

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

In The Appeal of )  
David A. Bramble, Inc. )  
 )  
 ) Docket No. MSBCA 2823  
Under SHA Contract )  
No. WO6345270 )

**APPEARANCE FOR APPELLANT:** C. Daniel Saunders  
Megan Bramble Owings  
Chestertown, Maryland

**APPEARANCE FOR RESPONDENT:** Meryle Freiberg Dunlap  
Assistant Attorney General  
Baltimore, Maryland

**OPINION BY BOARD MEMBER DEMBROW**

This contract dispute arises as the result of certain changes that were made during the course of construction planning pursuant to a design/build contract for a road project. The instant appeal is denied on multiple procedural and substantive grounds, including untimely submission of appellant's notice of claim, untimely submission of the claim itself, inability to establish pre-bid reliance on specifications without the construction modification alleged, and waiver of the claim in accordance with the terms of the contract.

**Findings of Fact**

1. In the summer of 2008, the Maryland State Highway Administration (SHA) held an informational meeting on a certain road improvement project in Worcester County which called for the dualization of US 113, expanding that road from one lane in each direction to two over a length of about 2.5 miles, including the road's crossing over a stream known as Massey Branch.

2. The Request for Proposals (RFP) for this road construction project was conducted as a low-bid design-build two-step procurement process, first identifying qualified contractors and thereafter receiving proposals, including price, which were evaluated with the objective of selecting the best overall value to the State.
3. General Provision 5.14 of the RFP included language which mirrors State law, Md. Code Ann., State Fin. & Proc. §15-219(a), as well as the Code of Maryland Regulations (COMAR) 21.10.04.02 by stating, "A contractor shall file a written notice of a claim within 30 days after the basis for a claim is known or should have been known." (State's Motion Ex. 15, pg. 34-35.)
4. David A. Bramble, Inc. (Bramble) was awarded the contract, for which it agreed to perform the specified work at a total cost to the State of \$12,160,868, using Johnson, Mirmiran & Thompson (JMT) as its engineers for the design phase of the project.
5. Bramble is a reputable and experienced road construction company which has been in business in Maryland for 65 years.
6. In the course of developing its price proposal, Bramble included in its internal rough notes which were not provided to SHA an itemization of a portion of the total cost of the project the sum of \$70,000 for "piles @ Massey Branch" and additional internal rough notes in its pricing calculation reflect the possibility that \$155,000 and/or \$150,000 may also have been included in Bramble's bid for "risk." (State's Hearing Ex. 1, pg. 10; State's Motion Ex. 3, pg. 68; & State's Motion Ex. 4, pgs. 2-4.)
7. At the time of its bid submission, Bramble did not know for certain whether pilings would be needed at Massey Branch, but did know that that was a possibility. (State's Motion Ex. 12, deposition pg. 27.)

8. SHA issued to Bramble a Notice to Proceed on June 17, 2009, with a contract completion date of September 1, 2011.
9. The partnering agreement inherent in this design-build contract expressly required the parties to "resolve issues at the lowest level possible" and RFP § TC-2.06 further stated, "the partnership will be structured to draw on the strengths of each organization through open communication, teamwork and cooperative action. . .The objective is to create an atmosphere of trust and honest dialogue among all stakeholders. . ."
10. Special Provision § 3.11.03.06 of the RFP prescribed for the road crossing over Massey Branch a structural plate arch culvert, but the contractor was conditionally allowed to deviate from that specification by the following provision: "If the Design-build Team proposes to eliminate or introduce new structures, the proposed changes shall be submitted in writing to the [State Highway] Administration's Office of Bridge Development for review and development of any site specific requirements. . ." (State's Hearing Ex. 1, pg. 7; State's Motions Ex. 1, pg. 199.)
11. The subject RFP further provided that the specified structural plate arch culvert was to be constructed using either a deep foundation with pilings or in the alternative, a shallow foundation using only Stone 57 and not pilings; but, unlike another culvert on the project, the option of using a shallow foundation to support the structural plate arch culvert at Massey Branch was contingent upon "improved subgrade as determined by the Design-build Team and approved by the [State Highway] Administration." SP 3.11.03.06.02.A. (State's Hearing Ex. No. 1, pg. 8.)
12. Bramble understood that SHA had authority to dictate site specific requirements beyond those provided by its design-build team. (State's Motion Ex. 3, deposition pg. 82.)

13. Because the prescribed structural plate arch culvert incorporated the installation of large metal pipes under the roadway, that construction design specification as initially set forth by SHA in the RFP was determined by Bramble to be unsuitable to the particular location at issue, where the soil was tested and found to be too acidic and corrosive to preserve the metal culvert pipes for the requisite duration of road preservation.
14. The use of a structural plate arch culvert was also determined by appellant to be unsuitable for use at the Massey Branch road crossing because, according to Bramble's review and evaluation of SHA's initial plan, the diameter of the required metal culvert pipes would intrude upon the surface of the roadway.
15. Special Provision 2.08.01.05 of the RFP, entitled "Duty to Notify if Errors Discovered" states, "If a Bidder discovers . . . an error, omission or discrepancy [in the RFP], he shall *immediately* notify the [State Highway] Administration in writing; failure to do so notify shall constitute a waiver of any claim based upon such error, omission, or discrepancy." (State's Hearing Ex. 2. Emphasis supplied.)
16. It was conceded during sworn testimony at the deposition of David C. Bramble on behalf of appellant that Bramble knew at the time it was reviewing the RFP and developing its bid that there was a defect in SHA's initial design of the road crossing at Massey Branch using a structural plate culvert but did not inform SHA of that defect at that time. (State's Hearing Ex. 3, deposition pgs. 37 & 39-40.)
17. David C. Bramble also testified at deposition that he knew at the time of his development of Bramble's bid proposal that pilings might be required for the road crossing at Massey Branch. (State's Motion Ex. 3, deposition pg. 61.)
18. After contract award, on August 24, 2009, Bramble submitted

to SHA a detailed plan providing for the substitution of a pre-cast segmented concrete box culvert in place of the structural plate arch culvert originally contemplated by SHA and included in the RFP for installation at Massey Branch.

19. Neither the initial plan to use a structural plate arch culvert nor the revised plan proposed by Bramble to use a pre-cast segmented concrete box culvert included the necessity of constructing a deep foundation using pilings to support the culvert, though the original SHA plan contemplated that possibility.
20. Bramble again submitted to SHA on July 2, 2010 a detailed plan for the Massey Branch crossing, relying on a geotechnical engineering analysis based in part upon test borings of subsurface conditions, and concluding that a shallow foundation was sufficient to support the concrete box culvert proposed to be installed at that location.
21. On August 25, 2010, based in part upon its reading and review of the same test borings, SHA differed with that conclusion and notified Bramble "that a pile foundation may be more appropriate for this structure. . ." (Rule 4 file, Tab 28.)
22. Geotechnical engineering experts at JMT on behalf of appellant are prepared to testify at trial in this appeal that a shallow foundation would have been perfectly suitable to support the concrete box culverts at Massey Branch, while experts in bridge and road construction at SHA are prepared to testify that SHA had good cause to demand a deep foundation with pilings at that location in order to prevent differential settlement and the resulting possibility of developing cracks in the concrete boxes.
23. Discussions continued between the parties concerning the propriety of using a shallow instead of a deep foundation to support the concrete box culvert which was proposed to be

substituted for the structural plate arch culvert originally contemplated by SHA, including communications that occurred on October 20, 2010 as well as during a partnering meeting on November 3, 2010 and related communications on January 19 and March 3, 2011, during which SHA expressed its concern over the possibility of differential settlement of the concrete box culvert, leading to the potential of cracks in the culvert.

24. David C. Bramble testified at his deposition that appellant knew as early as March 3 as well as on March 9, 2011 that SHA was rejecting Bramble's proposal to use a shallow foundation at the Massey Branch crossing. (State's Motion Ex. 3, deposition pgs. 89-90.)
25. By e-mail communication on March 18, 2011, David C. Bramble on behalf of appellant advised Jack Moeller at JMT, "I am working on a claim letter when I get a draft I will send it for your comments." (State's Hearing Ex. 8.)
26. On May 13, 2011 Bramble requested from SHA additional compensation in the amount of \$296,690 as the added cost of installing pilings to construct a deep foundation rather than using crushed stone for a shallow foundation at Massey Branch, exclusive of additional costs attributable to 52 days of claimed delay alleged by Bramble to have been incurred due to SHA's contract changes, though appellant concedes that its delay claim was the result of multiple issues for which no apportionment was provided. (State's Motion Ex. 3, pg. 156; State's Motion Ex. 9; & State's Motion Ex. 14, pgs. 105-106.)
27. On June 10, 2011, SHA responded to the aforementioned letter by denying Bramble's request for additional compensation.
28. On Monday, July 11, 2011, thirty-one (31) days after SHA's claim denial, Bramble filed a formal Notice of Claim with SHA's Office of Construction seeking compensation for the

extra cost of the deep foundation pilings that SHA insisted upon notwithstanding the recommendations of Bramble and its design engineers at JMT.

29. Less than ninety (90) days later, on October 6, 2011, Bramble requested an extension of time within which to file its substantive claim, advising SHA on October 14, 2011 that it intended to file its claim "by the end of the year."
30. Bramble finally submitted to SHA its substantive claim for additional compensation on February 24, 2012 and after further delay SHA denied that claim on August 23, 2012. (Appellant's Complaint, Ex. 14; Hearing Transcript, pg. 21, line 19.)
31. Bramble filed a timely Notice of Appeal to the Maryland State Board of Contract Appeals (Board) on August 30, 2012, which was docketed by the Board as MSBCA 2823, the instant appeal.
32. Following extensive discovery, on October 2, 2013, SHA filed a Motion for Summary Decision which was heard by the Board on October 23, 2013.

#### **Decision**

Unfortunately for Bramble, the Board's analysis of the instant appeal may begin and end with reference to applicable State law requiring that "a contractor shall file a written notice of a claim relating to a procurement contract for construction within 30 days after the basis of the claim is known or should have been known." Md. Code Ann., State Fin. & Proc. §15-219(a). That 30-day notice requirement is repeated in COMAR 21.10.04.02A and a subsequent COMAR section, 21.10.04.02C, provides further that "A notice of claim or a claim that is not filed within the time prescribed in Regulation .02 of this chapter *shall* be dismissed." (Emphasis supplied.) The Board is without discretion to deviate from this plain requirement of law and regulation which was also repeated *verbatim* in the RFP and

certainly well known to a highway construction contractor that has been in business in Maryland for decades.

The State might have contended that the basis of appellant's claim was known as early as October 20, 2010, or for that matter, even before Bramble's bid was submitted, but instead, SHA argues that the operative date for commencement of the running of the statute of limitation was later, on March 3, 2011. That is the day that David C. Bramble admitted under oath at his deposition that he had actual knowledge of SHA's rejection of appellant's proposal to use a shallow foundation without pilings to support a concrete box culvert at the Massey Branch crossing. That sworn testimony remains uncontroverted by any prospective evidence offered or referenced by appellant.

It is also undisputed that on March 9, 2011 Bramble was working to redesign the subject foundation per SHA demands. And shortly afterwards, on March 18, 2011, David C. Bramble advised his design engineers at JMT that appellant was at that time "working on a claim letter." Surely during this time frame Bramble knew that it had a claim. Why else would it be working on a claim letter?

Yet Bramble directed no formal notice of claim to SHA until July 11, 2011, over four (4) months following appellant's admission in deposition that it had actual knowledge of its claim. The 30-day statute of limitations for affording notice to the State of potential claims by contractors is strict and unforgiving. The Board is afforded no flexibility to depart from the obligation of statute and regulation. SHA is correct in its contention that any notice of claim filed later than April 3, 2011 was untimely. As a consequence, this appeal must be denied.

The Board is not unsympathetic to Bramble's assertion that both the letter and the spirit of a sound and workable partnering agreement embodied by a design/build contract such as the one at issue here not only encourages but requires cooperation and



collaboration among all parties involved, including the contractor and its design engineers along with representatives of the State. But that is not to imply that design/build contracts are exempt from the application of the 30-day statute of limitations for affording the State notice of a prospective claim. If such partnering agreements are to be so exempt, it is up to the legislature and not the Board to establish such an exception which does not currently exist in State law or regulation. State highway contractors may be legitimately frustrated at the short time frame permitted to preserve a claim for additional compensation, but that is what is established in law and SHA may easily defend the reasonable basis of the statutory 30-day notice limitation as appropriate to assure that all parties to a design/build partnering agreement understand at the earliest possible time the potential cost consequences of design alternatives. That permits the State to dictate its requirements with advance knowledge of the possibility of incurring extra costs. In the case of the crossing at Massey Branch, the State was and will remain permitted to assume that no extra costs are incurred by SHA's dictate of constructing a deep foundation with pilings because it received no notice of a claim for costs in timely fashion.

Furthermore, the Board notes that not only was Bramble's Notice of Claim untimely, the actual substantive claim that followed was also filed late. According to Maryland law, "Unless extended by the unit [of state government, in this case SHA], 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." Md. Code Ann., State Fin. & Proc. §15-219(b). This provision in law is also repeated by

the inclusion of substantially identical language in COMAR 21.10.04.02B. But here it is uncontested that appellant filed its Notice of Claim on May 13, 2011 and did not follow-up with the required elements of the claim itself until some nine (9) months later, on February 24, 2012. While it is true that appellant requested an extension of time within which to file its claim, there is no proffer of evidence to suggest that SHA consented to such a continuance. Even if the State had agreed to Bramble's request to be allowed to file its claim by the end of calendar year 2011, appellant failed to file within that time frame and never sought any extension beyond the last day of December 2011. So assuming *arguendo* that the Board were to determine that the failure of SHA to reject Bramble's request for extra time constituted implicit consent to the requested extension, appellant's claim would still be deemed untimely. This is a second basis upon which the instant appeal must be denied.

The requirement of pre-bid reliance also prohibits Bramble's recovery of additional costs under the uncontested circumstances presented here. A contractor cannot expect at the time of its bid to build a project knowing in advance that it may be required to undertake certain work not set forth in an RFP, and thereafter claim that it is entitled to extra compensation for performing the work that it always intended to do, or suspected from the outset that it might be required to do. To repeat the refrain offered by counsel for SHA in these proceedings, in the case of Bramble's work at Massey Branch, "They bid it. They did it. They got paid for it."

Throughout the course of this procurement appellant understood that SHA had authority to dictate site specific requirements beyond those determined by Bramble's design engineers at JMT. This is admitted by deposition testimony which is undisputed and irrefutable. David C. Bramble also testified

at his deposition that he knew at the time he developed his proposal and established his price that pilings might be required at Massey Branch. This testimony is also not rebutted. And the rough notes recorded by David C. Bramble evidencing the basis of his charge to the State of a total lump sum of more than \$12 million reflect that he specifically included in his offered price the sum of \$70,000 for "piles @ Massey Branch." Appellant should not be paid twice for that work and SHA's June 10, 2011 determination not to remit an additional \$296,690 for the piles at Massey Branch was thorough, correct, and fully justified.

In this regard, the Board also harkens to the RFP's Special Provision 2.08.01.05, which required Bramble immediately to notify SHA in writing of any error, omission or discrepancy discovered in the RFP and provided further, "failure to do so notify shall constitute a waiver of any claim based upon such error, omission, or discrepancy." It is undisputed that prior to the time that appellant submitted its bid, Bramble recognized that a structural plate arch culvert, as SHA initially prescribed for the road crossing at Massey Branch, was not feasible for that location. Appellant admits that even before it submitted its proposal to SHA, Bramble intended to install a concrete box culvert instead of a structural plate arch culvert. Appellant may not have known with certainty at that time that a deep foundation with pilings would ultimately be required by SHA, but Bramble admits that it knew that that was also a possibility. Because appellant failed to notify SHA in timely fashion of the design defect it discovered early on in the procurement, according to the express terms of the contract, the contractor thereby waived any subsequent claim it may have made arising from that defect.

In rendering the foregoing decision, the Board is mindful of its obligation at this pre-trial juncture of this litigation to view all evidentiary claims in the light most favorable to

appellant and to resolve all factual inferences in appellant's favor. However, giving appellant the benefit of all doubt, even though there may remain undetermined genuine issues of material fact concerning the necessity of installing at Massey Branch a concrete box culvert instead of a structural plate arch culvert and most importantly, the propriety and reasonableness of SHA's determination to require a deep foundation with pilings to support the concrete box culvert constructed at Massey Branch, regardless of those facts, this appeal must be denied on the basis of other facts which are not in dispute and are dispositive of the outcome of this appeal. Moreover, in dismissing the instant appeal, the Board assumes that Bramble prevails in all of its factual assertions; but irrespective of how the unresolved factual issues may have been resolved at a trial which likely would have included the testimony of expert witnesses on the points mentioned above and other contested factual issues, appellant is nonetheless barred from recovery on the basis of the uncontested facts for which there is no genuine dispute for all of the reasons set forth above and for the additional reasons set forth in the State's Motion for Summary Decision.

Wherefore it is Ordered this \_\_\_\_\_ day of October, 2013 that this appeal be and hereby is DENIED and it is further Ordered that the trial scheduled to commence on November 13, 2013 be and hereby is cancelled.

Dated:

\_\_\_\_\_  
Dana Lee Dembrow  
Board Member

I Concur:

\_\_\_\_\_  
Michael J. Collins  
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 2823, appeal of David A. Bramble, Inc. Under SHA Contract No. W06345270.

Dated:

\_\_\_\_\_  
Michael L. Carnahan  
Deputy Clerk