



2. On April 10, 2010, Titan issued an invoice to SHA in the amount of for \$522,120 for Progress Estimate No. 2, the second of several bills directed to SHA by Titan for its work on the subject bridge. (Rule 4 File, Tabs 8, 9.)
3. Upon receipt of Titan's invoice, in the ordinary course of its bill payment procedures, on April 21, 2010 SHA prepared a Voucher Summary approving payment to Titan of the amount of \$496,014, representing payment in full of the invoice except for 5% retainage as provided for by contractual agreement. (Rule 4 File, Tabs 8, 9, 28.)
4. Less than thirty (30) days after receipt of the invoice, on May 3, 2010, the Office of the Comptroller processed the State's payment to Titan in the amount of \$496,014 by mailing check no. 041768565 to Titan at the address provided to SHA by Titan, namely, 4054 North Point Road, Baltimore, Maryland 21222. (Rule 4 File, Tabs 28, 30.)
5. The aforesaid check was never received by Titan, nor was it returned by the post office to the Comptroller's Office as undeliverable or otherwise.
6. Titan questions whether check no. 041768565 was actually written and sent to the correct address, pointing out to the Board the absence of additional documentary evidence of record other than computer entries to establish the facts alleged by SHA, but sworn Affidavit by the appropriate state employee confirms these allegations.
7. Other checks to Titan written by the Office of the Comptroller at SHA request were sent by mail to Titan's address set forth above, and all of those checks were received by appellant, including the following payments on or about the dates stated:

Progress Estimate No. 1	March 8, 2010
Progress Estimate No. 3	June 25, 2010
Progress Estimate No. 4	July 13, 2010
Progress Estimate No. 5	September 1, 2010

Progress Estimate No. 6 September 24, 2010

Progress Estimate No. 7 January 31, 2011

Progress Estimate No. 8 July 18, 2011

(Rule 4 File, Tabs 9-21.)

8. Following receipt, acceptance, and presentment of the above itemized payments by check, funds were transferred in timely fashion from the State to appellant for work performed under the subject contract on seven (7) separate occasions, six (6) of which occurred after Progress Estimate No. 2.
9. The Board is without explanation why check no. 041768565 for Titan's Progress Estimate No. 2 was not received, though it was mailed by the State to Titan's correct address on May 3, 2010 and never returned by the post office.
10. By correspondence dated October 23, 2012, Titan for the first time since submission of its invoice of April 10, 2010, notified SHA that it had not been paid for its Progress Estimate No. 2. (Rule 4 File, Tab 22.)
11. The following day, on October 24, 2012, SHA requested a stop payment on the original check and the reissuance of a new check to pay Titan's April 10, 2010 invoice for Progress Estimate No. 2. (Rule 4 File, Tab 23, 24.)
12. The State's second attempt to pay Titan for Progress Estimate No. 2 by check no. 45225586, also in the amount of \$496,014, was mailed to Titan on November 16, 2012 and was received by Titan on November 19, 2012. (Rule 4 File, Tab 29.)
13. By correspondence dated January 23 and March 4, 2013, appellant claimed entitlement to additional payment by SHA in the sum of \$44,641 representing statutory interest at the specified rate of nine per cent (9%) per annum for one (1) year on the principal sum of \$496,014 for which Titan submitted its invoice on April 10, 2010 but was not paid until 954 days later, on November 19, 2012. (Rule 4 File, Tabs 25, 26.)

14. SHA denied Titan's claim by final determination dated July 17, 2013, which was appealed to the Board on August 8, 2013, with the State filing its Rule 4 Agency Report on September 6, 2013. (Rule 4 File, Tab 1.)
15. The parties filed Cross-Motions for Summary Decision on December 2, 2013 for which oral argument was heard by the Board on December 13, 2013.
16. The operative facts surrounding this appeal are not in genuine dispute, presenting to the Board only the legal determination of whether or not appellant is entitled to statutory interest under the circumstances present.

#### Decision

This dispute comes before the Board under the Accelerated Procedures provisions set forth in the Code of Maryland Regulations (COMAR) 21.10.06.12 for expedited resolution of claims against the State for monetary award of an amount less than \$50,000. The principal question presented requires the Board to interpret certain provisions in Maryland statute which state as follows:

#### **§ 15-104. Interest on late payments.**

(a) In general. - Except as provided in 15-105 of this subtitle, interest shall accrue at the rate of 9% per annum on any amount that:

(1) is due and payable by law and under the written procurement contract; and

(2) *remains unpaid* more than 45 days after a unit receives an invoice.

(b) Interest accrual. - Interest shall accrue beginning on the 31<sup>st</sup> day after:

(1) the day on which payment becomes due under a procurement contract; or

(2) if later, the day on which the unit receives an invoice.

(Emphasis added.)

#### **§ 15-105. Interest not payable.**

A unit is not liable under § 15-104 of this subtitle for interest:

- (1) unless within 30 days after the date on the State's check for the amount on which the interest is accrued, the contractor submits an invoice for the interest;
- (2) if a contract claim has been filed under Subtitle 2 of this title;
- (3) accruing more than 1 year after the 31<sup>st</sup> day after the unit receives an invoice; or
- (4) on an amount that represents unpaid interest. (SF §§ 11-132, 11-135; 1988, ch. 48, § 2; 1996, ch. 682.)

State Finance and Procurement (SF&P) Article, Maryland Annotated Code.

Correct resolution of this appeal turns essentially on the determination of what is meant by the words, "remains unpaid," in the first of the aforementioned statutes. The legislative proposals that gave rise to the wording above are found in House Bill 907 from the 1982 session of the Maryland General Assembly, which was reported unfavorably by the House Appropriations Committee, and House Bill 358 from the 1983 session, reported favorably by the Committee on Constitutional and Administrative Law and thereafter approved by the House and Senate and signed into law. These proposals arose in response to widespread contractor complaints that State agencies were failing to make timely payment of bills due and owing. That issue carried the attention of then Governor Harry Hughes and followed the work of a Procurement Advisory Council, which was established by the Board of Public Works in 1981 to investigate the cause and frequency of payment delay and make recommendations to cure the problem.

The legislative history of the subject statute is thoroughly documented. From review of that material, it is clear to the Board that the intent of the legislature by eventual enactment of House Bill 358 in 1983 was to establish a mechanism to encourage the State to pay its bills on time. It was not to grant to its contractors a windfall profit arising from late payment for reasons

outside of the State's control. By the same token, the legislation accomplishes the objective of timely payment by establishing the unforgiving and potentially harsh consequence of the State's incurring interest costs on bills that are not promptly paid.

The statute plainly states that when a bill "remains unpaid" for more than thirty (30) days, the vendor is owed nine per cent (9%) interest to be paid by the State in addition to the principal amount due. At first blush, it may seem that the classification of a bill as paid or unpaid is a rather simple and straightforward determination. But upon closer examination, the legal and technical demarcation of the word, "unpaid," the operative word used in the statute, becomes somewhat more complex. Because an invoice is rightfully classified as unpaid until it is paid, in the discussion below, both words are used in the Board's analysis.

Appellant argues correctly that an invoice does not reach the status of being actually paid simply because the payor has written a check or placed a check in the mail. According to appellant, payment occurs only upon the payee's receipt of the check. But that is not quite correct either. Consider the following scenario. Person A owes to Person B a debt of \$100. Person A therefore hands to Person B a check for \$100. Person B examines the \$100 check and then hands it back to Person A. Is the debt paid? Of course not. Person B may have received payment, but did not accept it in the sense implied by use of the legal term of art, "acceptance." Person B's rejection of the tender offer was plain and unambiguous. Without question, the debt remains unpaid. At the same time, would anyone suggest that Person A should face some negative consequence because of the unpaid debt, when the status of the debt as being unpaid resulted solely from the action of the payee, Person B, and not the payor, Person A?

Consider another hypothetical. The State owes Corporation X the sum of \$1,000,000. A check is therefore issued by the State to Corporation X and hand-delivered on the same day that the bill is received. Rather than depositing the check, Corporation X,

intentionally or accidentally, fails to deposit or cash the written draft. After passage of a year, Corporation X then claims it is entitled to an additional \$90,000 representing the amount due from application of the statutorily specified interest rate of nine per cent (9%) to the million dollars owed for which a draft was issued but payment was never perfected or completed, i.e., "paid," because the draft was never presented to a bank. Until presentment to a bank, the payment is inchoate and incomplete. The payee did not enjoy the use of the money for an entire year. During that time, the draft was subject to revocation at the sole election of the payor. The payee earned no interest on the undeposited check while the State as payor continued to earn whatever interest was applicable to the funds which remained on deposit in the State's account. In the strictest, most accurate sense of the word, for a bill to be "paid," it is necessary not only for payment to be authorized by the payor and received and accepted by the payee, but also to be perfected by the payee's deposit effecting transfer of funds from the control of one party to the other.

Under the above scenario, it would be true and correct for Corporation X to contend that it was not "paid" until a year after it issued its invoice. No funds were actually transferred until then. The State had the ability to stop payment on the check at any time during this interval before deposit. Until that time, the subject sum of one million dollars (\$1,000,000) remained on deposit in the State's coffers, presumably with interest on that deposit accruing to the State, not to the payee. Wouldn't it be fair, appropriate, and mandated by law that the interest gained on that sum accrue not to the State, but to the advantage of Corporation X, which was rightfully entitled to the money? Those funds were never really transferred for the use and benefit of the payee until a year after the bill was submitted to the State. Is the State therefore legally obligated under such circumstances to pay to Corporation X another ninety thousand dollars (\$90,000)?

The Board suggests that such a result would be preposterous. It certainly was not the intent of the legislature to compel such action when SF&P §15-104 was enacted into law. But carried to its natural extreme, that is precisely the result that would occur if the Board were to rule that monies are not "paid" until funds are actually transferred from the payor's bank account into the payee's bank account by presentment of a draft to a financial institution. Until then, a payee could correctly contend that a check, even after it is received, does not constitute "payment." After all, a check is just a piece of paper stating that, upon presentment of that instrument, the payor authorizes and directs its bank to "pay to the order of" the payee the sum specified. A check is not payment; it is merely a written authorization by a payor for the payee to secure payment. In the strictest sense of the word, therefore, the mere issuance of a check by the State does not render an invoice paid, as appellant correctly contends. Furthermore, even receipt and possession of a check by the payee is also insufficient *per se* to render an invoice "paid" in the most precise delineation of that word.

Moreover, a payee may correctly contend that until a check is received *and* presented to a bank, an invoice remains technically "unpaid" in the sense of transfer of funds from the obligor to the obligee. So the foregoing hypothetical raises the question: Does the potential negligence or deliberateness of the obligee's failure to receive, accept, and deposit a check affect the correct determination of whether and when the debt is paid? If so, once the door is open to factual questions potentially clarifying the exact time that a bill becomes "paid" after a check is issued, based upon the conduct or mental state of the recipient, even if the door is only open a crack to determine the question of deliberateness or motive for withholding presentment, the absolute condition of whether a bill is paid or unpaid based solely upon possession or presentment of the instrument is rendered fallacious.



All of the foregoing is simply to explain that in determining the formal legal status of a bill being paid or remaining unpaid may not be determined solely on the basis of whether a check was requested, whether it was processed and written, whether it was received, whether it was accepted, nor even whether and when it was deposited. Upon careful inspection, the difference between a bill being paid and unpaid requires more than issuance by the payor or possession by the payee. The Board is convinced that in the context of SF&P 15-104, "payment" is not predicated upon receipt of a check, or by actual transference of funds from one party to another, either of which appellant may contend. The word, "unpaid," as used in this statute means something else. Specifically, in light of the legislative history and purpose of the statute here interpreted, "unpaid" appears to go to the question of whether the State as payor has taken reasonable steps to enable the payee to become "paid."

To sum, in order to render an invoice "paid" rather than "unpaid," action is required not only on the part of the payor but also by the payee. The statute, however, appears to have the purpose of imposing upon the State the obligation of remitting an interest penalty in the event that the State fails in its obligation to send timely remittance to enable the payee to become "paid," regardless of what the payee may or may not do afterwards. Surely the payee is not and should not be empowered by the statute to compel the State's obligation to remit interest at the payee's election for reasons completely outside of the State's control. The statute does not contemplate liability for payment of interest when the State, within the thirty (30) day time frame permitted for payment, has processed, issued, and mailed to the correct address a draft instrument authorizing transfer of funds to the payee.

Unlike the above hypotheticals, in the case at bar, the Board does not suggest that Titan may have deliberately deferred receipt of funds in order to gain the advantage of securing nine percent (9%) interest for a year on the payment due for Progress Estimate

No. 2. But the Board will not embellish the limited intent of the statute to give rise to that unintended result. Also unlike the instant appeal, the Board recognizes that in the hypotheticals, the payee actually receives a check authorizing payment. By contrast, Titan did not receive the check for Progress Estimate No. 2 until November 19, 2012, 954 days after payment was due. At the same time, unrebutted evidence supports the finding that long before that day, in good faith, the State approved, processed, wrote, and took the necessary steps to transmit to Titan the check for \$496,014 which was mailed to appellant but never received. For years, the State was unaware that Progress Estimate No. 2 was not paid, because appellant never informed the State that its check had not been received. It is further uncontested that after sending its invoice for Progress Estimate No. 2, appellant received, accepted, and deposited six (6) other payments sent to it by the State for work performed under the same contract. For two and one-half (2-1/2) years, Titan mentioned nothing to the State concerning the missing half-million dollars for which it expected and was due payment in the spring of 2010.

As has been stated on many prior occasions, it is not for the Board to create or modify statute in any way. That authority is reserved solely to the legislature. The Board is empowered only to interpret and implement statutory law as intended and written. But in doing so, it is not unusual for the Board to make determinations concerning the meaning of words used in statute. As more fully discussed above, the words, "remains unpaid" are subject to more than one reasonable interpretation. The Board is not inventing new concepts or applying previously unexplored notions of contract definition in ruling that in the context of SF&P 15-104, "remains unpaid" refers solely to the responsibilities of the State, which are completed when the State has approved, processed, written, and placed into the mail to the correct address its check to facilitate the payee's ultimate receipt of monies due.

The principle adopted here is akin to the "mailbox rule," a well-known precept of contract common law which holds that an acceptance of an offer takes place concomitant with the posting of a letter indicating contract acceptance, not at the time of the subsequent receipt of that letter by the offeror. The "mailbox rule" dates at least as far back as 19<sup>th</sup> century English law and has long been justified by the premise that the postal service acts as implied agent of the offeror and therefore, once a notice of acceptance is placed in the hands of the post office, a contract is immediately formed regardless of when and even whether it may later be received.

This holding and rationale is also consistent with current Maryland regulation, specifically, COMAR 21.02.07.01B, which prescribes that a condition of "delayed payment" occurs when more than 25 days has elapsed between the time that a contractor's invoice is received and the time that a request for payment is sent to the General Accounting Division of the Comptroller of the Treasury. The COMAR definition of "delayed payment" has nothing to do with the date of receipt, acceptance, or presentment of a check by the State's payee. Delayed payment is determined solely by the action of the State to fulfill its obligation to pay its bills on time. Similarly, the 1983 statute codified as SF&P 15-104 applies only when the State fails in its duty to process, prepare, and mail a check within 30 days of invoice receipt. There is no evidence that the State fell short of performing that responsibility in the case that is the subject of this appeal.

The Board concludes that in the context of SF&P 15-104, the State paid Titan's April 10, 2010 invoice on May 3, 2010. Appellant's second invoice for the same work was dated October 23, 2012 and paid November 16, 2012. At no time did more than thirty (30) days elapse between the time that SHA received an invoice from Titan and the time that payment was properly sent by the State. As a result, no interest payment is due.

Finally, even if the Board applied a more simplistic and flawed analysis of the statute at issue, determining that an invoice "remains unpaid" until such time as the payee receives, accepts, and thereafter presents a check to a bank or other financial institution, Titan's appeal would nonetheless fail from application of the doctrine of laches. Here it is undisputed that appellant received check after check from the State in regular progress payments on the work it performed for SHA at the bridge on Rt. 231 over the Patuxent River in Calvert County. Six (6) times after April 10, 2010 Titan received a check from SHA for work on this job and never said a word about its not having received an earlier-due payment. It was only after the passage of some two and one-half (2-1/2) years that appellant advised SHA to the effect that it was missing a half million dollars long past due. Even more shocking is Titan's claim after payment for its Progress Estimate No. 2 that the State was also indebted an additional \$44,641 for interest for a year at the rate of nine per cent (9%) on the amount due for which appellant had not informed SHA that it did not receive the check that the State sent to Titan on May 3, 2010 promptly following receipt of Titan's invoice.

The Board does not fault appellant for bringing the instant appeal and counsel for appellant has dutifully and persuasively made the most of its contention that it should be paid interest on the monies that it didn't receive until 954 days after its invoice was sent. But the reason that Titan was not paid earlier is that it never followed-up with the State by asking to be paid after it should have realized that it was missing the sum of \$496,014 past due. The Board respects appellant's perspective and strict construction of the meaning of the words, "remains unpaid," in SF&P 15-104, but those words simply do not apply to the stipulated facts in this appeal and the Board will not compel SHA to pay to appellant \$44,641 in extra costs because of shortfalls committed primarily by Titan, not SHA.

Because this appeal must be denied for the reasons set forth above, the Board does not address two (2) additional barriers to Titan's entitlement to interest on its invoice: First, that its April 10, 2010 invoice failed to comply with all of the statutory requirements set forth in SF&P 15-101 and 15-102; and Second, that Titan failed to make its claim in timely fashion in accordance with the contract's General Provision 5.14(a) requiring the contractor to make claim "within 30 days after the basis of the claim is known or should have been known, whichever is earlier."

For all of the foregoing reasons, appellant's Motion for Summary Decision is hereby denied; the State's Motion for Summary Decision is hereby granted; and as a result, this appeal is denied.

Wherefore it is Ordered this \_\_\_\_\_ day of December, 2013 that this appeal be and hereby is DENIED.

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 decision in MSBCA 2862, appeal of Titan Industrial Services, Inc. Under SHA Contract No. CA3785180.

Dated:

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

