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| Docket Nos. 1940, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2093 & 2094 | Date of Decision: 12/17/98 |
| Appeal Type: [ ] Bid Protest | [X] Contract Claim |
| Procurement Identification: Under MTA Contract No. 90-44-11 | |
| Appellant/Respondent: Arundel Engineering Corporation<br>Mass Transit Administration | |

Decision Summary:

Notice of Claim - COMAR 21.10.04.02A requires that, 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. Effective October 1, 1996, §15-219(a) of the State Finance and Procurement Article provides that except to the extent a shorter period is prescribed by regulation governing differing site conditions, a contractor shall file a written notice of a claim relating to a construction contract within 30 days afer the basis for the claim is known or should have been known. Prior to October 1, 1996, the notice of claim provision as contained in COMAR 21.10.04.02A was based on §15-217(b) which provided that a contract claim be submitted within the time required under regulations.

**BEFORE THE**
**MARYLAND STATE BOARD OF CONTRACT APPEALS**

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| **In the Appeal of ARUNDEL ENGINEERING CORPORATION** | ) | |
| **Under MTA Contract No. 90-44-11** | ) | **Docket Nos. MSBCA 1940, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2093 and 2094** |

**APPEARANCE FOR APPELLANT:** **Henry Eigles, Esq.**
**Columbia, MD**

**APPEARANCE FOR RESPONDENT:** **Julia Paschal Davis**
**Assistant Attorney General**
**Baltimore, MD**

MEMORANDUM OPINION BY CHAIRMAN HARRISON
ON RESPONDENT'S MOTION TO DISMISS

Respondent, Mass Transit Administration, MTA, moves to dismiss the above captioned appeals on grounds that the Appellant failed to file timely notices of claims and claims[1]. We shall deal only with the Respondent's allegations that Appellant failed to file timely notices of claims. If a contractor fails to file, without legal excuse, a timely notice of claim, the claim must be dismissed and the Board of Contract Appeals may not award the contractor an equitable adjustment.

By way of background we note that these ten captioned appeals are part of the seventeen (17) total appeals filed by Appellant under the captioned contract[2]. All seventeen appeals involve in some fashion a

[1] Respondent also moves to dismiss the appeal docketed as MSBCA No. 2094 on grounds the Board lacks authority to grant the relief requested.

[2] MSBCA Docket Nos. 1929, 1940 and 1957 (consolidated) and MSBCA Docket Nos. 1988, 1989, 1990, 1991, 1992, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2093 and 2094.

claim by Appellant Arundel for at least "$300,000" for "financial and time damages" (MSBCA Docket No. 1940, amended upward in Appellant's Second Amended Complaint to $573,986), a claim on behalf of S.Z. Schwartz and Associates for engineering fees (MSBCA Docket No. 1929) and an affirmative State claim of $65,000 for liquidated damages (MSBCA Docket No. 1957). Additionally, the Appellant in its appeal docketed as MSBCA Docket No. 2093 seeks $269,763.54 related to "Claim #8" and seeks $221,870.05 for Claims Nos. 1 through 7 as set forth in MSBCA Docket Nos. 2039 through 2045. MSBCA Docket No. 2099 seeks relief previously requested in MSBCA Docket No. 1940 relating to alleged oral directives. The Board has previously granted Respondent's motion to dismiss that portion of MSBCA Docket No. 1940 and MSBCA Docket No. 1929 that requested that the Board direct MTA to reduce alleged "verbal" (oral) directives to writing. This interlocutory decision dated January 3, 1997 which is incorporated herein by reference was appealed by Appellant to the Courts and ultimately remanded back to the Board on grounds the Board's January 3, 1997 interlocutory decision did not constitute a final order as to the appeals and was thus not ripe for judicial review. Arundel Engineering Corporation v. Mass Transit Administration, No. 1408, Md. Ct. of Spec. App. September Term, 1997 unreported (May 7, 1998)[3]; Certiori Denied Ct. of Appeals, Pet. Docket No. 205, Sept. Term 1998 (August 24, 1998). Subsequently, by Memorandum Decision of October 7, 1998 on Respondent's further motion to dismiss for lack of jurisdiction the Board dismissed MSBCA Docket Nos. 1988, 1989, 1990, 1991 and 1992 with prejudice. The Board's decision of October 7, 1998 is incorporated herein by reference. We turn now to the motions to dismiss the above captioned appeals.

Preliminarily we observe that since its inception seventeen years

[3]The Court of Special Appeals' decision also deals with a discovery matter in MSBCA Docket No. 1957.

ago the Board has recognized, considered and granted motions for summary disposition[4], although not specifically provided for under the Administrative Procedure Act, because of its belief that to do so is consistent with legislative direction to provide for the "informal, expeditious, and inexpensive resolution of appeals . . . ." Section 15-210, Division II, State Finance and Procurement Article; See e.g. Intercounty Construction Corporation, MDOT 1036, 1 MSBCA ¶11 (1982); Dasi Industries, Inc., MSBCA 1112, 1 MSBCA ¶49 (1983). In all instances the legal standards the Board will apply to determine the appropriateness of summary disposition remain the same. The party moving for summary disposition is required to demonstrate the absence of a genuine issue of material fact. See Mercantile Club, Inc. v Scheer, 102 Md. App. 757 (1995). The purpose of summary disposition is not to resolve factual disputes nor to determine credibility, but to decide whether there is a dispute over material facts which must be resolved by the Board as trier of fact. Coffey v. Derby Steel Co., 291 Md. 241 (1981); Russo v. Ascher, 76 Md. App. 465 (1988); King v. Bankerd, 303 Md. 98, 111 (1985). See Heat & Power Corp. v. Air Products, 320 Md. 584, 591 (1990); King v. Bankerd, supra, 303 Md. at lll. In making its determination of the appropriate ruling on the motion, the Board must examine the record as a whole, with all conflicting evidence and all legitimate inferences raised by the evidence resolved in favor of the party (in this instance the Appellant) against whom the motion is directed. See Honaker v W.C. & A.N. Miller Dev. Co., 285 Md. 216 (1977); Delia v. Berkey, 41 Md. App. 47 (1978), Affd. 287 Md. 302 (1980).

MSBCA 1940

[4]The word disposition is used rather than judgement because the Board is not a court and has no equitable powers or equitable jurisdiction.

The record reflects that Appellant has failed to file a timely notice of claim in any of the above-captioned appeals.

The issues raised by the Motions for Summary Disposition as we focus on MSBCA 1940 are (1) whether MTA personnel have the authority to waive the statutory and regulatory requirements based on statute regarding the filing of a timely notice of claim and (2) whether certain alleged conduct by MTA personnel otherwise results in a waiver of the statutory and regulatory requirements for filing of a timely notice of claim. For the reasons that follow we find that requirements for filing a timely notice of claim are not waived.

Statutory filing requirements are mandatory prerequisites to administrative remedy. In Title 15 of the State Finance and Procurement Article, the General Assembly established exclusive administrative procedures for the resolution of contractor disputes arising out of state procurement contracts. The Legislature provided three consecutive administrative levels for resolving disputes, each of which must be completed before the contractor may proceed forward to the next. First, in order to initiate the procedure, a contractor is required to submit timely notice and documentation of claim to the procurement officer for final decision.[5] Second, the contractor may appeal the final decision of the agency to the Maryland State Board of Contract Appeals (the Board).[6] Third, a contractor may petition the Circuit Court for judicial review of a final appealable decision issued by the Board.[7]

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[5] State Fin. & Proc. Code Ann. §§15-217 through 219. This decision focuses on the failure of the Appellant to file a timely notice of claim under the statute and COMAR.

[6] State Fin. & Proc. Code Ann. §15-220.

[7] State Fin. & Proc. Code Ann. §15-223. See Driggs Corporation v. Maryland Aviation Administration, 348 Md. 389(1998); Arundel

At the threshold level of these administrative procedures, the Legislature requires that a contract claim[8] shall be submitted within the time required under regulations adopted by the primary procurement unit responsible for the procurement. State Fin. & Pro. Code Ann. §15-217(b). Pursuant to such statutory direction COMAR 21.10.04.02A, as adopted by the Board of Public Works requires that a contractor "shall" file written notice of its claim "within 30 days after the basis for the claim is known or should have been known, whichever is earlier", unless a lesser time period is prescribed by law or by contract. COMAR 21.10.04.02B further defines the documentation a contractor is required to file in support of its claim. Consistent with the mandatory nature of the statutory filing requirements and the delegation of authority to implement the provisions of the General Procurement Law, COMAR 21.10.04.02C provides that a notice of claim or a claim that is not filed within these required time periods "shall be dismissed." The essence of these requirements is contained in GP-5.14 Claims of the Contract herein. In State Fin. & Pro. Code Ann. §§12-101(b)(2) and (3), the Legislature delegated to the Board of Public Works the authority "to implement the provisions of this Division II" (of the State Finance and Procurement Article, the General Procurement Law) and to "ensure that regulations of the primary procurement units provide

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Engineering Corporation v. Mass Transit Administration, No. 1408 Md. Ct. of Spec. App. September Term, 1997 unreported (May 7, 1998); Certiori Denied Ct. of Appeals, Pet. Docket No. 205, Sept. Term 1998 (August 24, 1998).

[8] Contract claim is defined to mean a claim that relates to a procurement contract and includes a claim about the performance, breach, modification or termination of the procurement Contract. State Fin. & Proc. Code Ann. §15-215(b).

for procedures that are consistent with this Division II . . . ."[9] Thus, the Legislature has affirmatively charged the Board of Public Works with the responsibility of implementing and complying with the requirements of Division II. The Legislature's delegation of authority to the Board of Public Works is conditioned upon compliance with Division II of the State Finance and Procurement Article which includes the time requirements of §15-217(b) and effective October 1, 1996 for construction contracts the 30 day notice requirement as specifically set forth in §15-219(a). Under the General Procurement Law the Board of Public Works may control procurement by units to include MTA. Neither the Board of Public Works nor MTA have the authority to waive, modify or ignore the mandatory filing requirements of §15-217(b) and §219(a) included in Division II. Neither does this Board. While the Board of Contract Appeals has subject matter jurisdiction to determine whether a timely claim has been filed and, if not, whether a legal excuse exist for such failure, once it is determined that the requirement has not been met or excused, the claim must be dismissed and the Board may not proceed further.

The Courts of Maryland have instructed us in other contexts that compliance with a statutory requirement for the filing of a administrative claim against the State is a condition precedent to the filing of an action, and that failure to file a claim within the specified time bars its later assertion. Maryland State Police v. Warwick, 330 Md. 474,(1993) (failure to file timely appeal to MSBCA); Johnson v. Maryland State Police, 331 Md. 285 (1993) (failure to submit claim under Maryland Tort Claims Act within 180 days after injury). In Simpson v. Moore, 323 Md.(1991) it was held that failure to timely file

[9] COMAR 21.03.01.01 provides that a "state agency may not enter into a procurement contract except as permitted under State Finance and Procurement Article, Division II, and this title."

a claim under the Maryland Tort Claims Act barred the action, even though the State may have suffered no prejudice.

The reasoning of these decisions, taken together with the mandatory nature of the language of Section 15-217(b) of the State Finance and Procurement Article, compels the conclusion that Appellant's claims must be dismissed for failure to comply with the requirement to timely notice claims unless such requirement may be found to have been waived.

With the aforegoing as background and assuming arguendo (as we must for purposes of Respondent's motions for summary disposition) that Appellant's allegations of economic coercion by named and unnamed persons at MTA are true, does such conduct serve to waive or otherwise negate the aforementioned requirement to file a timely notice of claim? The essence of Appellant's allegations of economic coercion is that Appellant was told not to file any claims until the "end of the job" or that reprisals would be taken[10] and that MTA would not act on any claims until the end of the job. It is also alleged, and for purposes of Respondent's Motions we must assume the truth thereof, that MTA issued contradictory oral directives and issued oral directives that increased the scope, duration and cost of the work but wrongfully and deliberately refused to put such oral directives in writing which caused one of Appellant's subcontractors to go bankrupt and violated Appellant's rights under the contract and denied Appellant Constitutional due process.

As noted for purposes of Respondent's motions we must assume the

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[10] There is no evidence that the reprisals would involve physical violence or that Appellant would be physically restrained from filing claims before the end of the job. Presumably the alleged threatened reprisals consisted of Respondent's warnings of assessment of liquidated damages and that liquidated damages were actually assessed, which damages are the subject of the appeal in MSBCA 1957.

truth of these allegations.[11] The acts encompassed by these allegations would be unauthorized, i.e. State employees are not authorized to engage in coercive acts designed to a contractor to prevent the contractor from exercising its remedial rights under the General Procurement Law.

We note as an initial matter that according to the case law in Maryland the State is not bound by the unauthorized acts of its agents. ARA Health v. Dept. of Public Safety, 344 Md. 85, 95(1996). Contractors who contract with a State agency are presumed to know the limitations placed by the Legislature on the authority of an agency. Id. "Persons who contract with the State do so at their peril when they fail to take notice of the limits of the agent's authority." Id., citing Schaeffer v. Anne Arundel County, Md., 17F.3d 711, 714(4th Cir. 1994). The State is not bound by the acts of its officials or employees acting beyond their actual authority regardless of the reasonableness of the beliefs of the other party. Dept. of Public Safety v. ARA, 107 Md. App. 455, 462-62, (1995), Aff'd ARA Health v. Dept. Of Public Safety, Supra. Officials or employees acting beyond the scope of their authority cannot waive a statutory or regulatory requirement nor can their conduct estop the State from raising noncompliance with the requirements as a defense. Id.[12] This case law

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[11] We make no actual finding concerning the truth of Appellant's allegations of misconduct based on the record compiled in Appellant's seventeen (17) appeals filed to date. Appellant will, however, be permitted to assert and attempt to prove such allegations as a defense should Respondent meet its burden to make a prima facie showing that the assessment of liquidated damages involved in MSBCA 1957 was appropriate.

[12] The regulation under consideration in the instant decision, COMAR 21.10.04.02, does not contain that language providing for waivers or exceptions found in COMAR 21.05.02.10 (providing exceptions that would allow consideration of a late bid where the lateness is attributable to the action of inaction of certain State employees.

is binding on this Board and we have not been advised that it has been overidden by the General Assembly as regards the remedial rights afforded contractors by the General Procurement Law.

Thus MTA does not have the authority to waive time requirements which the Legislature and the Board of Public Works have established as mandatory prerequisites to the Board's jurisdiction. Nor does MTA have the authority to waive the mandatory requirement that a contractor exhaust its administrative remedies at the agency level before it can seek the jurisdiction of this Board. Accordingly, even if MTA personnel engaged in the conduct alleged by Appellant they were not authorized to actually waive the time requirements for filing a notice if claim by extending the time for such filing until "the end of the job". This Board is required by law to uphold the time requirements as actually set forth in the statute or its implementing regulations.

Similarly, the specific allegations raised by Appellant herein of economic coercion and depravation of due process, assuming arguendo the truth thereof, do not result in a constructive waiver of the requirement to file a timely notice of claim. The conduct by MTA personnel as alleged in these appeals does not constitute a legal defense to the requirement to file notices of claims within the 30-day time frames set forth in COMAR 21.10.04.02A. Indeed, where a contractor believes that State personnel are acting contrary to law and regulations and that such acts give rise to a contract claim, the Contractor should immediately invoke the remedial process provided by law by noticing a claim. This will then place a spotlight on such unauthorized conduct and guarantee the contractor that its rights will be enforced.

We would reach the same conclusion were we to view the matter from the perspective of waiver of sovereign immunity. The Legislature has agreed by waiving the State's sovereign immunity in contract that a contractor may file contract claims against the State. However,

certain conditions apply. These conditions include the timely filing of notice and documentation of a claim as defined by §§15-217(b) and 15-219(a) of the State Finance and Procurement Article and COMAR 21.10.04.02A and B.[13] Only the Legislature can extend, expand or modify the conditions on the obtaining of relief by a contractor through the administrative claims process. See the Driggs Corporation, MSBCA 1262, 2 MSBCA ¶121 (1986). Therefore, assuming arguendo that MTA personnel did wrongfully and willfully refuse to reduce directives to writing and either extended the time for filing notices of claims until the end of the job or refused to accept notices of claims until the end of the job as alleged by Appellant, it was not

[13] In view of our determination that no timely notice of claim was filed pursuant to §15-217(b) and COMAR 21.10.04.02A, we shall not further decide whether Appellant's claims are also barred by the doctrine of sovereign immunity to the extent they are based on an alleged oral contract modifications (rather than a written contract modification) which was beyond the scope of MTA's authority. The ARA decisions of the Court of Appeals and Court of Special Appeals referred to above suggest that such claims based on alleged oral contract modifications would be barred. We recognize the dichotomy presented where a contractor is required to act on an oral directive which may involve additional work at additional cost and must continue to work on the job and perform the additional work notwithstanding that if the oral directive is not reduced to writing through the change order process the contractor may not legally be paid the cost of such additional work. We have chosen to briefly address the argument of counsel for Respondent has argued in these appeals that Appellant's failure to file a timely notice of claim requires that the appeals be dismissed on sovereign immunity grounds. We shall not discuss this argument at length in view of our determination that absent a timely claim, whose lateness may not be legally excused for some reason not presented by these appeals, this Board may not further proceed. In this regard however, in a recent unreported decision, Tschechtelin v. Samuels, No. 231 (Md. App., Nov. 6, 1998), the Court of Special Appeals held that employment-related contract claims against the State which were not filed within a statutory deadline were barred by sovereign immunity. In Tschechtelin, the filing of a claim within the statutory time limit was deemed a condition precedent to the maintenance of a contract claim otherwise barred by the doctrine of sovereign immunity.

within the scope of their authority to waive the conditions for filing claims against the State. Therefore, their alleged unauthorized conduct in not reducing directives to writing and extending the notice of claim filing requirements beyond thirty (30) days cannot bind the State or estop the State from insisting on compliance with such requirements in administrative proceedings before this Board.

We have thus rejected Appellant's argument that it was not required to file timely notices of claims because such requirement was either waived or extended by the conduct of MTA personnel. However, Appellant also argues that the thirty day requirement is unlawful. Up until October 1, 1996, State Fin. & Proc. Code Ann. §15-217(b) provided that a contract claim shall be submitted within the time required under regulations adopted by the primary procurement unit responsible for the procurement. The Board of Public Works promulgated such a regulation at COMAR 21.10.04.02A which at all relevant times herein provided that a contractor file a written notice of claim with the procurement officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier[14]. Appellant, citing University of Maryland v. MFE incorporated/NCP Architects, Incorporated, 345 Md. 86(1997), argues that the Board of Public Works 30 day notice requirement as set forth in COMAR 21.10.04.02A is inconsistent with §15-217(b) as it existed prior to October 1, 1996 and is therefore unlawful. We reject such argument. Presumably it is based on Appellant's belief that 30 days is not a long enough time to comport with the expressions of fundamental fairness contained in the General Procurement Law at §11-201 or otherwise is inconsistent with legislative intent concerning the administrative resolution of

[14] For a general discussion of the scope of the authority of the BPW to issue procurement regulations see Maryland State Police v. Warwick, 330 Md. 474(1993) at pp. 480 - 482.

construction contract disputes. We have noted that this Board is bound by the regulations of the Board of Public Works, i.e., we must uphold such regulations. We find nothing inconsistent between the statute or its expressed legislative intent and the challenged regulation. We note that effective October 1, 1996, with respect to construction contracts the statute itself sets forth a 30 day filing requirement except to the extent a shorter period is described by regulations governing differing site conditions. State Fin. & Proc. Code Ann. §15-219(a). The contract at issue (for the renovation and rehabilitation of a metro station) is a construction contract. See COMAR 21.01.02.01B(23).

Finally, Appellant, in addition to arguing that the 30 day notice of claim requirement set forth in COMAR 21.10.04.02A and GP-5.14 of the contract was waived by conduct of MTA personnel and that the regulation was unlawful, argues that COMAR 21.10.04.02Aand GP-514 of the Contract does not apply to Appellant's claims arising out of alleged wrongful administration of the contract. We have previously rejected this argument in our Memorandum Opinionof October 7, 1998 dealing with certain other appeals by Appellant which as previously noted is incorporated herein by reference. Therein we said:

> *Appellant argues that GP-5.14 of the contract which provides for filing of written notice of claims for damages with the Procurement Officer within a thirty (30) day period and COMAR 21.10.04.02A which likewise requires filing of a written notice of claim with the Procurement Officer within thirty (30) days of when the contractor knew or should have known of such claim only apply to claims for "labor, materials and equipment." Appellant asserts that GP-5.14 and COMAR 21.10.04.02A do not apply to claims that are based upon damages arising from Appellant's alleged wrongful administration of the contract as represented, for example, by the allegations of economic coercion, malicious interference and tortious conduct. Appellant argues that claims involving alleged wrongful administration of the Contract should be brought pursuant to the Disputes Clause of the Contract, GP-5.15 and particularly Subsection C thereof. However, Subsections A and B of GP-5.15*

*acknowledge the supremacy of the General Procurement Law (Act) as set forth in the State Finance and Procurement Article and COMAR 21.10 dealing with administrative and civil remedies.*

*Regardless of which General Provision of the Contract may apply, the Board holds that it only has jurisdiction over a claim that is timely filed under and otherwise meets the requirements of COMAR 21.10.04 (Chapter 04 of COMAR 21.10) as that regulation implements the statutory provisions regarding final agency action in contract claims for construction contracts and appeal to the Board as set forth in Sections 15-211, 15-215, and 15-217 and 15-219 of the State Finance and Procurement Article.*

Arundel Engineering Corporation, MSBCA 1988, 1989, 1990, 1991 & 1992, _____MICPEL_____(October 7, 1998) at p. 4. For identical reasons we reject Appellant's argument that the notice of claim requirements do not apply to claims arising out of alleged wrongful administration of the contract in the above-captioned appeals as well.

Accordingly, we find that Appellant must have filed a timely notice of claim within 30 days after the basis for the claim is known or should have been known. None of the claims involved in the above-captioned appeals to include the claims involved in the instant focus on MSBCA 1940 were filed within thirty (30) days of the time Appellant knew or should have known of the basis for the claim, and, as discussed in more detail below, are required to be dismissed pursuant to COMAR 21.10.04.02C.

Thus, Appellant's claims encompassed by the appeal docketed as MSBCA 1940 that seek at least $300,000 for financial and time damages as amended upward in Appellant's second amended complaint to $573,986 were not timely filed and are required to be dismissed. The Board had already dismissed what remained at issue in MSBCA 1940, (i.e., Appellant's request that this Board direct that MTA reduce alleged oral ("verbal") directives to writing) by Memorandum Opinion dated January

3, 1997. That Memorandum Opinion is incorporated herein by reference and for the reasons set forth therein the portion of MSBCA 1940 that deals with Appellant's request that this Board direct that MTA reduce alleged oral ("verbal") directives to writing is dismissed with prejudice for the reasons set forth herein and in the Board's Memorandum Opinion of January 3, 1997.

Accordingly, Appellant's entire appeal docketed as MSBCA No. 1940 is dismissed with prejudice.

MSBCA 2094

The Board lacks authority to direct that a State agency put certain matters in writing upon the agency's refusal to do so. We so said in our Memorandum Opinion of January 3, 1997 which, as noted above, is incorporated herein by reference.

Therefore, the identical relief requested in MSBCA No. 2094, wherein Appellant refiled on identical grounds as that previously set forth in MSBCA No. 1940, is beyond the Board's authority to grant and the appeal asking for such relief must be dismissed. Since this is the only relief requested in MSBCA No. 2094, the appeal in MSBCA No. 2094 is dismissed with prejudice.

We now turn to the remaining motions as they pertain to the remaining captioned appeals.

MSBCA Nos. 2039, 2040, 2041, 2042, 2043, 2044, 2045 and 2093

The Board will also dismiss with prejudice the appeals in MSBCA Nos. 2039, 2040, 2041, 2042, 2043, 2044, 2045 and 2093 due to Appellant's failure to file a timely notice of claim.

The Board finds that the applicable laws are the applicable provisions of the General Procurement Law and COMAR prior to October 1, 1996. Application of such applicable laws after October 1, 1996 would, however, lead to the same result.

The following facts and decision focus on each particular appeal.

MSBCA 2039

1. On June 3, 1997 Appellant submitted Claim No. 1 [15] upon which this appeal is based.
2. Claim 1 requests direct costs for labor, material and equipment for work related to the framing of the mezzanine expansion joint on June 14, 1994, the first pour of the mezzanine slab on June 15, 1994 and the rejection of the mezzanine slab on June 16, 1994.
3. The last day on which Appellant claims it incurred any cost related to Claim 1 was February 26, 1995, the date that all work relating to the installation of the joint sealer was completed.

State Fin. & Proc. Code Ann. §15-217(b) and COMAR 21.10.04.02A require a contractor to file written notice of a claim within 30 days after the basis for the claim is known or should have been known. Claim 1 is based on events which occurred between June 14 1994 and February 26, 1995. Appellant did not file Claim 1 until May 30, 1997, over two years later. Claim No. 1 was thus filed over two years after Appellant knew of the basis for its claim.

Therefore, claim No. 1 was not timely filed as required by State Fin. & Proc. Code Ann. §15-217(b) [or §219(a)] and COMAR 21.10.04.02A.

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[15]Claim Nos. 1 through 7 (MSBCA Nos. 2039-2045) as filed on June 3, 1997 consisted of both the notice of claim and claim. These claims involve matter that was previously the subject of settlement negotiations. On August 9, 1996, counsel for Appellant informed MTA that settlement negotiations had reached an impasse and withdrew outstanding change proposals stating that.

> *As to the subject matter of these change proposals, Arundel shall hereafter formally submit claims to MTA pursuant to GP-5.14, General Provisions for Construction Contracts (1989), so that they may be adjudicated by the Procurement Officer and then be subject to appeal to the Maryland State board of Contract Appeals.*

Pursuant to COMAR 21.10.04.02C, MSBCA No. 2039 must be dismissed. The Board, thus, lacks the authority to consider the claim and MSBCA 2039 is dismissed with prejudice.

MSBCA 2040

1. On June 3, 1997 Appellant submitted Claim No. 2 upon which this appeal is based.
2. Claim No. 2 requests direct costs for labor, material and equipment for work related to concrete construction beginning in May of 1994 and continuing until October of 1994.

State Fin. & Proc. Code Ann. §15-217(b) and COMAR 21.10.04.02A require a contractor to file written notice of a claim within 30 days after the basis for the claim is known or should have been known. Claim No. 2 is based on events which occurred between May and October of 1994. Appellant did not file Claim No. 2 until June 3, 1997, over two and a half years later. Claim No. 2 was filed over two and one half years after Appellant knew of the basis for its claim.

Therefore, Claim No. 2 was not timely filed as required by State Fin. & Proc. Code Ann. §15-217(b) [or §15-219(a)] and COMAR 21.10.04.02A. Pursuant to COMAR 21.10.04.02C, MSBCA No. 2040 must be dismissed. The Board, thus, lacks the authority to consider the claim and MSBCA 2040 is dismissed with prejudice.

MSBCA 2041

1. On June 3, 1997, Appellant submitted Claim No. 3 upon which this appeal is based.
2. Claim No. 3 requests direct costs for labor, materials and equipment for work related to the performance of platform surveys between July 10, 1994 and July 25, 1994 and the cost of keeping survey equipment on the sit for four months until November 1994) and the cost of installing fiberglass angles and associated work.

State Fin. & Proc. Code Ann. §15-217(b) and COMAR 21.10.04.02A require a contractor to file written notice of a claim within 30 days after the basis for the claim is known or should have been known. Claim No. 3 is based on events which occurred between July and November of 1994. Appellant did not file Claim No. 3 until June 3, 1997, some two and a half years later. Claim No. 3 was filed over two and a half years after Appellant knew of the basis for its claim.

Therefore, Claim No. 3 was not timely filed as required by State Fin. & Proc. Code Ann. §15-217(b) [or §15-219(a)] and COMAR 21.10.04.02A. Pursuant to COMAR 21.10.04.02C, MSBCA No. 2041 must be dismissed. The Board, thus, lacks the authority to consider the claim and MSBCA 2041 is dismissed with prejudice.

MSBCA 2042

1. On June 3, 1977, Appellant submitted Claim No. 4 upon which this appeal is based.
2. Claim No. 4 requests direct costs for labor, material and equipment for work related to the refabrication and installation of handrails between April 15, 1994 and April 11, 1995.

State Fin. & Proc. Code Ann. §15-217(b) and COMAR 21.10.04.02A require a contractor to file written notice of a claim within 30 days after the basis for the claim is known or should have been known. Claim No. 4 is based on events which occurred between April 15, 1994 and April 11, 1995. Appellant did not file Claim No. 4 until June 3, 1997, over two years later. Claim No. 4 was filed over two years after Appellant knew of the basis for its claim.

Therefore, Claim No. 4 was not timely filed as required by State Fin. & Proc. Code Ann. §15-217(b) or [§15-219(a)] and COMAR 21.10.04.02A. Pursuant to COMAR 21.10.04.02C, MSBCA No. 2042 must be dismissed. The Board, thus, lacks the authority to consider the claim and MSBCA 2042 is dismissed with prejudice.

MSBCA 2043

1. On June 3, 1977, Appellant submitted Claim No. 5 upon which this appeal is based.
2. Claim No. 5 requests direct costs for labor, material and equipment for work related to the installation of "J" bracket temporary safety barriers on the mezzanine between March 1994 and November 7, 1994.

State Fin. & Proc. Code Ann. §15-217(b) and COMAR 21.10.04.02A require a contractor to file written notice of a claim within 30 days after the basis for the claim is known or should have been known. Claim No. 5 is based on events which occurred between March of 1994 and November 7, 1994. Appellant did not file Claim No. 5 until June 3, 1997, over two years later. Claim No. 5 was filed over two years after Appellant knew of the basis for its claim.

Therefore, Claim No. 5 was not timely filed as required by State Fin. & Proc. Code Ann. §15-217(b) [or §15-219(a)] and COMAR 21.10.04.02A. Pursuant to COMAR 21.10.04.02C, MSBCA No. 2043 must be dismissed. The Board, thus, lacks the authority to consider the claim and MSBCA 2043 is dismissed with prejudice.

MSBCA 2044

1. On June 3, 1997 Appellant submitted Claim No. 6 upon which this appeal is based.
2. Claim No. 6 request direct costs for idled work crews resulting from the need to obtain identification badges on April 28, 1994 and track access delays between June 29, 1994 and December 5, 1994.

State Fin. & Proc. Code Ann. §15-217(b) and COMAR 21.10.04.02A require a contractor to file written notice of a claim within 30 days after the basis for the claim is known or should have been known. Claim No. 6 is based on events which occurred between April 28, 1994

and December 5, 1994. Appellant did not file Claim No. 6 until June 3, 1997, over two years later. Claim No. 6 was filed over two years after Appellant knew of the basis for its claim.

Therefore, Claim No. 6 was not timely filed as required by State Fin. & Proc. Code Ann. §15-217(b) or 219(a) and COMAR 21.10.04.02A. Pursuant to COMAR 21.10.04.02C, MSBCA No. 2044 must be dismissed. The Board thus lacks the authority to consider the claim and MSBCA 2044 is dismissed with prejudice.

MSBCA 2045

1. On June 3, 1997 Appellant submitted Claim No. 7 upon which this appeal is based.
2. Claim No. 7 request direct costs for labor, material and equipment for work related to the automatic doors on the project.
3. Claim No. 7 fails to state the specific dates on which work on the automatic doors was performed. However, all work was completed by the end of April 1995.

State Fin. & Proc. Code Ann. §15-217(b) and COMAR 21.10.04.02A require a contractor to file written notice of a claim within 30 days after the basis for the claim is known or should have been known. Work was completed by the end of April, 1995. However, Claim No. 7 was not filed until over two years later. Claim No. 7 was filed over two years after Appellant knew of the basis for its claim.

Therefore, Claim No. 7 was not timely filed as required by State Fin. & Proc. Code Ann. §15-217(b) [or §15-219(a) and COMAR 21.10.04.02A. Pursuant to COMAR 21.10.04.02C, MSBCA No. 2045 must be dismissed. The Board thus lacks the authority to consider the claim and MSBCA 2045 is dismissed with prejudice.

MSBCA 2093

1. On March 10, 1998 Arundel submitted Claim No. 8 to the MTA. Appellant submitted an amended Claim No. 8 on April 3, 1998.

2. Claim

No. 8 request extended overhead costs for delays and disruptions due to alleged MTA changes.

State Fin. & Proc. Code Ann. §15-217(b) and COMAR 21.10.04.02A require a contractor to file written notice of a claim within 30 days after the basis for the claim is known or should have been known. Claim No. 8 is based on events which occurred between March 9, 1994 (the day the contract was awarded) and the end of April, 1995 (the last day Appellant alleges it performed work on the project.) Claim No. 8 was filed over two and a half years after Appellant knew of the basis for its claim.

Therefore, Claim No. 8 was not timely filed as required by State Fin. & Proc. Code Ann. §15-217(b) or [§15-219(a)] and COMAR 21.10.04.02A. Pursuant to COMAR 21.10.04.02C, MSBCA No. 2093 must be dismissed. The Board thus lacks the authority to consider the claim and MSBCA 2093 is dismissed with prejudice.

For the foregoing reasons, the above-captioned appeals are dismissed with prejudice. Wherefore it is ordered this _____ day of December, 1998 that the above-captioned appeals are dismissed with prejudice.

Dated:

_____
Robert B. Harrison III
Chairman

I concur:

_____
Candida S. Steel

Board Member

Randolph B. Rosencrantz
Board 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 cases.

Annotated Code of 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 10 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 certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1940, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2093 and 2094 Appeal of Arundel Corporation under MTA Contract No. MTA-90-44-11.

Dated:

Mary F. Priscilla
Recorder