

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of Morrison's)
Health Care, Inc.)
) Docket No. MSBCA 2253
Under Maryland State Department)
of Education, Division of)
Rehabilitation Services)
Contract No. R00B9000088)

APPEARANCE FOR APPELLANT: James P. Gillece, Jr., Esq.
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APPEARANCE FOR RESPONDENT: Elliott L. Schoen
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OPINION BY BOARD MEMBER HARRISON ON RESPONDENT'S MOTION TO DISMISS

Respondent, Maryland State Department of Education, Division of Rehabilitation Services (DORS) has moved to dismiss Appellant's claim based upon Appellant's alleged failure to provide a timely Notice of Claim and Claim to DORS. Specifically, DORS asserts that Appellant failed to provide a written notice of its claim within 30 days of when the basis of such claim was known, or should have been known, to Appellant and if it provided a timely Notice of Claim, Appellant thereafter failed to file a timely Claim.

Findings of Fact

1. Appellant asserts that DORS breached the captioned Contract by refusing to pay Appellant under the Estimated Quantities Clause of the Contract for net losses of \$169,500 allegedly incurred by Appellant during the period August 1, 1999 to July 31, 2000.
2. On July 20, 1999, DORS entered into the captioned Contract with

Appellant. The term of the Contract is August 1, 1999 through June 30, 2002. The services to be provided under the Contract are per the specifications and terms in Request for Proposal (RFP) #99-154. Under the Contract and RFP, Appellant agreed to operate and manage the Cafeteria and Food Cart at the Maryland Rehabilitation Center (Center)¹ and to administer DORS's food services training vocational rehabilitation pro-gram.

3. Appellant was notified of the time period for filing a Notice of Claim and Claim, as required by Maryland law, through Paragraph 9 of the Contract. Paragraph 9 of the Contract titled **DISPUTES** (emphasis in original) provides in relevant part: "This contract shall be subject to the provisions of State Finance and Procurement Article, Title 15, Subtitle 2, Annotated Code of Maryland, and COMAR 21.10 (Administrative and Civil Remedies)." These laws require filing of a Notice of Claim and a Claim within specific time frames with the Procurement Officer. The RFP included a sample agreement where notices to DORS were to be sent to Ms. Marilyn Fountain with copies to Ms. Sue Schaffer, DORS Director of Business Support Services. Neither is the Procurement Officer. The Procurement Officer for this Contract was Ms. Norma Scalf.
4. On November 11, 1999, Martin P. Cawley, Regional Vice President for Appellant wrote a letter to Ms. Sue Schaffer, DORS Director of Business Support Services. DORS received

¹ The Maryland Rehabilitation Center is now known as the Workforce and Technology Center. Appellant has continuously been the operator and manager of the cafeteria at the Center since 1972, under succeeding corporate identities.

the letter on or about November 19, 1999. Mr. Cawley asserted that Appellant had experienced significant loss since August of 1999 because the student census count at the Center had dropped and the parties had deviated from the original terms of the Contract. He stated that the responsible course was to return to financial provisions specified in the Contract even if Appellant might not be able to earn what it expected. He further stated that starting with the November billing Appellant would follow the terms of the agreement and bill the rate meal of \$5.36 for each meal served, cash sales would be credited to the invoice for each billing period, and cash sales would be counted the same as student meals.

5. On or about December 9, 1999, Ms. Schaffer replied to Mr. Cawley's November 11, 1999 letter. She disputed his statements that the terms of the Contract had been deviated from and rejected his proposed changes to the Contract.
6. By July 31, 2000, Appellant and DORS reached an agreement to modify the Contract and on September 5, 2000, Appellant executed a written modification of the Contract² which modified the food price structure and the weekend meals service. All other terms of the Contract remained the same. The alleged net losses of \$169,500 for the period August 1, 1999 to July 31, 2000 were not addressed.
7. For all times relevant to this Contract and the Motion to

² The State had previously executed the modification on August 3, 2000.

Dismiss Ms. Norma Scalf has been the appropriate Procurement Officer for DORS to receive a written Notice of Contract Claim and a Contract Claim.

8. On June 14, 2001, Ms. Scalf received a letter from Appellant's counsel dated June 12, 2001 and addressed to Ms. Scalf as Procurement Officer. The letter references COMAR 21.10. 04.02(B) and states that Appellant is providing additional written notice of a claim of monies due and owing to Appellant. It contains an explanation of the claim, including reference to paragraph 18 of the Contract concerning variations in estimated quantities. The letter contains the alleged amount of the claim (\$169,500) and Appellant's allegations of facts upon which the claim is based. Included as attachments are the November 11, 1999 and December 9, 1999 correspondence between Mr. Cawley and Ms. Schaffer that Appellant relies upon to substantiate the claim. The letter also includes as an attachment a certification of Appellant's Vice President and General Counsel certifying that the claim made to the "Maryland Department of Education Procurement Section is in good faith, the supporting data are accurate and complete and the amount requested accurately reflects the Contract adjustment for which I believe the procurement agency is liable."
9. The Board finds that this June 12, 2001 letter is the first and only Notice of Claim, or Claim received by the DORS' Procurement Officer. On August 16, 2001, the DORS' Procurement Officer dismissed Appellant's Contract Claim as

untimely filed.

Decision

This Board, consistent with its charge to conduct expeditious and inexpensive resolution of appeals, will entertain motions to dismiss which the Board refers to as motions for summary disposition because the Board is an Article II executive branch agency and not an Article III Court. See Cherry Hill Construction, Inc., MSBCA 2056,5 MSBCA ¶ 459(1999). DORS, as the moving party, has the burden of showing an absence of any genuine issue of material fact. See, e.g., Mercantile Club, Inc. v. Scheer, 102 Md. App. 757(1995), and the Board will resolve all inferences in making a decision on the Motion in favor of the Appellant, the party against whom the Motion is directed. See, e.g., Honaker v. W.C. and A.N. Miller Dev. Co., 285 Md 216(1979). Applying such standards and for the reasons that follow, the Board will grant DORS' Motion to Dismiss.

State procurement contract claims are subject to an exclusive statutorily prescribed administrative disputes resolution procedure. McLean Contracting Co. v. Maryland Transportation Auth., 70 Md. App. 514(1987), cert. denied, 310 Md. 130(1987). This process presently is set forth in Md. State Fin. & Proc. Ann. Code (SF&P) §§ 15-215, et seq. (2001 Vol.) and has been implemented in the Code of Maryland Regulations (COMAR) at 21.10.04 for contract claims.

SF&P §§ 15-217(b) requires that a written notice of a bid protest or a contract claim must be filed within the time required under regulations adopted by the primary procurement unit responsible for the procurement. This statute has been implemented by regulation promulgated by the Board of Public

Works at COMAR 21.10.04 for contract claims. Specifically, under COMAR 21.10 .04.02A, 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. . . ." The requirements of the current statute and regulation are mandatory.

To initiate a contract claim, a contractor must file written notice of its claim with the appropriate procurement officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier. SF&P § 15-217 (b); COMAR 21.10.04. 02.A. Next, the contractor must submit a written explanation of its claim within 30 days after submitting notice of its claim. COMAR 21.10.04.02.B. COMAR 21.10.04.02.C provides that notices of claim and claims not filed within the required time periods "shall be dismissed."

With respect to the issue here, the regulatory implementation of SF&P § 15-217(b) for contract claims, COMAR 21.10.04.02, permits a contractor to first file a notice of claim and to separately file, within 30 days after the notice, the substantive contents of the claim although the notice of claim and claim may be filed contemporaneously. The substantive contents of the claim must include an explanation of the claim, including reference to all contract provisions upon which it is based; the amount of the claim; the facts upon which the claim is based; all pertinent data and correspondence that the contractor relies upon to substantiate the claim; and a certification by a senior official, officer, or general partner of the contractor. The certification must state that to the best of the person's knowledge and belief, the claim is made in good faith, support-

ing data are accurate and complete, and the amount requested accurately reflects the contract adjustment for which the person believes the procurement agency is liable. Therefore, the regulations for submission of claims provide separately for notice of claim and for the claim itself. These regulations require (1) that both the notice of claim and the claim itself must be in writing and (2) prescribe separate time periods for filing each.

With respect to a notice of claim, COMAR 21.10.04.02.A and C provide:

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.

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

COMAR 21.10.04.02.A thus requires that a contractor must file a notice of claim within a prescribed time. COMAR 21.10.04.02.C further provides that the consequence of non-compliance is that the claim must be dismissed, *i.e.*, it cannot be considered on its merits under the statutory disputes resolution process. The procurement officer's consideration of the claim on its merits must be preceded by a timely filing of the notice of claim and claim.

The State procurement regulations set forth in COMAR Title 21, which were adopted pursuant to statutory authority, have "the force and effect of law." Maryland Port Administration v. John W. Brawner Contracting Co., Inc., 303 Md. 44, 60(1985).

The current statute mandates that the contractor "shall" file a timely written notice of claim. By providing a procedure for claims by contractors against the State, the General Assembly has granted a waiver of its sovereign immunity. That waiver, contained in Md. State Gov't. Code Ann. (SG) §§ 12-201, et seq. (1999) and SF&P §§ 15-215, et seq. (2001), is limited and conditional.

Prior to 1976, the common law doctrine of sovereign immunity precluded contractors from suing the State. The State enjoys immunity from suit unless that immunity is waived as a matter of public policy. See, e.g., Department of Nat. Resources v. Welsh, 308 Md. 54, 58-60 (1986); Calvert Associates v. Department of Employ. and Soc. Servs., 277 Md. 372 (1976). In 1976, the Maryland Legislature enacted a limited waiver of the State's immunity, allowing a contractor to sue the State based on a written contract with the State executed by an authorized State official or employee. See Md. Ann. Code Art. 41A, § 10A (now codified at SG § 12-201 (1999)). In 1981, the Legislature further limited its waiver of immunity by requiring a contractor to comply with, and exhaust, an administrative dispute resolution procedure prior to judicial review in a circuit court.³ McLean Contracting, supra 70 Md. App. 514 at 526. As a prerequisite to the State's waiver, statutes and implementing regulations have required a contractor to submit a timely written notice of its claim. For this reason, the State's waiver of its immunity is not effective unless a contractor submitted a notice of its claim within the mandatory time period.

³ The Legislature created the Department of Transportation Board of Contract Appeals by Ch. 418, Acts of 1978, effective July 1, 1978. Subsequently, the Legislature replaced the Transportation Board with the statewide MSBCA by Ch. 775, Acts of 1980, effective July 1, 1981.

Only the Legislature, (or the Executive Branch or Board of Public Works, acting through delegation), can extend, expand, or modify the limits placed on the State's sovereign immunity. Department of Public Safety v. ARA, 107 Md. App. 445, 460 (1995), aff'd, ARA v. Dept. of Public Safety, 344 Md. 85 (1996). This Board has no authority to extend, expand, or modify the State's waiver of sovereign immunity to include claims not filed within the required time period. The Board's jurisdiction cannot extend beyond what has been expressly conferred upon it. University of Maryland v. MFE Inc./NCP Architects, Inc., 345 Md. 86 (1997). Moreover, absent a legislative waiver, suit does not lie against the State or any of its agencies. Dept. of Public Safety v. ARA, 107 Md. App. at 457. As with any statute in derogation of the common law, a waiver by the Legislature of the State's sovereign immunity must be strictly construed. See Central Collection v. DLD, 112 Md. App. 502, 513 (1996); see also Simpson v. Moore, 323 Md. 215, 228 (1991); Loewinger v. Prince George's Co., 266 Md. 316, 317 (1972); Rich v. City of Baltimore, 265 Md. 647 (1972). Furthermore, State agencies may not waive sovereign immunity. Dept. of Natural Resources, supra 308 Md. at 60. Also, Maryland's courts have declined to abrogate sovereign immunity by judicial fiat. Id. at 59. Without legislative authority to do so, a State agency, this Board, or a Court may not ignore the 30-day deadline for filing a notice of claim.

Contract claim cases are not the only matters subject to strict enforcement of statutory deadlines. Maryland courts have held, in a variety of circumstances, that notice filing requirements are statutory prerequisites to the State's waiver of sovereign immunity. For example, in Samuels v. Tschechtelin, 135 Md. App. 483 (2000), the Court of Special Appeals determined

that the one-year deadline for filing suit under a non-procurement contract was a condition precedent to suit. Similarly, in Simpson v. Moore, 323 Md. 215 (1991), the Court of Appeals determined that the filing of a claim within 180 days of an accident is a statutory prerequisite to an action under the Maryland Tort Claims Act. See also, Haupt v. State, 340 Md. 462, 470 (1995). Further, Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22(1984) held that a State agency could not waive a filing deadline or requirement imposed by regulation pursuant to clear statutory authority.

It is abundantly clear that the State's common law immunity bars suit against the State by contractors unless that immunity has been waived. The State waived its immunity, in a limited fashion, in SG § 12-201 (1999) and SF&P § 15-215, *et seq.* (2001). That waiver, however, is only effective if a timely written notice of claim is filed as required by SF&P § 15-217(b) (2001), and COMAR. Because the State's immunity has not been waived in cases of tardy notices of claim, dismissal of such matters is mandatory.

In 1988, the General Assembly restructured the General Procurement Law as it applied to contract claim submissions. The revised statute required that a timely claim, instead of a "timely demand," be submitted pursuant to administrative procedures. Furthermore, the legislature left it to the procuring agency to determine the proper time to file a notice of claim. See SF&P §15-217(b) (1995) (provision was later altered effective October 1, 1996 as set forth in 2001); see also Cherry Hill Constr., Inc., MSBCA 2056, 5 MSBCA ¶459(1999) (finding that § 15-217(b)(1995) provided that a notice of contract claim must be submitted within the time provided by administrative regulation or be dismissed). In response to this

statutory delegation of authority, the Board of Public Works through promulgation of COMAR 21.10.04.02 implemented a 30-day deadline for the filing of a notice of claim in 1989.

As noted, this Board has previously determined that the 30-day COMAR notice of claim deadline involves a jurisdictional limit. In Cherry Hill Constr., Inc., supra 5 MSBCA ¶459 at p. 13, this Board determined that the regulatory 30-day requirement for filing a notice of a claim was jurisdictional. Moreover, contract claims for which notice was not submitted during the regulatory time period are to be dismissed for lack of subject matter jurisdiction without consideration of prejudice to the State. *Id.* at pp. 15-16. That was the situation in 1995. COMAR 21.10.04.02 still remains in effect, unchanged in any material way and under the facts of this appeal dismissal is required.

Appellant asserts that on November 11, 1999, three months after the Contract began, it provided written notice to DORS' "signaling" a variance below estimated quantities in the agreement and that adjustments must immediately be made. However, Appellant's November 11, 1999 letter was not a notice of claim as required by COMAR 21.10.04.02. It was not sent to DORS's Procurement Officer. The letter does not notify DORS to expect a contract claim; it does not request resolution by the Procurement Officer; and does not demand \$169,500.00. The letter was sent to Ms. Sue Schaffer, DORS' Director of Business Support Services. Ms. Schaffer has never held the position of Procurement Officer nor was she authorized under Maryland law to accept a notice of contract claims.

However, under the Contract Ms. Schaffer was a person designated to receive copies of notices. We shall assume without deciding that the November 11, 1999 letter was a demand by a party for an equitable adjustment under the Variations in

Estimated Quantities Clause, Paragraph 18, of the Contract. As such it was a notice Ms. Schaffer was to receive a copy of. Mr. Cawley's November 11, 1999 letter states that in the first three months of the Contract Appellant had experienced significant loss because the student census count at the Center had dropped and the parties had deviated from the original terms of the Contract. He proposed that Appellant and DORS return to financial provisions specified in the Contract even if Appellant might not be able to earn what it expected. He further proposed that starting with the November, 1999 billing, Appellant follow the terms of the agreement, bill all meals served at \$5.36, credit cash sales to DORS, and count cash sales the same as student meals. In a December 9, 1999 written response to Mr. Cawley's letter, Ms. Schaffer disputed his assertions that the parties had deviated from the terms of the Contract. She argued that the Contract had been followed and rejected his proposed terms as unacceptable. In effect, she declined to honor his request for an equitable adjustment based on the Variations in Estimated Quantities Clause as set forth in Paragraph 18 of the Contract. Thus upon receipt of the December 9 response from DORS', Appellant had 30 days within which to file a notice of claim with the Procurement Officer.

Between DORS receipt of the November 11, 1999 letter and July of 2000, Appellant and DORS representatives engaged in negotiations. By July 31, 2000 Appellant and DORS had reached an agreement and a modification of the Contract was fully executed by September 5, 2000. Under the modification, the Contract was modified to change the food price structure and the weekend meals service. All other terms of the Contract remained the same. The modification did not address the alleged net losses of \$169,500 for the period August 1, 1999 to July 31, 2000,

i.e., the claim at issue in this appeal. Between September 5, 2000 and June 13, 2001, DORS did not further communicate in writing with Appellant about the Contract or receive any claim for monies owed. Receipt by the Procurement Officer on June 14, 2001 of the letter of June 12, 2001 constituted the only notice of claim and claim at issue in this appeal.

The June 12, 2001 letter clearly shows that by November 11, 1999, Appellant knew or should have known it had the basis for a claim. Thus, from that date, it had 30 days to file a notice of claim with the DORS' Procurement Officer which it did not. Even if the November 11, 1999 letter is considered to be a notice of claim, Appellant did not submit a claim until June 12, 2001, almost 600 days beyond the required 30 day time period for documenting a claim following the filing of a notice of claim.

The June 12, 2001 letter to Ms. Norma Scalf is the only written material from Appellant which purports to be a notice of claim or a claim. The letter references COMAR 21.10.04.02, the notice of claim provision for initiating a contract dispute. The letter contains an explanation of the claim, including reference to the Contract provision upon which it is based, Paragraph 18 of the Contract concerning the Variation in Estimated Quantities Clause. It contains the alleged amount of the claim and the facts upon which the claim is based and includes the November 11, 1999 and December 9, 1999 letters between Mr. Cawley and Ms. Schaffer, which Appellant relies upon to substantiate the claim. The letter includes the required certification of the Vice President and General Counsel for Appellant. Although the letter states "this letter is to provide you additional written notice of a claim of monies due," it is in fact the first and only written notice of claim to the DORS' Procurement Officer.

The June 12, 2001 letter is the only written correspondence

from Appellant to the DORS' Procurement Officer contending to be a notice of claim and the only letter to include the elements of a claim required by Maryland law. Earlier correspondence was sent to DORS' employees other than the Procurement Officer and failed to include information required by Maryland law to give DORS notice of a claim or to document a contract claim.

Furthermore, the June 12 letter itself suggests that the notice of claim and claim may be untimely. The letter acknowledges that under COMAR that the written notice of claim is to be filed within thirty (30) days after the basis of the claim was known or should have been known. Despite such admission, Appellant argues that the dispute resolution process should be preserved because DORS failed to properly advise Appellant of the time period to file a notice of claim and claim as required by COMAR. However, it is undisputed that the Contract contained the dispute resolution provisions required by regulation. A review of those provisions would have advised Appellant of the time period for filing a notice of claim. Paragraph 9 of the Contract, titled **DISPUTES** (emphasis in original) states in relevant part: "This contract shall be subject to the provisions of State Finance and Procurement Article, Title 15, Subtitle 2, Annotated Code of Maryland, and COMAR 21.10 (Administrative and Civil Remedies)." The dispute language in the Contract is precisely the wording mandated by COMAR 21.07.01.06. Although this section provides two options for dispute language, a short and long form, the language in this Contract is the permitted short form. This mandatory contract provision notified Appellant of the statute and regulations which would govern disputes under the Contract.

The facts demonstrate that Appellant commenced this action no earlier than June 14, 2001 when the DORS' Procurement

Officer, Norma Scalf, received the June 12, 2001 letter from Appellant's counsel. Furthermore, the record reflects that Appellant had known the basis of the claim since November 11, 1999. Since Appellant's notice of claim and claim were thus not timely filed this Board is divested of subject matter jurisdiction pursuant to SF&P 15-217(b) and COMAR 21.10.04.02C.

Therefore, it is Ordered this day of
that the appeal is dismissed for lack of jurisdiction.

Dated:

Robert B. Harrison III
Board Member

I concur:

Randolph B. Rosencrantz
Chairman

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 2253, appeal of Morrison's Health Care, Inc. under Maryland State Department of Education, Division of Rehabilitation Services Contract No. R00B9000088.

Dated:

Mary F. Priscilla
Recorder