

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

**In the Appeal of Kirk McKenzie**

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**Under**

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**Maryland State Highway Administration  
Contract No. SV16662022**

**Docket No. MSBCA 3059**

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**OPINION AND ORDER BY BOARD MEMBER STEWART**

Based upon the undisputed material facts, the Board concludes that the Procurement Officer's ("PO") decision to deny Appellant's contract claim was correct because Appellant's notice of claim ("Claim") was untimely filed.

**UNDISPUTED MATERIAL FACTS**

Appellant, Kirk McKenzie ("McKenzie"), the Vice President of West Side Services, Inc. ("West Side"), a Pennsylvania corporation that entered into a contract ("the Contract") with the Maryland State Highway Administration ("SHA") to provide snow and ice removal services for the 2015-2016 winter season out of the SHA's LaVale Shop in Alleghany County. The Contract was signed by McKenzie in his representative capacity on behalf of West Side on September 28, 2015 and was signed by the Assistant Resident Maintenance Engineer ("ARME"), Eric Minnich, on behalf of the SHA on September 29, 2015.

The Contract in the Scope of Work, Item 1 provides: "[t]he Contractor shall provide all labor, equipment, and expertise to perform snow and ice removal operations on roadways, ramps, bridges, parking lots and other areas designated by the Administration in the county. The Scope of Work in Item 2 provides:

The Contractor shall provide dump trucks and other equipment with operators, equipped at the Contractor's expense, according to the specifications found in this Contract. The dump trucks and other equipment shall be available for work under the direction of the Administration for snow and ice removal operations from

November 15, 2015 - April 30, 2016. The equipment under Contract to the Administration shall be available on an "as needed basis" seven (7) days a week, twenty-four (24) hours a day. The Administration may seek the services of Contractors for rare winter events prior to the November 15<sup>th</sup> date or after the April 30<sup>th</sup> date. Each Contractor should make the Administration aware of its interest in performing emergency operation during these dates. Hourly Rates will be paid according the Hourly Rates for Snow and Ice Removal Services section of this Contract.

The Scope of Work clearly provides that it is the responsibility of the Contractor to provide all vehicles and equipment necessary for snow and ice removal during the term of the Contract.

As compensation for the work performed, the Contractor would be paid for its time at the hourly rates specified in Item 27 of the Contract. In addition to payment for its time, the Contractor would also receive (1) a pre-season retainer fee, (2) a guaranteed minimum payment for the winter season to offset the Contractor's expenses should the Contractor not receive callout payments equaling a certain amount, and (3) a season-ending retainer fee. The amounts of the pre-season retainer, the minimum guarantee payment, and the season-ending retainer fee were to be determined by the number and type of vehicles supplied by the Contractor and how each vehicle was equipped.

Payment of the full amount of the pre-season retainer fee was subject to the Contractor meeting certain requirements regarding vehicle inspection/recalibration, Contractor attendance at the SHA annual winter maintenance meeting, and Contractor attendance at a training session by November 15, 2015. If the Contractor was unable to meet the November 15, 2015 deadline, it could still be eligible for payment of one half (1/2) of the pre-season retainer fee if it complied with all these requirements by November 30, 2015. If the Contractor failed to meet the November

30<sup>th</sup> deadline, then the Contractor would not be paid the pre-season retainer, and the SHA reserved the right to void the Contract.<sup>1</sup>

On November 17, 2015, ARME Minnich sent Appellant a letter stating that Appellant had not yet provided proof of workers' compensation insurance<sup>2</sup> and had not had his vehicle recalibrated. The required certificate of insurance was finally provided on December 1, 2015, and the vehicle inspection/recalibration was completed on the same date, which was one day after the November 30<sup>th</sup> deadline.<sup>3</sup>

At this point, the SHA had the option of voiding or terminating the Contract. If the SHA wanted to void or otherwise terminate the contract, it was required to comply with the termination provisions in Items 32 and 33 of the Contract.<sup>4</sup> Item 32 provides:

The Administration will be the sole judge as to whether the contracted unit and its operator are performing satisfactorily. The Administration may terminate this Contract based on the Contractor's unsatisfactory performance or for any other reasons without showing cause, **upon giving written notice to the Contractor.** (emphasis added).

Item 33 provides in part:

Upon notification of termination, the Contractor shall cease working for the Administration, and all payments, including the season-ending retainer and any outstanding minimum guarantee payments will be stopped on the date of termination.

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<sup>1</sup> The Contract was amended via Addendum #1 issued on September 4, 2015, to correct the last paragraph of Item 25 to reference the pre-season requirements set forth therein, instead of the incorrect reference to Item 22. Appellant acknowledged receipt of Addendum #1 on September 28, 2015.

<sup>2</sup> Item 37 of the Contract provides that the contractor must submit to the Resident Maintenance Engineer a certificate of insurance coverage, including workers' compensation coverage, with the Contract submittal package.

<sup>3</sup> See, Exhibit 13 to the SHA Rule 4 Submission, filed December 4, 2017, consisting of an email from Jodie Casteel, SHA Administrator 1/Procurement to ARME Minnich dated December 1, 2015, and Appellant's Exhibit 3 to its Supplement to the Record filed January 2, 2018, consisting of a letter to Appellant dated January 27, 2017, from Gregory C. Johnson, Administrator SHA.

<sup>4</sup> The Maryland Department of Transportation ("MDOT") General Conditions and Procedures, revised on 9/1/81, is incorporated as part of the Contract and contains two additional termination provisions: Paragraph 6, Termination for Convenience, and Paragraph 7, Termination for Default. Neither of these termination provisions conflicts with the termination provisions set forth in Paragraphs 32 and 33 of the Contract.

Although Appellant was never called out to provide snow and ice removal services during the term of the Contract, the SHA never notified Appellant in writing that it was voiding or terminating the Contract.

The Contract also provided that the season-ending retainer fee be paid upon the Contractor meeting several conditions, including the requirement in Item 30 that the Contractor submit all outstanding invoices, including an invoice for the season-ending retainer fee, to the SHA by May 10, 2016. Neither of the parties alleges, and there is no evidence to show, that Appellant submitted an invoice to the SHA for the season-ending retainer fee by May 10, 2016, but it is undisputed that Appellant was not paid a season-ending retainer fee within 30 days of that date, or at all. It is undisputed that Appellant emailed Governor Larry Hogan in January 2017 regarding the Contract, and that he received a reply on January 27, 2017, from SHA Administration, Gregory C. Johnson, stating: “[r]egarding your allegations about your contract with SHA, the contract term had expired and no claim was filed under the dispute provisions of the contract.”

A little over two months after being advised by SHA that he had failed to file a claim under the dispute provisions of the Contract, on April 6, 2017, Appellant filed a written Notice of Claim (“Claim”) with the PO, Eric Lomboy, SHA Director of Procurement. Appellant alleged in his Claim that:

[T]he basis for his claim began in November 2015, when he received clearance from the inspection of his truck on or about November 30, 2015, and he did not receive the pre-season retainer fee. His claim continued throughout the term of the contract each time that he was not called to work and at the end of the contract when he was never compensated for neither [sic] the guaranteed minimum payment nor the post-season retainer fee.

The PO issued his final decision on Appellant’s Claim on October 11, 2017. The PO denied Appellant’s Claim as untimely pursuant to COMAR 21.10.04.02A & B, which provide that a contractor shall file a written notice of a claim relating to a contract with the appropriate

procurement officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier, and that the contractor file its claim either contemporaneously with its notice of claim or within 30 days thereafter in non-construction contracts. The PO noted that Appellant did not file his Claim until nearly 13 months after the term of the Contract had ended.<sup>5</sup>

On November 3, 2017, Appellant filed this Appeal to the Board. Respondent filed a Motion to Dismiss or for Summary Decision on January 5, 2018. Respondent asserted two grounds supporting the dismissal or the granting of summary decision in its favor: (1) that Appellant lacks standing to pursue an appeal with the Board because Appellant filed his Claim in his individual capacity rather than in his representative capacity on behalf of West Side, the party to whom the SHA awarded the snow and ice removal Contract, and (2) that Appellant's Notice of Claim was untimely, thereby depriving the Board of jurisdiction to hear his Appeal.

Appellant filed a Response to [Respondent's] Motion to Dismiss or For Summary Decision or in the Alternative Motion to Amend on January 30, 2018. Appellant argued that he has standing as a principal of West Side or, in the alternative, that he should be allowed to amend his Complaint pursuant to COMAR 21.10.06.07, which allows the Board, within the proper scope of the appeal, to permit either party to amend its pleading upon conditions just to both parties. Appellant further argued that the SHA was estopped from raising the issue of the timeliness of Appellant's filing of his Claim because the SHA did not comply with the notice requirements set forth in COMAR 21.10.04.02D.

Respondent filed a Reply to Appellant's Response and a Response to Appellant's Motion to Amend on February 14, 2018. Neither party requested a hearing on their respective motions.

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<sup>5</sup> In his Final Decision, the PO stated that the term of the Contract ended on March 31, 2016, but the Contract's Scope of Work Item 2 provides that the term of the Contract ended on April 30, 2016.

## SUMMARY DECISION STANDARD

In deciding whether to grant a Motion for Summary Decision the Board must follow

COMAR 21.10.05.06D(2):

The Appeals Board may grant a proposed or final summary decision if the Appeals Board finds that (a) [a]fter resolving all inferences in favor or the party against whom the motion is asserted, there is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law.

The standard of review for granting or denying summary decision is the same as for granting summary judgment under Md. Rule 2-501(a). *See, Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726 (1993). To defeat a motion for summary judgment, the opposing party must show that there is a genuine dispute of material fact by proffering facts that would be admissible in evidence. *Id.* at 737-738. While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *Clea v. City of Baltimore*, 312 Md. 662, 678 (1988).

## DECISION

Because the PO did not raise the issue of standing as a basis for denying Appellant's Claim, the Board declines to address this issue on appeal. The Board holds authority and responsibility only to review final action by the State's procurement agents. Appeals are taken to the Board from a procurement officer's final decision. Issues not raised before the procurement officer are generally not ripe for our review. *Mercier's, Inc.*, MSBCA No. 2629 at 4 (2008). The PO denied Appellant's Claim solely on the basis of untimeliness; therefore, the Board shall review the PO's final decision solely on the basis of that issue.

The requirements for filing a timely claim are set forth in COMAR 21.10.04.02A, which provides:

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 30 days after the basis for the claim is known or should have been known, whichever is earlier.

In addition, COMAR 21.10.04.02C provides:

A notice of claim or a claim that is not filed within the time prescribed in Regulation .02 of this chapter shall be dismissed.

In this Appeal, it is undisputed that Appellant waited until April 6, 2017 to file his Claim. As to the pre-season retainer fee, Appellant alleged that “the basis for his claim began in November 2015, when he received clearance from the inspection of his truck on or about November 30, 2015, and he did not receive the pre-season retainer fee.” Accordingly, by his own admission, Appellant knew as late as November 30, 2015 that he had not received the pre-season retainer fee. Therefore, he had until December 30, 2015 to file a notice of claim as to this amount. Yet he waited until April 6, 2017 to file his Claim.

As to the failure to be called out to provide snow and ice removal services during the term of the Contract, the plain language of the Contract does not guarantee that a Contractor will be called out at all, hence the inclusion of the minimum guarantee provision. Although Appellant contends that he does not know why he was not called out to render snow and ice removal services, it is undisputed that Appellant knew he had not been called out during the Contract term, which ended on April 30, 2016. Therefore, he had until May 31, 2016 to file a claim as to this amount. Yet he waited until April 6, 2017 to file his Claim.

As to the season-ending retainer fee, the Contract specifically provided that the Contractor was required to send SHA an invoice for this fee by May 10, 2016. It is undisputed that although Appellant was not paid a season-ending retainer fee, Appellant waited nearly eleven months to file his Claim. Further, it is undisputed that Appellant was informed in a letter from the Administrator of the SHA dated January 27, 2017, in response to Appellant’s email to the

Governor, that Appellant's contract ended, and he failed to file a claim. It is undisputed that Appellant did not file a notice of claim until two months after the date of this letter. Finally, Appellant argues that he was not given proper notice of how to file a claim by SHA, as is required by COMAR 21.10.04.02D. COMAR 21.10.04.02D provides that:

- Each procurement contract shall provide notice of the:
- (1) Time requirements of this regulation; and
  - (2) Acceptable methods of filing a claim, including whether and how claims may be filed by electronic means.

In this Contract, the MDOT General Conditions and Procedures was incorporated by reference and includes a Disputes provision at Paragraph 4, which provides that:

This Contract will be subject to the provisions of Article 21, Title 7 (Administrative and Civil Remedies) of the Annotated Code of Maryland and COMAR 21.10. Pending resolution of a claim, the Contractor shall proceed diligently with the performance of the Contract in accordance with the procurement officer's decision.

The language of the Contract clearly references COMAR Title 21 Chapter 10, which includes the requirements for filing a timely contract claim.<sup>6</sup> This provision apprised the Contractor of the requirements of COMAR 21.10 regarding the resolution of disputes and includes COMAR 21.10.04.02, which specifically sets forth the requirements for filing a timely claim. The undisputed facts clearly indicate that the PO was correct in denying the Claim as untimely filed pursuant to COMAR 21.10.04.02A. Accordingly, we must deny this Appeal.

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<sup>6</sup> The Disputes provision satisfies the requirements of COMAR 21.07.01.06, which provides that a mandatory disputes clause be included in all contracts, namely the short form provided in Regulation, 06A: Alternate Disputes Clause (short form). "This contract shall be subject to the provisions of State Finance and Procurement Article, Title 15, Subtitle 2, Annotated Code of Maryland, and COMAR 21.10 (Administrative and Civil Remedies). Pending resolution of a claim, the Contractor shall proceed diligently with the performance of the contract in accordance with the procurement officer's decision."

We strongly recommend that this Disputes provision, which is a revision from 1981, be updated by SHA for use in future contracts to reflect the current language of the Regulation as set forth above, instead of the superseded reference to Title 7 of Article 21.



ORDER

Based on the foregoing, it is this 21<sup>st</sup> day of February, 2018, hereby:

ORDERED that Respondent's Motion to Dismiss is DENIED; and it is further

ORDERED that Appellant's Motion to Amend is DENIED; and it is further

ORDERED that Respondent's Motion for Summary Decision is GRANTED.

over

I concur:



/s/

Bethamy N. Beam, Esq., Chairman

/s/

Ann Marie Doory, Esq., Member

/s/

Michael J. Stewart Jr., Esq., 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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA No. 3059, Appeal of Kirk McKenzie, under Maryland State Highway Administration Contract No. SV16667777

Dated: 2/21/18

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/s/  
Ruth W. Foy  
Deputy Clerk