free enterprise system[.]

Fay contends that the procurement officer’s decision “runs contrary to the goals of the Partnering Charter and the Maryland Code,” and that:

The record demonstrates that SHA did not treat Fay in an open and honest manner nor did SHA act in a manner that would generate trust and respect between the parties. Rather, Fay presented evidence that SHA was deceptive and played timing “gotcha” with Fay. The Board’s Order condones SHA’s improper actions.

We do not agree. Our review of the record does not support the conclusion that the Board, the members of the SHA’s staff, or the SHA’s procurement officers treated Fay

unfairly. Moreover, nothing prevented Fay from presenting this contention when this case was pending before the Board. We see no reason why Fay should get a second chance.⁴⁷

3. The “Incomplete Claims” Problem

Fay argues that the Board’s decision put it (and by extension other contractors on SHA projects) “in the untenable position of certifying incomplete claims.” Fay states:

COMAR allows for extensions of the time for submission of claims. Allowing MSBCA to strictly enforce the 90-day claim submission requirement when there was evidence that Fay had requested an extension which SHA repeatedly acknowledged because it was still compiling and analyzing data, the area affected by the DSC had increased, and Fay was waiting for information from SHA that was necessary to complete its claim, would force a contractor to prematurely submit a claim to preserve its rights at the risk of severe penalty. This outcome cannot be permitted as it is patently unfair to contractors and harmful to the State.

The SHA characterizes this contention as a “red herring” because:

The record does not demonstrate that Fay lacked accurate and complete information for its claim at any point. And Fay itself admitted it had complete information by September 9, 2019, when it received the response from District 7 that it allegedly needed. Even then, Fay did not file a claim for another ten months. Fay was never at risk of filing a “false certification.”

(Citation omitted.)

We agree with the SHA.

⁴⁷ In fairness to Fay’s appellate counsel, Fay was represented by different lawyers when this case was before the Board.

4. Resolving Disputes On The Merits

Fay contends that the Board’s decision “runs afoul of Maryland’s policy of [resolving disputes] on the merits.” As support for this proposition, Fay cites State Fin. & Proc. § 11-201(a), which states:

- (a) The purposes and policies of this Division II include:
 - (1) providing for increased confidence in State procurement;
 - (2) ensuring fair and equitable treatment of all persons who deal with the State procurement system;
 - (3) providing safeguards for maintaining a State procurement system of quality and integrity;
 - (4) fostering effective broad-based competition in the State through support of the free enterprise system;
 - (5) promoting increased long-term economic efficiency and responsibility in the State by encouraging the use of recycled materials;
 - (6) providing increased economy in the State procurement system;
 - (7) getting the maximum benefit from the purchasing power of the State;
 - (8) simplifying, clarifying, and modernizing the law that governs State procurement;
 - (9) allowing the continued development of procurement regulations, policies, and practices in the State; and
 - (10) promoting development of uniform State procurement procedures to the extent possible.

In response, the SHA points out that:

[S]ummary decision is appropriate if, as here, there are no factual disputes and a party is entitled to prevail as a matter of law. *Brawner Builders*, 476 Md. at 43. Further, Maryland public policy promotes the orderly and efficient management of contract disputes. *See Stern v. Board of Regents, Univ. Sys. of Md.*, 380 Md. 691, 722 (2004); State Fin. & Proc. § 11-201. One of the laws supporting this State policy is COMAR 21.10.04.02C: a claim that is not timely filed “shall be dismissed.”

We do not read § 11-201 as precluding resolution of contract disputes on procedural grounds. We agree with the SHA's reading of COMAR 21.10.04.02C.⁴⁸

5. Delays in Submitting Claims

Fay's last contention is that, if the case is remanded to the SHA,

the evidence in discovery will establish [that] SHA's reasonable conduct vis-à-vis Fay was not because SHA wanted to help Fay obtain an unworthy recovery upon a fallacious claim, but rather because SHA wanted to allow Fay to submit a complete claim based upon full information from both SHA and Fay. That level of cooperation to avoid unnecessary formal dispute processes to reach a fair resolution of the open items is good public policy, and the Board's foreclosure of such conduct by a State agency is bad public policy.

We recognize Fay's point — it certainly makes sense for contractors and the SHA to work cooperatively with one another in highway construction projects, including when they disagree. But the issue before us is whether the Board erred in granting the SHA's motion for a summary decision based on the record that was before the Board at the time of the Board's hearing. We decline to speculate as to whether there is other evidence (in the record or otherwise) that might support Fay's contentions. The time for Fay to present that evidence was at the proceeding before the Board, and Fay failed to do so. We are not persuaded that Fay is entitled to a do-over.

⁴⁸ We do not read our Supreme Court's analysis in *Stern* as pertinent to the issues raised in the case before us.

Because we do not perceive any errors in the reasoning of either the procurement officer or the Board, we affirm the Board's decision.

**THE JUDGMENT OF THE CIRCUIT
COURT FOR ANNE ARUNDEL
COUNTY IS REVERSED AND THIS
CASE IS REMANDED FOR ENTRY OF A
JUDGMENT AFFIRMING THE
DECISION OF THE MARYLAND STATE
BOARD OF CONTRACT APPEALS.
COSTS TO BE PAID BY APPELLANT.**

IN THE MATTER OF

JOSEPH B. FAY COMPANY

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IN THE

CIRCUIT COURT

FOR

ANNE ARUNDEL COUNTY

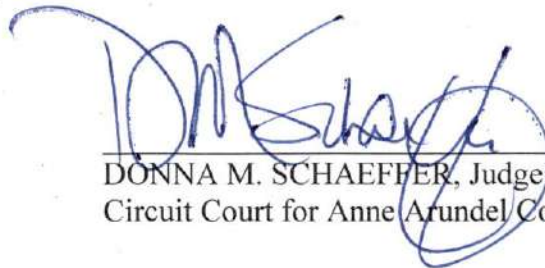
Case No. C-02-CV-23-1712

* * * * *

ORDER

The March 14, 2024 Judgment of this court having been reversed and remanded by the Appellate Court of Maryland, it is this 30th day of September, 2026, by the Circuit Court for Anne Arundel County, Maryland,

ORDERED, that the August 3, 2023 Opinion and Order of the Maryland State Board of Contract Appeals is hereby affirmed.



DONNA M. SCHAEFFER, Judge
Circuit Court for Anne Arundel County