

Docket No. 2144	Date of Decision: 2/9/00
Appeal Type: <input type="checkbox"/> Bid Protest	<input checked="" type="checkbox"/> Contract Claim
Procurement Identification: Under State Highway Administration Contract No. AW551-701-041	
Appellant/Respondent: Engineering Management Services, Inc. d/b/a EMS, Inc. State Highway Administration	

Decision Summary:

Board of Contract Appeals - Jurisdiction - The Board of Contract Appeals lacks jurisdiction to consider a claim where the notice of claim is not timely filed.

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of ENGINEERING)
MANAGEMENT SERVICES, INC. d/b/a)
EMS, INC.)
) Docket No. MSBCA 2144
Under State Highway Administra-)
tion Contract No. AW551-701-041)

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MEMORANDUM OPINION BY CHAIRMAN HARRISON ON
RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

This appeal arises out of a contract to clean and paint five bridges over I-95 in Baltimore and Howard Counties. Appellant, Engineering Management Services, Inc., hereinafter EMS, is seeking a time extension and an equitable adjustment to the Contract in the amount of \$764,036.00. EMS alleges that it is entitled to a time extension and an equitable adjustment because changes in regulations issued by the federal Occupational Safety and Health Administration (OSHA) relating to the level of exposure allowed for lead abatement workers in construction projects, which were enacted after bids were submitted, increased its costs, thereby entitling it to recover the additional cost from the State. SHA denied the claim on the ground that the Contract required EMS to comply with the changed OSHA

regulations.¹ On appeal, Respondent moves for summary disposition on grounds that EMS failed to file a timely notice of claim. For the reasons that follow, we shall grant the motion.

Findings of Fact

1. In March, 1993, SHA issued an invitation for bids in Contract No. AW551-701-041 requesting respective bidders to submit bids on a project that involved the cleaning and painting of five existing bridges over I-95 in Baltimore and Howard Counties.
2. On April 13, 1993, EMS submitted the lowest bid for the Contract.
3. On May 4, 1993, new federal regulations concerning lead exposure for construction workers were issued by the Occupational Safety and Health Administration (OSHA). The federal regulation was titled as an interim final rule "Lead Exposure in Construction." 29 CFR 1926.62.
4. SHA issued a Notice of Award to EMS on May 21, 1993.
5. The new federal regulations promulgated by OSHA became effective on June 3, 1993. 29 CFR 1926.62.
6. On July 26, 1993, SHA issued a Notice to Proceed to EMS.
7. General Provision GP 5.14, Claims, provides:

Unless a shorter period is prescribed by law or elsewhere in this Contract:
 - A. The Contractor shall file a written notice of claim for extension of time, 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.
 - B. Contemporaneously with or within 30 days of the filing of a notice of claim, but not later than the date that final payment is made, a contractor

¹ The changed OSHA regulations are found at 29 CFR 1926.62.

shall submit the claim to the appropriate procurement officer. 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 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 Administration is liable.
- C. The claim shall also contain itemized supporting data for the elements of cost the Contractor claims to have incurred or it will incur. This data shall be in sufficient detail to permit analysis by the Administration of material, labor, equipment, subcontract and overhead costs as well as profit and shall include all work covered by the claim, whether deleted, added, or changed. Subcontract cost shall be supported by similar data.
- D. A notice of claim or a claim that is not filed within the prescribed time shall be dismissed.
8. EMS filed a notice of claim on March 6, 1995 requesting a 180 - day time extension due to the alleged impact on productivity of the new OSHA regulations. The Board finds that this March 6, 1995 letter also constitutes a notice of claim for money damages. At

the time EMS filed this notice it had been working on the project off and on for several months and had been advised by SHA by letter dated April 27, 1994 that the more stringent provisions of the new OSHA regulations would apply to the Contract. Accordingly, EMS undertook to evaluate the effect of compliance with the new OSHA regulations in the April, May 1994 time frame. EMS wrote the SHA District Engineer on May 2, 1994 advising that in a few days it would complete such evaluation. The Board finds that Appellant should have known by the time it completed its evaluation of the cost of compliance with the new OSHA regulations that it would seek an equitable adjustment based on such cost of compliance with the new OSHA regulations. Resolving all inferences in Appellant's favor we find that such evaluation should have been completed by the end of May, 1994 as indicated in Appellant's letter to the District Engineer of May 2, 1994.

9. On June 13, 1995, EMS requested the District Engineer to increase the Contract by \$1,244,564.00 and to grant a 180 - day time extension, because EMS' compliance with the changed federal regulations had greatly increased its costs.
10. On November 15, 1996, EMS filed a claim with the District Engineer requesting an increase of \$2,377,341.00 and a time extension of 100 days on the two final bridges under the Contract alleging that the new federal regulations had increased the costs and time needed to complete the work required under the Contract and that the alleged settlement offered Appellant at a meeting with SHA on October 22, 1996 was not satisfactory.
11. On February 11, 1997, the District Engineer issued a final decision denying EMS' claim and referring EMS to the Chief Engineer.

12. On February 26, 1997, EMS filed a claim with the SHA Chief Engineer for the amount of \$1,244,546 and a 180 - day time extension on the basis that new federal regulations had increased the costs and the time needed to complete the work under the Contract.
13. On November 20, 1997, EMS and SHA entered into an agreement to mutually terminate the Contract.²
14. On March 16, 1998, EMS filed a claim with SHA, similar to its claim of February 26, 1997, requesting \$764,037.00 and a 150 - day time extension on the basis that changed federal regulations had increased the costs and time needed to complete the work.
15. On June 28, 1999, SHA issued a final decision denying EMS' claim and EMS appealed to this Board. On December 16, 1999, SHA moved for summary disposition on grounds the notice of claim was not timely filed.

Decision

Preliminarily we observe that since its inception seventeen years ago the Board has recognized, considered and granted motions for summary disposition³, 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.

² The agreement mutually terminating the Contract contained a provision that "the claim and extensions for the amount of \$764,036.00 dated February 26, 1997 (currently at the Chief Engineer level) is EMS' final claim on this Contract." There is no explanation in the record for the discrepancy in the claimed amount set forth in the termination agreement from what appears in the claim dated February 26, 1997 (\$1,244,546 versus \$764,036.00).

³ The word disposition is used rather than judgment because the Board is not a court and has no equitable power or equitable jurisdiction.

Intercounty Construction Corporation, MDOT 1036, 1 MSBCA ¶11 (1982); Dasi Industries, Inc., MSBCA 1112, 1 MSBCA ¶49 (1983). Where the Board lacks jurisdiction there is no reason not to dismiss an appeal through preliminary process.

Issues of Board jurisdiction may often be determined as a matter of law. To the extent factual matter need be considered, 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). 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 record 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 (1979); Delia v. Berkey, 41 Md. App. 47 (1978), Affd. 287 Md. 302 (1980). See also 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). Furthermore, for purposes of a motion for summary disposition, even where the underlying facts are undisputed, if they are susceptible of more than one permissible factual inference, the choice between those inferences should not be made, and summary disposition should not be granted. See Heat & Power Corp. v. Air Products, 320 Md. 584, 591 (1990); King v. Bankerd, supra, 303 Md. at 111.

EMS is barred from any equitable adjustment as it failed to meet the timeliness requirements as set forth in the applicable regulation and the Contract at the time of bid and award on March 13, 1993 and May 21, 1993, respectively. Under the applicable statute, regulation and general provision⁴ EMS was required to submit a written notice of claim

⁴ Sections 15-217 and 15-219, State Finance and Procurement Article; COMAR 21.10.04; GP 5.14. The applicable provisions of the Statute and COMAR in 1993 are discussed in more detail below.

for an equitable adjustment and time extension within thirty (30) days of the time it knew or should have known of the basis for the claim. Viewing the evidence and reasonable inferences to be drawn therefrom in the light most favorable to EMS, as the Board must in ruling on a motion for summary disposition, we find that EMS' first written notice of claim was not filed until March 6, 1995, some twenty (20) months after the June 1993 effective date of new OSHA regulations concerning lead abatement procedures for construction workers. By March 6, 1995, Appellant had performed work under the Contract for a number of months. Viewing the evidence and inferences in the light most favorable to Appellant, it is clear from the record that Appellant knew and was asserting in the March 6, 1995 notice that compliance with the changed regulations was costing it money not anticipated in its bid; i.e. that it had a claim, more than 30 days prior to March 6, 1995. Since EMS failed to submit its notice of claim in a timely manner, the Board lacks jurisdiction and the appeal must be dismissed.

The Board's subject matter jurisdiction is limited to that which has been specifically conferred upon it by the legislature. Cherry Hill Construction, Inc., MSBCA No. 2056, 5 MSBCA ¶__ (March 19, 1999) at p. 26 *citing* University of Maryland v. MFE Incorporated/NCP Architects, Incorporated, 345 Md. 86, 691 A.2d 676(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 §§15-211, 15-215, 15-217 and 15-219 of the State Finance and Procurement Article. Cherry Hill, at page 26. In reviewing the pertinent statutes and regulations relating to timeliness, the Board held that "[c]ontract 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." Cherry Hill, at pages 24-25.

The State Finance and Procurement Article (as it was in effect in 1993) provides that a contract claim shall be submitted in the time required under regulations adopted by the primary procurement unit responsible for the procurement. Md. State Fin. and Proc. Code Ann. §15-217(b)(1988). Pursuant to that statutory authority, the Board of Public Works promulgated regulations in COMAR concerning the filing of claims by contractors. The pertinent provision, in effect in 1993, is as follows:

COMAR 21.10.04.02. Filing of Claim by Contractor

- 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 thirty days after the basis for the claim is known or should have been known, whichever is earlier.
- B. [omitted]
- C. 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 added)
- D. Each procurement contract shall provide notice of the time requirements of this regulation.

In accordance with COMAR 21.10.04.02D, supra, the Contract provides that a notice of claim be filed within a thirty (30) day time frame. Specifically, General Provision 5.14(A) of the Contract provides:

The Contractor shall file a written notice of claim for extension of time, 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.

General Provision 5.14(d) of the Contract further advises that a "notice of claim or a claim that is not filed within the prescribed time shall be dismissed."

Applying the provisions relating to timely filing of a claim as set forth in COMAR and the general provisions of the Contract, a notice of claim was required to be filed within thirty (30) days after the basis for the claim was known or should have been known. For EMS' claim relating to additional costs allegedly resulting from new OSHA regulations to be timely, a notice of claim arguably should have been filed no later than 30 days after the OSHA regulations became effective on June 3, 1993 and certainly within 30 days of the completion of Appellant's cost evaluation of the effect of compliance in May, 1994. We recognize that cost quanti-fication or documentation may not have been possible on the day the new regulations took effect or were held to be applicable to Appellant's Contract and would have been dependent on any actual additional costs related to compliance with the new regulations incurred during performance. However, EMS did not file its notice of claim until March 6, 1995. The notice of claim reflects EMS' awareness that the new regulations were having an alleged cost impact on its performance of the Contract for more than thirty days prior to March 6, 1995. The Board may not consider a claim for which notice is late. Accordingly, the Motion for Summary Disposition is granted and the appeal is dismissed with prejudice.⁵

Wherefore, it is Ordered this 9th day of February, 2000 that the appeal is dismissed with prejudice.

⁵ Appellant voluntarily withdrew the portion of its claim dealing with retainage and set forth in Count II of its Complaint by letter dated January 27, 2000 upon receipt of the retained funds from Respondent.

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 2144, appeal of Engineering Management Services, Inc. d/b/a EMS, Inc. under State Highway Administration Contract No. AW551-701-041.

Dated:

Mary F. Priscilla
Recorder