

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

In The Appeal of )  
Concrete General, Inc. )  
 ) Docket MSBCA Nos. 2693  
 )  
Under State Highway )  
Administration )  
Contract No. MO8685170 )

**APPEARANCE FOR APPELLANT:** Paul O. Jolis, Esq.  
Costa Mesa, California

**APPEARANCE FOR RESPONDENT:** Stanley Turk  
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Assistant Attorneys General  
Baltimore, Maryland

**MEMORANDUM ORDER AND OPINION BY BOARD MEMBER DEMBROW**

This contract dispute comes before the Maryland State Board of Contract Appeals (Board) for ruling on the State's Motion for Summary Decision. Specifically, the State Highway Administration (SHA) argues first, that the appeal must be dismissed because it is not filed in timely fashion and second, that based upon the undisputed matters of material fact admitted during the course of discovery, appellant's claim must be denied as a matter of law. Having reviewed the pertinent pleadings filed herein and considered the oral arguments of counsel at the hearing conducted on the record on July 13, 2011, the Board concludes that the State's Motion must be granted on both grounds and this appeal dismissed.

The underlying contract here at issue was bid in July 2003 providing for the reconstruction of the interchange of Maryland Route 29 and Briggs Chaney Road in Montgomery County. Only one of the elements of that project is subject to this appeal, namely,

Retaining Wall 1 (RW1), a structure on the west side of that interchange intended to preserve and reinforce a significant variance in ground grade levels between the roadbed of Rt. 29 and the adjacent property on which a townhouse development is located very close to and above that road. This particular component of the project was constructed by the Schnabel Foundation Company of Bethesda, Maryland (Schnabel), subcontractor to the general contractor in privity of contract with the State and responsible for the entire job, namely, appellant Concrete General, Inc. (CGI), in whose name this pass-through claim is pursued.

RW1 is considered a "detail/build" element of the overall project by which SHA sets forth certain of the specifications of the desired construction but allows the contractor and its sub some flexibility in determining the precise details of the method of construction and the particular construction components required. With reference to the anchored wall identified as RW1, the contract specifies, 'The term "anchored wall" shall include, but not be limited to ground anchors, galvanized steel soldier piles and wales, **concrete lagging**, concrete facing, and drainage.' (Tab 3, emphasis supplied.) The same section of the contract further states, "The conceptual Plans show the type, size, and location of the wall only...The Contractor may propose other details or systems with similar structural characteristics, which will be considered by the [State Highway] Administration." (Tab 3.) The "Conceptual Anchored Wall Section" blueprint for RW1 also specifies the need for "concrete lagging." (Tab 4.)

Schnabel priced the requisite work to CGI at \$1,639,000 and specifically described its offered work stating, "The system [RW1] will consist of pre-drilled galvanized soldier piles, **precast lagging**, permanent tiebacks and studs..." (Tab 4 and 5, emphasis supplied.) CGI understood Schnabel to offer precast lagging, as required. (Tab 6, pg. 34.) CGI itemized to SHA the entire cost of RW1 at a lump sum of \$3 million and entered into a post-award subcontract for the work to be done by Schnabel for \$1,580,250.

(Tabs 8 and 9.) The contract between CGI and Schnabel contains at least two (2) express references to the use of "precast lagging" for RW1, as required also by CGI's contract with SHA as more specifically set forth above. (Tab 9.) "Precast lagging" implies the use of concrete as compared to timber lagging, which is not cast. Concrete lagging is more expensive than timber lagging but it lasts much longer than wooden lagging, which deteriorates much more rapidly than concrete. SHA's determination to require concrete lagging for RW1 was a deliberate design element incorporated into this project owing to the height of the subject wall as well as the presence of concentrated preexisting housing units immediately adjacent to the road. However, "Geotechnical Engineering Circular No. 4" published by the Federal Highway Administration (FHA) identifying various acceptable building designs for anchored foundation systems prescribe the option of timber lagging as potentially superior to concrete due to the tensile flexibility of wood compared to concrete. (Tab 22.)

On April 28, 2004, shortly after construction of this road project commenced, CGI proposed to SHA that it be allowed to use timber rather than concrete lagging for RW1. Its formal submittal to SHA was completed on July 15, 2004 and on August 3, 2004 SHA agreed to evaluate CGI's request to substitute timber for concrete lagging. (Tab 15.) On August 30, 2004, SHA agreed to allow the substitution proposed by CGI, but only if CGI agreed to encapsulate in concrete the front flanges of the vertically placed soldier piles, or "H"-beams, the flanges of which hold the timber lagging in place. (Tab 14 and 16.) CGI notified its subcontractor of this conditional approval by letter dated September 13, 2004. (Tab 17.) Like the foregoing chronology, it is undisputed that on November 10, 2004, oral discussions occurred between representatives of SHA and CGI concerning the potential of CGI filing a claim with SHA for the extra cost that could be incurred by a change or substitution in the contract allegedly arising from SHA's allowing CGI to use less expensive timber rather than concrete lagging, but

compensating for the absence of concrete lagging by using instead a thicker poured concrete facing to support the anchored foundation structure. (Appellant's Answer to Interrogatory No. 2.) Notwithstanding this conversation, CGI filed no written claim until July 30, 2007. That claim was denied by SHA on September 4, 2007, revised and resubmitted to SHA November 25, 2007, and denied again on February 11, 2008.

Section 15-219(a) of the State Finance and Procurement Article (SF&P) of the Annotated Code of Maryland requires that "a contractor shall file a written notice of a claim relating to a procurement contract for construction within 30 days after the basis for the claim is known or should have been known." Likewise, the Code of Maryland Regulations (COMAR) 21.10.04.01(A) provides, "a contractor shall file a written notice of a 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." COMAR 21.10.04.02(C) further states, "a claim that is not filed within the time prescribed...shall be dismissed." General Provision 5.14(a) of the contract here in dispute sets forth the same requirement, stating, "The Contractor shall file written notice of claim for...equitable adjustment, extra compensation, damages, or any other matter (whether under or relating to this Contract) with the procurement officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier. (Tab 21.)

Here appellant admits by its responses to discovery, including Answers to Interrogatories as well deposition testimony of its agents and representatives, that it had actual knowledge of a claim relating to RW1 no later than November 10, 2004. Indeed, in truth CGI had actual knowledge of the potential of claim on August 30, 2004, when SHA acceded to CGI's request for approval of its proposed design modification. Yet, CGI inexplicably failed to submit to SHA a written notice of its claim until July 30, 2007, nearly three years later. CGI's failure to submit any formal

written notice to SHA in timely fashion operates to SHA's severe prejudice. If the required formal notice of claim had been submitted by the simplest of writings, SHA could have made timely reconsideration of its approval of CGI's request to use timber rather than concrete lagging, and agreed or simply informed CGI that its proposed substitution was unacceptable. Instead, SHA acceded to CGI's request only to learn long after the fact that CGI's subcontractor was expecting additional payment notwithstanding the plain language of the contract which prohibits the same, stating, "No additional compensation will be made for any additional material, equipment, design, or other items found necessary to comply with the project Specifications as a result of the Engineer's review of the design." (Tab 3, pg. 130.) To sum, Maryland statute, regulation, and contract mandate all compel the dismissal of this appeal because it is not timely filed.

The Board also notes that even if the instant claim had been timely filed with SHA within 30 days after August 30, 2004, the Board would still be compelled to dismiss this appeal on substantive grounds rather than just a procedural shortfall. The unambiguous contractual specifications for RW1 called for the use of concrete and not timber lagging. Viewing the evidence in the light most favorable to appellant, there remains no doubt about this simple admitted fact. There is simply no reference whatsoever to the use of timber lagging at RW1, except for a pre-bid inquiry about the acceptability of such a substitution, which SHA clearly answered in the negative. (Tab 23.) Furthermore, no evidence exists to support a contention that either CGI or Schnabel relied upon any alleged contract ambiguity when it bid on the job. Instead, all of the written communications confirm that the parties fully understood the mandate of concrete lagging and agreed to provide it at the time of the bid. In the absence of a genuine issue of material fact on these points, the Board is bound to dismiss this appeal by granting the State's Motion for Summary Decision.

For all of these reasons, SHA's Motion is hereby granted.

Wherefore it is Ordered this \_\_\_\_\_ day of July, 2011 that the above-captioned appeal be and hereby is DISMISSED.

Dated:

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

I Concur:

\_\_\_\_\_  
Michael J. Collins  
Chairman

\_\_\_\_\_  
Ann Marie Doory  
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 decisions in MSBCA 2693, appeal of Concrete General, Inc. under SHA Contract No. MO8685170.

Dated:

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Michael L. Carnahan  
Deputy Clerk