

STATE OF MARYLAND
BOARD OF CONTRACT APPEALS
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SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. 2266	Date of Decision: 04/10/03
Appeal Type: [] Bid Protest	[X] Contract Claim
Procurement Identification: Under DGS Project No. SG-000-003-003	
Appellant/Respondent: Absolute Environmental Contractors, Inc. Maryland Department of General Services	

Decision Summary:

Equitable Adjustment - Jury Verdict - Where the record reflects that an appellant is entitled to an equitable adjustment, but the actual amount of the adjustment is not established, the Board will apply a jury verdict approach to determine the amount of the adjustment.

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

In The Appeal of Absolute)
Environmental Contractors,)
Inc.)
)
) Docket No. MSBCA 2266
)
Under DGS Project No. SG-000-)
003-003)

APPEARANCE FOR APPELLANT: Douglas H. Seitz, Esq.
 Scaldara & Potler, LLP
 Baltimore, Maryland

APPEARANCE FOR RESPONDENT: Joel H. Oleinik
 Assistant Attorney General
 Baltimore, Maryland

OPINION BY BOARD MEMBER HARRISON

This appeal arises out of Department of General Services (DGS) Project No. SG-000-003-003 (Project) involving a contract between DGS and Appellant to provide asbestos removal and replacement of floor coverings and underlying mastics and residues in Red Brick Cottages #1 and #2 at Spring Grove Hospital Center. Appellant seeks an equitable adjustment based on its alleged removal of two (2) distinct layers of mastic throughout the entire project. Specifically, Appellant contends that the removal of only one (1) type of mastic (white/yellow) was contemplated under the Contract and that it is entitled to additional compensation for the removal of the second type of mastic (black).

Respondent argues for dismissal of the appeal on the basis of Appellant's alleged failure to file a claim with the Procurement Officer, in accordance with COMAR 21.10.04.02B, and that the Board thus lacks jurisdiction over this matter.

Respondent also asserts that the appeal fails on the merits. Respondent argues that the removal of the black mastic fell within the description of the scope of work that was included as part of the detailed Contract specifications which description stated that

removal was to be "to the concrete slab of all existing layers ... including any mastics and residues." Respondent also argues that Appellant's appeal should be denied because it has already received, pursuant to a unilateral change order, payment in full for the removal of the black mastic, which the evidence allegedly shows to have covered only approximately 20% of the square footage of the Project.

Finally, Respondent argues that Appellant may not maintain this action based on the forfeiture of its authority to conduct business in the State of Maryland.

Appellant denies that the Board lacks jurisdiction, asserts entitlement, and contends that it may maintain this action.

Findings of Fact

1. By letter dated May 17, 2001 with attachments, Appellant, through its President, Philip Finkle, informed the DGS Procurement Officer on the Project, Timothy Kepp, of the mastic issue, and he referred to the matter as a claim. The cost for black mastic removal was not set forth.
2. The May 17, 2001 letter was sent by both facsimile and regular mail. The facsimile copy of the letter was transmitted and received on May 18, 2001, and the hard copy of the letter was received through regular mail on May 31, 2001.
3. By letter dated June 13, 2001, Mr. Kepp acknowledged receipt of Mr. Finkle's May 17, 2001 letter and informed Mr. Finkle that the May 17, 2001 letter would be considered as a notice of claim under COMAR 21.10.04.02A. Mr. Kepp also advised Mr. Finkle that he would respond with his Procurement Officer's final decision "[u]pon receipt of a timely and properly documented and certified claim pursuant to COMAR 21.10.04.02B."
4. Appellant, through Mr. Finkle, and DGS personnel thereafter exchanged various correspondence relating to the mastic issue including a letter from Mr. Finkle dated June 18, 2002 in which the cost of the black mastic removal was set forth. By way of this correspondence and related discussions, the parties engaged in negotiations for a change order with

- respect to the removal of the black mastic.
5. Those negotiations were only partially successful and culminated in the issuance of a unilateral change order by DGS on December 28, 2001, whereby payment was made to Appellant for removal of the black mastic in an amount corresponding to 20% of the total square footage of the Project.
 6. This appeal was filed on January 14, 2002.
 7. Mr. Kepp never issued a Procurement Officer's final decision with respect to this matter as contemplated under COMAR 21.10.04.04E(2)(a). He explained at the hearing that a final decision was not issued because, in his opinion, Appellant never submitted a claim to him in accordance with COMAR 21.10.04.02B. However, this Contract is a construction contract, and, pursuant to COMAR 21.10.04.04E, if a claim had been filed, an appeal to this Board could be taken on a deemed denied basis ninety (90) days (based on the fact that the amount of the claim is less than \$50,000) after Mr. Kepp received the claim. We find that a claim was filed and that the Board thus has jurisdiction over the appeal.¹

Decision

Failure to File a Claim.

We shall first deal with the argument that the Board lacks jurisdiction because of an alleged failure to file a proper claim.

The law applicable to this appeal, involving a construction contract entered into after October 1, 1999, is set forth in *Section 15-219* of the *State Finance and Procurement Article* (Statute). *Section 15-219* provides in relevant part:

§ 15-219. Same - Contract claims for construction contracts.

(a) *Notice of claim must be filed within 30 days.*- 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

¹The Board recognizes that it may be argued that Appellant was required to file its appeal to the Board on a ninety (90) day deemed denied basis earlier than January 14, 2002. We note, however, that the unilateral change order, which only partially recognized the validity of the claim, was not issued until December 28, 2001, less than thirty (30) days from the date the appeal was filed.

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

(b) *Explanation of claim.*— 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.

The COMAR regulations supporting the Statute² add a requirement that the claim be certified. Specifically COMAR 21.10.04.02B(5) provides:

(5) A certification by a senior official, officer, or general partner of the contractor or the subcontractor, as applicable, that, to

²The COMAR regulations in question, COMAR 21.10.04.02B provide:

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

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.

Respondent argues that Appellant's claim is defective because it does not contain a certification and thus could not be considered by the Procurement Officer. Respondent asserts that the requirement for certification is substantive and mandatory in nature and that it is thus necessary to perfect a claim. The Board agrees that the requirement for certification is substantive, and we have so indicated in a recent opinion. In Morrison's Health Care, Inc., MSBCA 2253, 5 MSBCA _____ at p.5 (2002), we noted "[t]he substantive contents of the claim must include ... a certification by a senior officer, officer, or general partner of the contractor." While we recognize that the Statute does not require certification, we believe the COMAR requirement promulgated by the Board of Public Works to be appropriate and enforceable.

Mr. Finkle's letter of May 17, 2001, as supplemented by his letter of June 18, 2001 (which set forth the amount claimed), does not contain the certification language set forth above. Nevertheless, Appellant argues that the totality of circumstances reflects that the certification requirement was met.

COMAR 21.10.04.02B sets forth what is necessary for a claim to be valid, and Appellant argues that it met the conditions of this section with its May 17, 2001 and June 18, 2001 correspondence because:

- (1) The initial claim was submitted to the Procurement Officer, Tim Kepp (21.10.04.02B);
- (2) Appellant explained the claim in detail (21.10.04.02B(1));
- (3) Appellant clearly explained the amount of the claim (21.10.04.02B(2));
- (4) Appellant explained in detail the facts upon which the

claim is based (21.10.04.02B(3));

- (5) In its May 17, 2001 correspondence, Appellant attached all correspondence that it relied upon to substantiate the claim (21.10.04.02B(4)); and, specifically as to certification,
- (6) The claim was certified (21.10.04.02B(5)) because:
 - a. All correspondence asserting this claim was signed by Appellant's President, Mr. Finkle;
 - b. All statements made were to the best of Mr. Finkle's knowledge and belief;
 - c. The claim was made in good faith and the existence of the claim was supported by written statements made by Martel Labs, the DGS on-site industrial hygienist;
 - d. Supporting data were accurate and complete; and
 - e. The amount requested accurately reflected the adjustment for which Mr. Finkle believed that DGS was responsible.

While these factors taken together may show Appellant's good faith assessment of its claim, and while Mr. Finkle testified about Appellant's claim at length, and under oath, at the hearing of the appeal on November 25, 2002, technically the claim was not certified because it does not contain the certification language contained in COMAR 21.10.04.02B(5) which is set forth above. Notwithstanding this failure, the Board will not dismiss the appeal because of Appellant's failure to certify its claim, at least under the facts in this appeal where it does not appear that the Respondent was, in fact, prejudiced by such failure. It is clear from the record that the position of DGS, pre- and post-receipt of the Appellant's May 17, 2001 and June 18, 2001 letters, has been that there is no entitlement beyond the payment for removal of black mastic in an amount corresponding to 20% of the total square footage of the Project, which was conveyed through the issuance of a unilateral change order on December 28, 2001. Therefore, the

fact that the Procurement Officer did not believe that he had ever received a claim following his receipt of the May 17, 2001 correspondence, which he treated as a notice of claim, may not be said to have materially prejudiced the State. We recognize that our determination herein represents a retreat from our decision in Cherry Hill Construction, Inc., MSBCA 2056, 5 MSBCA ¶459(1999), wherein we said in finding that the Board lacks jurisdiction over an untimely claim without regard to actual prejudice:

In sum, the Board's subject matter jurisdiction is limited to that which has been specifically conferred upon it by the legislature in Title 15 of Division II of the State Finance and Procurement Article. University of Maryland v. MFE Incorporated/NCP Architects, Incorporated, 345 Md. 86(1997). The Board only has jurisdiction over a claim that is timely filed under and otherwise meets the requirements of COMAR 21.10.04 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. The Board finds that the lack of subject matter jurisdiction mandates dismissal regardless of allegations of lack of prejudice to the State arising from the delay.

We thus held that, without regard to prejudice, a contractor must not only file a timely claim but a claim that also meets the other requirements of COMAR 21.10.04, which include certification. Our retreat, however, is limited to the issue of certification under the particular facts of this appeal. We note that COMAR 21.10.04.02C only requires dismissal of a claim or notice of claim that is not timely filed; failure to certify a claim does not appear to require dismissal.

Forfeiture of Authority to Conduct Business.

We shall next consider the Respondent's argument that Appellant may not maintain this action based on the forfeiture of Appellant's authority to conduct business in the State of Maryland.

Appellant is a Virginia corporation. Admitted into evidence as Respondent's Exhibits 6 and 7 were written certifications from the State of Maryland's Department of Assessments and Taxation establishing that Appellant forfeited its authority to do business in the State of Maryland on November 15, 2001 for failure to file a 2001 personal property tax return and establishing that Appellant retained that status as of the date of the hearing.³ Mr. Finkle also confirmed that Appellant continued to conduct business in Maryland after the forfeiture.

Section 7-301 of the Corporations and Associations Article of the Annotated Code of Maryland bars a foreign corporation from "maintain[ing] a suit in any court of this State" when that "corporation is doing or has done any intrastate, interstate, or foreign business in this State without complying with the requirements of Subtitle 2 of this title." See Gilbraltar Constr. and Eng'g, Inc. v. State National Bank, 265 Md. 530, 535-36 (1972). As a result of the forfeiture of its right to conduct business in Maryland, Appellant was no longer in compliance with *Section 7-203 of the Corporations and Associations Article* relating to its qualification to do intrastate business. Appellant therefore may be barred under *Section 7-301* from maintaining a suit in the Maryland court system.

The parties disagree concerning the proper interpretation of the Statute. Respondent cites Gilbraltar Constr. and Eng'g, Inc. v. State National Bank, *supra* for the proposition that no suit could be maintained because Appellant was doing or had done business in Maryland without complying with the requirements of the Statute. Appellant, citing Yangming Marine Transportation Corp. v. Revon Products U.S.A., Inc., 311 Md. 496(1988), argues that the Statute bars an unqualified or unregistered foreign corporation only if the corporation is doing such a substantial amount of localized business in Maryland that it could be deemed present here. However, we shall not decide the question of whether

³It is Respondent's understanding that Appellant's status remained unchanged as of the date of the filing of Respondent's Post Hearing Brief on January 31, 2003.

Appellant would be precluded from maintaining a suit in court. This Board is an *Article II* executive branch agency and not an *Article III* court. We believe that *Section 7-301* does not reach appeals before this executive branch agency, and, thus, we will not dismiss Appellant's appeal. Nevertheless, we are further of the opinion that any money that might be awarded by the Board as an equitable adjustment herein could be offset by any tax monies that Appellant may owe to the State. In this regard, we note that General Condition 8.06 of the Contract provides that the State may withhold payment for any debt owed to the State.

Merits.

We shall now address the merits of the appeal. Respondent first argues that the removal of the black mastic fell within the scope of the required work under the Contract specifications.

In construing contracts, "Maryland courts have long adhered to the principle of the objective interpretation of contracts." Wells v. Chevy Chase Bank, F.S.B., 363 Md. 232, 250 (2001); see Cherry Hill Construction, Inc., MSBCA 2025 and 2048, 5 MSBCA ¶468 at p.6 (1999); Whiting-Turner Contracting Co., MSBCA 1975, 5 MSBCA ¶418 at p.3 (1997). Under that objective interpretation principle, absent an ambiguity in the Contract language, the language will be accorded its plain and ordinary meaning. See Wells, 363 Md. at p.251; Cherry Hill, at p.9; Whiting-Turner, at p.3.

With respect to this project, the description of the scope of work that was included within the Contract specifications read in pertinent part, as follows:

Red Brick Cottage I

1. Removal **to the concrete slab** and disposal of all existing layers of asbestos containing materials consisting of approximately 6,629 square feet of vinyl sheet flooring, 952 square feet of carpeting, 144 square feet of 12" x 12" tiles including any mastics and residues.

Red Brick Cottage II

1. Removal **to the concrete slab** and disposal of all existing layers of asbestos containing materials consisting of approximately 5,418 square feet of vinyl sheet flooring, 1,971 square feet of carpeting, 56 square feet of 12" x 12" tiles including any mastics and residues.

The language of the Contract specifications as set forth above provided that the scope of work with respect to both buildings was to include "[r]emoval **to the concrete slab** and disposal of all existing layers . . . including any mastics and residues." The language required the removal of any mastics encountered. However, Mr. Finkle testified that only white/yellow mastic should have been expected due to the nature of the Project. Appellant's Mr. Finkle further testified that Appellant's bid was based on such assumption. As stated in a letter from Mr. Finkle to DGS dated May 9, 2001:

In your absence, I spoke with Bart Thomas regarding area and mastic work as indicated to you in my previous correspondence.

At Cottage II our measurements reflect abatement required of 3170 sf on the first floor and 4789 sf on the second floor for a total of 7959 sf of vinyl. The spec calls for 5418 sf, with a difference of 2541 sf which is extra work. Bart suggested we confirm the measurements with the on site IH, which we have scheduled for May 9, 2001 (today).

With regards to the mastic, it was known and understood that all vinyl mastic was to be removed, but it was not known or identified in the spec that floor tile mastic would also be in place. The spec does not state remove two (2) different types of mastic. The chemical to remove the white mastic will not remove the

black mastic. This is the same as uncovering multiple layers of floor tile unknown on bid. The owner would approve compensation for unforeseen layers. Therefore it is unforeseen and should constitute a change order.

The Board agrees with Appellant that encountered black mastic should not have been foreseen and that the "mastics" referred to in the Contract specifications would be white/yellow mastic. Pursuant to the unilateral change order, Appellant has already been found by DGS to be entitled to compensation for removal of the black mastic albeit only in an amount corresponding to 20% of the total square footage of the project. That 20% figure was derived from the estimate provided by the DGS on-site industrial hygienist, Mr. Wayne Kucenski of Martel Labs, of the percentage of the total square footage that was covered with black mastic.

Mr. Kucenski was the only witness at the hearing who actually entered the containment area and observed the black mastic. In his testimony, Mr. Kucenski stated that while the black mastic was discovered in most of the rooms in the two (2) buildings, it was only found in patches and did not cover the entire rooms. He also confirmed his estimate that black mastic covered only approximately 20% of the total square footage of the Project. In that regard, Mr. Kucenski testified that he originally conveyed his 20% estimate orally to the DGS Project Manager, Mr. David Ralls, during the course of the Project. He thereafter provided a handwritten note containing the estimate near the end of the Project. Finally, he provided a typewritten version of the estimate after the completion of the Project.

The other evidence relating to the degree of coverage of the black mastic came from the testimony of Mr. Finkle. In particular, Mr. Finkle offered hearsay testimony of an alleged statement made by Appellant's Project Manager that "the mastics were - - and the glues were throughout the project." He also testified that his Project Manager never indicated to him "that they were just in

patches." There is no dispute that the black mastic was found in most of the rooms. The dispute is whether the black mastic covered the entirety of each of those rooms. It is the opinion of Mr. Finkle, who has over twenty (20) years experience involving numerous environmental abatement projects, that old buildings such as the ones in question would have black mastic over an entire room and not just in one portion of a room.

Mr. Finkle also testified that Appellant's allegation that 100% of the Project was covered with black mastic was supported by the amount of the materials expended on the job site and delivered to the job site. In particular, Mr. Finkle testified that he relied upon logs prepared by his employees describing the materials expended on the project and delivery tickets from a supplier describing materials delivered to the job site. Mr. Finkle acknowledged, however, that the employee logs were not necessarily accurate. In addition, the delivery tickets do not reflect a delivery of black mastic remover to the job site until long after the removal of the black mastic had commenced. Mr. Finkle attempted to explain the discrepancy by testifying that certain of the materials utilized on the job site originally came from Appellant's warehouse, but he was unable to provide any documentation in support of that statement.

Furthermore, Mr. Kucenski testified that Appellant used more of the white/yellow mastic remover than the black mastic remover because the black mastic covered less of the square footage. Mr. Kucenski also testified that Appellant did not use all of the mastic removers that were delivered to the job site and that Appellant used the job site as a staging point for other projects. He testified that he observed employees of Appellant at the job site loading their truck with mastic removers for transportation to another location. In addition, Mr. Finkle confirmed that Appellant had other projects going on in Virginia and the District of Columbia at the time of this Project.

Based on the record, we do not believe that Appellant has met

its burden of showing that black mastic covered 100% of the Project. On the other hand, we believe the evidence establishes that substantially more than 20% of the Project was covered with black mastic. We shall employ a jury verdict approach⁴ and find that the amount of black mastic removed amounted to 50% of the total square footage of the Project.

The record reflects that DGS approved 20% of the total square footage for the two (2) cottages (Red Brick Cottage #1 and Red Brick Cottage #2) for black mastic removal at a price of \$1.42 per square foot. The State thus approved a change for black mastic removal in Red Brick Cottage #1 for 1593 square feet at \$1.42 per square foot, for a total of \$2,262.06, and the State also approved a change for black mastic removal in Red Brick Cottage #2 for 1480 square feet at \$1.42 per square foot, for a total of \$2,101.60. We find the \$1.42 per square foot cost accepted by the State to be reasonable, and, applying a jury verdict approach as discussed above, we shall base the award of an equitable adjustment on %50 of total square feet footage in each cottage rather than 20% of total square footage.

The total square footage for Red Brick Cottage #1 is 7965 square feet. One half of the total square footage is 3982 square feet. Appellant is thus entitled to payment based on the difference between 3982 square feet and 1593 square feet (for which payment has already been received), or 2389 square feet, at the price of \$1.42 per square foot. Multiplying 2389 square feet times a price of \$1.42 per square foot results in an adjustment of \$3,392.38 for black mastic removal at Red Brick Cottage #1.

The total square footage for Red Brick Cottage #2 is 7400. One half of the total square footage is 3700 square feet. Appellant is thus entitled to payment based on the difference between 3700 square feet and 1480 square feet (for which payment has already been received), or 2220 square feet, at the price of

⁴See Orfanos Contractors, Inc., MSBCA 1849, 5 MSBCA ¶410(1996) at pp. 18-20.

\$1.42 per square foot. Multiplying 2220 square feet times a price of \$1.42 per square foot results in an adjustment of \$3,152.40 for black mastic removal at Red Brick Cottage #2.

Therefore, the total equitable adjustment awarded for removal of black mastic at Red Brick Cottages #1 and #2 is \$6,544.78 ($\$3,392.38 + 3,152.40 = 6,544.78$).

The Board declines in its exercise of discretion to award pre-decision interest pursuant to *Section 15-223* of the *State Finance and Procurement Article*.

Wherefore, it is Ordered this _____ day of April, 2003 that the appeal is sustained in the amount of \$6,544.78 and remanded to the Respondent for appropriate action.

Dated:

Robert B. Harrison III
Board Member

I Concur:

Michael J. Collins
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 2266, appeal of Absolute Environmental Contractors, Inc. under DGS Project No. SG-000-003-003.

Dated:

Michael L. Carnahan
Deputy Recorder