BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of CHERRY HILL CONSTRUCTION, INC.	)	
	)	MSBCA No. 2056
Under Maryland Transportation Authority Contract No. KB-421-000-006	)	

March 19, 1999

Board of Contract Appeals - Jurisdiction - The Board only has jurisdiction over a claim that is timely filed under and otherwise meets the requirements of COMAR 21.10.04 (Chapter 04 of COMAR 21.10) 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 Sections 15-211, 15-215, and 15-217 and 15-219 of the State Finance and Procurement Article.

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OPINION BY BOARD MEMBER STEEL

This matter comes before the Board on the motion of Respondent Maryland Transportation Authority (Authority, MdTA) for summary disposition based on Appellant Cherry Hill Construction's (Cherry Hill) failure to provide notice of claim to the Authority within 30 days of when the basis of the claim either was known or should have been known. A motions hearing was scheduled for December 8, 1998; on the evening of December 7, 1998 this Board received and

accepted for filing an amicus brief regarding the motion from the Maryland Highway Contractor's Association. Respondent was allowed time to respond to the amicus brief, and, at a hearing on January 11, 1999, following a proffer, while not disputing that notice appeared delayed, the Appellant was permitted to present evidence in mitigation of its failure to file timely notice of its claim with respect to the drilling associated with wick drain installation on a MdTA construction project.

Findings of Fact

1. Prior to October 1, 1996, State Fin. & Proc. Code Ann. §15-217(b) provided that a contract claim shall be submitted within the time required under regulations adopted by the primary procurement unit responsible for the procurement.[1]
2. The Board of Public Works has promulgated regulations pursuant to that statutory authority[2] regarding the filing of claims, in effect in 1995 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 30 days after the basis for the claim is known or should have been known, whichever is earlier.
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> B. Contemporaneously with or within 30 days of the filing of a notice of a claim, but no later than the date that final payment is made, a contractor shall submit the claim to the appropriate procurement officer.[3] The claim shall be in writing and shall contain:
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> (1) An explanation of the claim, including reference to all contract provisions upon which it is based;
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> (2) The amount of the claim;
>
> (3) The facts upon which the claim is based;
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> (4) All pertinent data and correspondence that the contractor relies upon to substantiate the claim; and
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> (5) A certification by a senior official, officer, or general partner of the contractor or the 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 procurement

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[1] The applicable statutes and regulations are those in effect in August, 1995 at the time the Appellant entered into its contract with the State.

[2] For a discussion of the scope of the authority of the Board of Public Works to issue procurement regulations, see Maryland State Police v. Warwick, 330 Md. 474 (1993) at pp. 480-482.

[3] Effective October 6, 1997, the following language was added to this paragraph: "On conditions the procurement officer considers satisfactory to the unit, the procurement officer may extend the time in which a contractor, after timely submitting a notice of claim, must submit a contract claim under a procurement contract for construction. An example of when a procurement officer may grant an extension includes situations in which the procurement officer finds that a contemporaneous or timely cost quantification following the filing of the notice of claim is impossible or impractical."

agency is liable.

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 supplied.)

D. Each procurement contract shall provide notice of the time requirements of this regulation.

3. Pursuant to the regulation, G.P. 5.14(a) of the Cherry Hill/MdTA 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.

4. Tracking COMAR, G.P. 5.14(d) of the contract further provides,

A notice of claim or a claim that is not filed within the prescribed time **shall** be dismissed. (Emphasis supplied.)

5. The Board of Public Works also has promulgated mandatory provisions which must be included in State construction contracts, including the following regarding Differing Site Condition provisions:

COMAR 21.07.02.05 Differing Site Conditions.

* * *

"(1) The Contractor shall promptly, and before such conditions are disturbed, notify the procurement officer in writing of: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The procurement officer shall promptly investigate the conditions, and if he finds that such conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

"(2) No claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in (1) above; provided, however, the time prescribed therefor may be extended by the State."

"(3) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract."

6. General Provision 4.05(a)(1) of the contract provides,

The Contractor shall promptly, and before such conditions are disturbed, notify the procurement officer in writing of: (1) Subsurface or latent physical conditions at the site differing materially from those indicated in this Contract.

7. On August 3, 1995, Cherry Hill entered into a contract with the Authority for construction of the north approach to the Francis Scott Key Bridge.

8. On September 29, 1995, Cherry Hill entered into a contract with Nilex Corporation (Nilex) to perform wick installation work on the construction of the North Approach to the Francis Scott Key Bridge. When an owner wishes to consolidate or increase the earth settlement of an area, before a large structure is built, an option is to install wick drains on a grid pattern over the entire area that is going to be consolidated, so as to consolidate the area more quickly than natural settlement would accomplish. By utilizing the wick drains, the owner is able to decrease the settlement time so that the project can be conducted more quickly without the wait time required if natural consolidation must occur. For example, with wick drains, it might take four months to consolidate what would take four years if only natural consolidation were relied upon. The drains in this case consisted of a type R geotextile made of polypropylene wrapped around an extruded core also made of polypropylene, which constitutes the wick. Using force, the wick drain is installed vertically into the ground, in this case to 90 feet, so as to reach, through any overburden soil which might be filled with debris, a soft compressible soil the consistency of toothpaste. By placing the wick drains on a grid pattern through an entire site, water is given an escape route from the soil, and the ground can sink or settle. In this case, the ground settled as much as two feet.

9. The wick drains are installed utilizing specialized equipment. Using the weight of an excavator, the wicks are driven into the ground using a lead, within which is a mandrel, a steel casing 2" by 5", which contains the drain. This is driven into the ground using sheer force. At the end of the drain within the mandrel is an anchor plate which protects the drain as it is forced into the ground, and then the plate attached to the drain is left at the bottom of the hole, and the mandrel casing is extracted, leaving, for example, 90 feet of wick drain in place. Upon completion of the installation of the wick drains, a pre-load such as gravel can be placed on the surface adding weight to the system so as to squeeze water more quickly from the clay and through the wick drains. Water follows the escape route out of the dense clay or soil, and settlement of the soil is accomplished.

10. Frequently, and particularly where as here the drilling is anticipated to be difficult as a result of concrete and slag debris (this site used to belong to Bethlehem Steel), the holes through which the wick drains are installed are predrilled, rather than relying solely on the force of the mandrel holding the wick drain to penetrate the soil. On November 22, 1995, Nilex entered into a subcontract with Syracuse Exploration Company (Syracuse) for this drilling associated with the wick drain installation work. Section 13.2 of the Nilex-Syracuse contract essentially adopts the notice requirements of the prime contract. The subcontract also provides a notice requirement for additional services or materials furnished. Section 8.4 requires notice of claim within seven days of providing services or materials and a written compilation of charges no later than the fifteenth day of the calendar month following such provision. Article One of the Cherry Hill - Nilex subcontract essentially adopts the notice requirements of the prime contract.

11. The contract specification on wick drain installation particularly contemplated the potential for rearranging or deleting wick drains upon request. SP 5-1.04 provides in part:

> . . . The Engineer may vary the depths, spacing, or the number of wicks to be

> installed, and may revise the plan limits for this work as necessary .... If obstructions are encountered that cannot be penetrated by the drain installation equipment, the Contractor shall notify the Engineer and, under his inspection, shall attempt to install an alternate drain within a 1-foot radius of the original design location. If, after two attempts, the alternate drain cannot be installed, the location shall be deleted or further moved as directed by the Engineer . . . .

There is no evidence that Cherry Hill or its subcontractors ever requested a deletion or rearrangement of wick drains that was refused.

12. The scope of work for the prime contract between Cherry Hill Construction and the State indicates that drilling through steel obstructions was not part of the bid. The scope of work states: "This proposal has allowances for drilling [through] materials that include concrete without steel, cobbles, sands, gravels, wood, slag and asphalt. Any materials that we deem to be an obstruction will facilitate an additional fee for drilling such obstructions. Obstructions would include steel, concrete with steel, pipes, excessive amounts of rock, etc..." Syracuse President Jay Deline testified that he anticipated encountering steel while drilling and specifically excluded it from the scope of his bid price of $15 per hole.
13. Under its contract with Nilex, Syracuse engaged in drilling the holes necessary for the installation of wick drains into the soil from November of 1995 to June of 1996.
14. The Authority's Daily Construction Reports and some inspector's daily logs identify weather conditions, labor, equipment, whether equipment is idle, locations of work, general comments about the work being prosecuted and the linear feet of wick drains installed. The Authority has no contemporaneous records of its own as to what if any steel (as opposed to slag) was encountered, how many holes it was encountered in, the exact location of the holes, the procedure undertaken to get the equipment repaired and the availability of additional manpower and/or equipment to move along the drilling operations[4].
15. The Authority did receive copies of the daily reports of Syracuse and Nilex. Syracuse's daily reports identify number of holes drilled, drilling time, a general note on materials encountered and a few general notes about the job. Syracuse did not record 1) what materials were encountered in which holes and at what depths and 2) where refusals if any were encountered. Upon notice of a claim, however, MdTA could have ordered that such records be kept or investigation could have been conducted by the Authority.
16. On February 5, 1996, Syracuse sent a letter to Nilex indicating that it would be charging Nilex an obstruction drilling rate for having encountered steel, which letter was intended to put Nilex on notice of the problem pursuant to the notice provision of the Nilex/Syracuse contract.
17. On February 9, 1996, Syracuse billed Nilex $38,000 for obstruction drilling and $1800 for drill bits. In a memo dated February 27, 1996, Nilex responded in part as follows:

> The second area that we are presently addressing is the 152 hours @ $250.00/hour for obstruction drilling and the 4 drill bits @ $450.00. The funds for these items are not part of our normal billing to Cherry Hill

[4] Md TA argues inter alia that because of the delay in receipt of notice it did not have the opportunity to verify, for example, that 1) steel was encountered, or 2) that drilling breakdowns were not due to faulty equipment. For the purpose of this decision on the motion, where we must resolve all inferences in favor of the party opposing the motion, we accept the premise that any delay was caused by the presence of steel in the materials through which Syracuse had to drill.

> Construction. Nilex and Syracuse Exploration are required by the terms of our contract and subcontract to submit a claim for additional compensation for these costs based on a claim and ultimately a change order for these costs. In addition to these costs Nilex has endured a significant amount of down time that will become part of this claim. John Peterson and/or Richard Cahoon will be contacting you in the next few days to gather the required information in order that we may commence preparation of this claim for additional costs.

18. On March 16, 1996, Nilex's Daily Construction Report states with regard to the impact of Syracuse's lack of progress on Nilex, "[Syracuse] ha[s] been informed that we are going to be back charging them [since t]his has caused our operation to incur additional cost and to be slowed considerably." Thus, on March 18, 1996, Nilex wrote Syracuse and stated: "Your present rate of production is unacceptable, you are preventing Nilex from installing the required wick drain per the contract. You are giving us no choice but to put you on notice that the costs Nilex and ultimately Cherry Hill are presently incurring will be back charged against Syracuse Exploration." On the same day, Syracuse wrote Nilex about a change in conditions.
19. On March 21, 1996, Nilex' Daily Construction Report states in part: "I informed [Cherry Hill's Assistant Project Manger] of the extras being submitted to us by our drilling subcontractor, and the impact they have had on Nilex. I informed him that we would be compiling a claim of our own based on their submitted extras, and the impact that these problems have caused Nilex. He informed me that we need to get our claim together and submit it as soon as possible."
20. In late April, the Authority was contacted by Cherry Hill about looking into the deletion of a small fraction of wick drains at Stations 1677-79. On May 1, 1996, one of the Authority's geotechnical consultants informed Cherry Hill that certain wick drains in this area could be deleted.
21. On April 15, 1996, Syracuse billed Nilex $8,375 for obstruction drilling. On May 16, 1996, Syracuse wrote a demand letter to Nilex for its obstruction drilling charges and copied Cherry Hill on that correspondence. On June 18, 1996, Syracuse billed Nilex $27,875 for additional obstruction drilling and $1350 for three drill bits. On the same day, Cherry Hill signed a certificate of completion with respect to this job.
22. On July 10, 1996, Nilex sent its written notice of claim to Cherry Hill; that letter was stamped received on July 11, 1996.
23. On July 11, 1996, Syracuse wrote another demand letter to Nilex for its obstruction drilling charges and copied both its attorneys and Cherry Hill. The letter noted, "I am also in receipt of your letter dated today to Cherry Hill Construction in regards to your intent to file claim. I was told this was going to be done several months before this, not almost a month after the completion of the work."
24. In a letter dated July 15, 1996 and received on July 19, Cherry Hill submitted a notice of claim on Nilex's behalf to the MdTA. The claim itself, which alleged differing site conditions, was submitted on August 8, 1996 and received on August 9.
25. Nilex contended that Syracuse's failure to progress in predrilling the holes which Nilex needed to wick, put Nilex on standby. The MdTA Procurement Officer ultimately denied the claim on the grounds that it was untimely and that there was no differing site condition.

Decision

Although not specifically provided for under the Administrative Procedure Act, this Board, since it is charged with the informal expeditious and inexpensive resolution of appeals,[5] is willing to hear and decide motions to dismiss or for summary disposition. The moving party must demonstrate the absence of a genuine issue of material fact, Mercantile Club, Inc. v. Scheer, 102 Md. App. 757 (1995). Further, in making its determination, the Board must examine the record as a whole, with all conflicting evidence and all legitimate inferences raised by the evidence resolved in favor of the party against whom the motion is directed (in this instance, the Appellant). Honaker v. W.C. & A.N. Miller Dev. Co., 285 Md. 216 (1977); Delia v. Berkey, 41 Md. App. 47 (1978), aff'd, 287 Md. 302 (1980).

In its motion to dismiss, the Respondent argues that Nilex's memo dated February 27, 1996 notifies Syracuse of its intent to file a claim both for Syracuse's drilling operations and Nilex's downtime. This memo evidences that the subcontractor was aware on February 27, 1996 of the basis for its claim, and thus provides the basis for Cherry Hill to file a notice of claim. The record is also clear that by March 21, 1996, Cherry Hill was directly aware of the basis for claim. See Finding of Fact 19. At the most, Nilex, through the general contractor Cherry Hill, had thirty days from this date to submit a written notice of claim to the procurement officer. However such a written notice of claim was not received by the Authority until July 19, 1996 -- approximately 143 days after Nilex' memorandum of February 27, 1996 to Syracuse discussing a claim for additional costs. Thus, Respondent argues, the notice of claim was untimely.

Appellant has not disputed the essential facts as to when Appellant knew or should have known of the basis for its claim as set forth in the Findings of Fact, above. Rather, it argues that the Respondent was not prejudiced by the failure of Cherry Hill to give the State notice within 30 days of the discovery of the conditions which gave rise to the claim, and that therefore, the requirement set out by the Board of Public Works should be waived.

We declined to hold a full hearing on the merits, and instead permitted the Appellant to present evidence it believed would mitigate the failure to file timely notice. This Board, in the face of the undisputed evidence as to timing of the notice, agrees with Respondent that the claim filed in this case was untimely for the reasons set forth below, and that the allegation of "no prejudice" does not excuse Cherry Hill's obligation to file timely notice.

Whether untimely notice of claim deprives this Board of "jurisdiction" to hear the appeal or whether "untimeliness" is a factual defense which may be interposed by the Respondent was of considerable interest to all parties in this case. Thus, what must obtain upon a finding that the claim was untimely is disputed by Appellant, and the Maryland Highway Contractor's Association which filed an amicus brief.[6]

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[5] Section 15-210, Division II, State Finance and Procurement Article; See Intercounty Construction Corporation, MDOT 1036, 1 MSBCA ¶11 (1982); Dasi Industries, Inc., MSBCA 1112, 1 MSBCA ¶49 (1983).

[6] This Board accepted for filing an amicus brief filed on the eve of the motions hearing. However, the Board takes this opportunity to state that if an amicus curiae wishes to file a brief in an appeal before this Board, it should contact the parties or the Board to determine what trial/briefing schedule is in place so that an amicus brief can be filed within the motions briefing

Appellant's No Prejudice/Waiver argument

Appellant argues that the delay in the notice of claim did not "prejudice" the Respondent, and thus, compliance with the notice requirements of COMAR 21.10.14.02A and C should be waived where, as it asserts, Respondent was not prejudiced by the delay in the filing of notice of claim. The major component of prejudice alleged by Respondent, Cherry Hill avers, was that "if given a timely notice of claim, the Authority would have had the opportunity to mitigate or eliminate any alleged loss by the rearrangement or deletion of wick drains." Appellant provided expert testimony at the hearing that it was unsound engineering practice to change the spacing of the wick drains during the course of the project due to concern for differential settlement, that reduction of the number of wick drains would increase the time for settlement and thus the expense to the State, and that the installation should have proceeded in accordance with the original design. Appellant further asserts that when notified earlier of drilling difficulties, Respondent did not conduct any meaningful investigation.

Thus, Appellant argues, since there was no actual prejudice shown resulting from the delay in filing of the notice until the work was completed, the requirement that the notice should be filed within 30 days of when the contractor knew or should have known of the basis of its claim should be waived or excused. Finally, Cherry Hill maintains that the State has the burden of proof to prove prejudice.

Respondent argues that it is clear that the Authority was prejudiced by the lack of timely notice of claim. By withholding its notice of claim to the Authority for at least 143 days and until well after the job was completed, the contractor succeeded in defeating at least two goals of such a notice provision: 1) to give the governmental body the opportunity to conduct a contemporaneous investigation of the basis of the articulated claim (i.e., for example, whether the obstruction drilling rate was due to encountering steel, or due to faulty equipment, both of which issues were the initial responsibility of the contractor, not the Respondent) and 2) to give the governmental body the opportunity to mitigate any alleged loss. Further, the Respondent states, when it was notified that steel was encountered in a small portion[7] (at Stations 1677-79) of the area to be drained, the State adjusted the number of drains to be installed.

Federal Boards, and this Board prior to the 1989 amendments to governing regulations, have been willing to waive compliance with particular contract notice requirements where the language admits of waiver and the lack of notice does not prejudice the Government[8]. As this Board stated in Corman Construction Inc., MSBCA No. 1254, 3 MSBCA ¶206 (1989),

> The Government can be prejudiced by lack of notice in either of two ways: "[T]he first is in the investigation and defense of claims and the second is in the

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schedule so that there is appropriately ample time for any opponent of that brief to file a response thereto before the initial motion is scheduled for hearing. In the future, if this courtesy is not afforded the parties to the appeal, an amicus brief may not be accepted for filing.

[7] This area, according to counsel, was no larger than the Board's hearing room.

[8] See discussion of Simpson Construction Co., VABCA No. 3176, 91-1 BCA ¶23,630 at 118,392, infra.

consideration of a viable alternative to the course of action actually taken." M.M. Sundt Construction Co., ASBCA No. 17475, 74-1 BCA ¶10,627 at 50,425.

Appellant addressed the second of these avenues, but did not satisfy the Board with regard to the prejudice attaching to Respondent with regard to investigation and defense of claims.

The Board finds that taking the evidence in the light most favorable to Appellant, the party against whom the motion is brought, the unrebutted evidence shows that the State was not in fact on notice that the contractor intended to file a claim covering matters which would normally be the responsibility of the contractor. While the State may or may not have ultimately changed the spacing of the wick drains had it been notified of the claim when it was known to Cherry Hill, it was at the least deprived of the opportunity to investigate those costs later claimed for damage to equipment, and time delays resulting from increased difficulty and "differing site conditions" encountered during the job. Thus, while the State may have known that the contractor was encountering difficulties for which the contractor was responsible under the contract, it did not know that the Contractor intended to shift the financial responsibility for those difficulties to the State through the claims process, and the State was precluded, by the delay in the notice, from verifying the underlying basis for the costs later charged to the State.

Appellant relies upon the decision of the Veteran's Administration Board of Contract Appeals in Simpson Construction Co., VABCA No. 3176, 92-1 BCA ¶23,630 (1990), a case in which the Contractor failed to give proper notice of a change in site conditions as required by the Differing Site Conditions clause, Federal Acquisition Regulations [FAR] 52.236-2(a)(1), and the Government argued that the case should therefore be dismissed. The VA Board found the actual site conditions differed materially from those represented in the contract, but that even where there is a complete failure of notice, Appellant was not precluded from recovering. The Board stated that "failure of notice serves as a defense to such a claim only if the Government can prove that it was prejudiced by the failure of notice".[9] The VA Board, citing Edward R. Marden Corporation, VABCA-1833, 85-2 BCA ¶18,083; and Shumate Constructors, Inc., VABCA-2772, 90-3 BCA ¶22,946, concluded that Appellant's failure of notice would not preclude recovery for an otherwise proper claim, since the failure of notice is a defense only if the Government can prove that it was prejudiced by the failure of notice. The Board then found that the government had failed to carry its burden that it was prejudiced by Appellant's failure to give notice of the differing site condition, and awarded an equitable adjustment to Appellant.

While this Board relies for guidance on the decisions of the Federal Boards of Contract Appeal, we are not bound by those decisions as precedent, particularly where our statutes and regulations diverge from those contained in the FAR[10]. If this were a federal case subject to the FAR,

[9]Maryland House bill 1094, introduced February 23, 1999, would excuse the strict construction contract 30-day notice of claim filing requirement where the State cannot show any prejudice resulting from the Contractor's failure to file.

[10]The Federal Differing Site Conditions clause has been observed to be practical, not punitive, allowing the government to perform its own investigation and take corrective measures regarding the site condition. Brechan Enterprises, Inc. v. United States, 12 Cl.Ct. 545 (1987). The Government under the FAR has the burden of proof to show that the failure of notice and the passage of time resulted in its inability to investigate the work or costs associated with the change. Such proof would require that the Government show that the failure of notice and passage of time resulted in the government's inability to investigate the site to ascertain the extent of work or conditions causing the extra work or to prove that the failure of notice prevented the Contracting Officer from minimizing or avoiding the extra expenses. Schnip Building Co. v. United States, 227 Ct.Cl. 148 (1981).

we would look in more detail at whether or not the State had in fact been prejudiced; and absent such a showing, might well find that the merits should be addressed, and if properly supported, that an equitable adjustment was due the contractor even in face of the failure to file timely notice.[11] However, the Maryland statutes and regulations do not track those applicable to the federal government insofar as the FAR does not require the dismissal of a claim filed more than 30 days after the grounds for the claim become apparent.

Thus, this Board finds that under the statute and regulations as applicable to the contract at issue, the Government is not required to show prejudice as a result of the late filing, and the failure of the Contractor to timely file its claim is fatal. Whether or not this is a jurisdictional determination will be discussed further below.

MHCA's Argument as to Jurisdiction

In its Amicus Curiae brief, MHCA takes no position as to whether, under the statute or regulations, Cherry Hill's notice of claim is timely. MHCA notes that "[t]he Contract Documents, the regulations and the statute go on to say that, absent the requisite notice, the claim should[12] be dismissed." However, MHCA expresses concern with the argument of Respondent that notice of a claim is a predicate to the Board's subject matter jurisdiction, and suggests that the Board, in the past, has considered lack of notice as a defense available to Respondent rather than as a jurisdictional hurdle.

Thus, MHCA argues, making notice a jurisdictional bar is not consistent with prior case law of the Board, the jurisdictional enabling provisions of the Procurement Article, and the stated purposes of the General Procurement Law.

The Amicus brief suggests that at issue here is not a jurisdictional question; that the Board has the authority to hear an appeal involving a contract dispute "unless" a defense is interposed by the Respondent that the protest and/or appeal were not timely filed. Thus, the Amicus argues, the question is one of fact, not jurisdiction. In support, Amicus submits for the Board's consideration, its prior decisions in a number of cases.

First, Amicus cites three early Board cases, American Cooperage & Steel Drum, Inc., MSBCA No. 1050, 1 MSBCA ¶ 47 (1983); Martin G. Imbach, Inc., MDOT No. 1020, 1 MSBCA ¶ 52 (1983); and Corman Construction Inc., MSBCA No. 1254, 3 MSBCA ¶206 (1989).

In American Cooperage, the contractor agreed to purchase and remove from State Highway Administration facilities 55-gallon steel paint drums. Approximately 5,400 drums were purchased,

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[11] It is also noted that the differing site condition in Simpson Construction involved the necessity to extend wallboard a short distance beyond the height portrayed in the plans. The federal government's best testimony of prejudice was that it could have saved $110 if it had earlier known of the difference in height. In the instant case, however, at issue is the quality of soil as much as 90 feet beneath a bridge entrance ramp, and a claim in the amount of $289,208.08 plus interest and costs.

[12] n fact, the regulations, and as of October 1, 1996, the statute, both state that the claim "shall" be dismissed, a vast difference from "should". Use of the word "should" would have given the Agency and the Board discretion to determine whether mitigating circumstances exist which excuse or provide grounds for waiver of the filing of the notice of claim. "Shall" suggests no such discretion.

and final payment was made by the contractor to the State in the amount of $31,500 almost a year after the contract was entered into in March of 1979. Within a month, the contractor was charged by the Maryland Department of Natural Resources for dumping hazardous materials (the drums), and ordered to clean up the area where the drums had been dumped. In October 1980, the contractor filed suit in Superior Court for Baltimore City against SHA claiming breach of contract for failing to provide, as the contract contemplated, "clean" drums. That action was dismissed for the Contractor's failure to exhaust his administrative remedies. The contractor in August of 1981 filed a claim of breach of contract with the appropriate procurement officer, which was denied as untimely, and timely appeal was taken to the Board. SHA argued before this Board that the Contractor's breach of contract claim to the procurement officer was untimely. The Board disagreed, noting that the only notice provisions in the contract did not encompass breach of contract claims. No other regulations or statutes applied to the question of notice. Therefore, the Contractor was not held to a 30-day notice requirement, since no such requirement affecting the Contract and applicable to a breach of contract claim existed at the time the contract was entered into.

In Martin G. Imbach, Inc., the State argued that it was not liable for increased costs of installing gabions in 1978 to a uniform width because Appellant failed to give prompt notice under a differing site condition contract clause: " . . . it shall be the responsibility of the contractor to promptly notify the Engineer of the existence of conditions which he feels differ materially from those described by the Plans and/or Specifications. . . ." The Board noted that prompt notice is imperative in differing site condition situations "in order to permit the contracting agency to observe the conditions encountered and determine the least expensive solution", and that without such notice, the contracting agency "would be unable to defend against a claim or limit its liability". However, the Board found that such notice is not required where the State's Engineer finds it necessary to himself initiate the changes, as occurred in Imbach, particularly since the existence of SHA survey data enabled SHA to determine accurately the additional excavation and fill necessitated by the extra work, and resulted in no prejudice to the State.

Finally, Corman dealt with the effect on a claim of the notice requirements of the contract's changes clause when the lack of notice does not prejudice the State. This Board held that the lack of notice did not prejudice the State in the context of the Corman claim, and therefore waived the notice requirements of the underlying contract's changes clause. The notice provisions at issue today were not in effect at the time the Corman contract was entered into.

There was no regulatory notice clause applicable in the American Cooperage contract,[11] contract clauses relied upon in Corman, and Imbach, however, for example, requiring that notice be "prompt", plainly allowed for discretion in their application on the part of the Agency and the Board. In 1989, however, a change in the regulations (and later the statute) governing the instant case removed any discretion enjoyed by the Agencies and the Board regarding discretionary language in such contract notice provisions. Prior to the applicability of the 1989 Board of Public Works notice requirements, the Board was not limited by a specific regulatory deadline for submission of notice of claim and was not mandated by COMAR 21.10.04.02C to dismiss a claim filed more than 30 days after the basis was known or should have been known. The regulations changed in 1989, and

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[11] "[T]here are no regulatory provisions addressing the time period for receipt and consideration of breach of contract claims. Accordingly, Appellant's claim is not barred by existing law or regulation." American Cooperage, Id. at p. 6.

thereafter, the agencies and this Board have not enjoyed the same flexibility with regard to review of notice of claims not filed within 30 days of when the Contractor knew or should have known of its existence.

Amicus therefore next cites a more recent case for the proposition that untimely notice is a defense and a factual question, not a jurisdictional bar to pursuit of a Contractor's claim: Orfanos Contractors, Inc., MSBCA No. 1849, 5 MSBCA ¶410 (1996). In Orfanos, the Appellant gave timely notice of its claim, but failed to document its claim within 30 days as was required by COMAR 21.10.04.02B as it existed at the time of Orfanos' contract. As the Board stated in finding that the failure to document the claim within 30 days of noticing the claim was excusable, the Board stated:

> Thus, where changed work results in a period of extended performance and where the actual costs for such changed work and period of extended performance are not possible to determine until after this work has been performed, the notice requirements of COMAR 21.10.04.02 and the contract [GP-5.14] are complied with absent a statement of damages or additional costs as long as (1) the State is placed on notice of the nature of the problem and that additional costs will result therefrom;(2) the basic elements of such potential costs or damages are stated; and (3) those costs are quantified as soon as reasonably practicable and prior to final payment. See, Rice Corporation, MSBCA 1301, 2 MSBCA ¶167 (1987); Odyssey Contracting Company, MSBCA 1617 and 1618, 4 MSBCA ¶317 (1992).

COMAR 21.20.04.02B presently reads:

> B. Contemporaneously with or within 30 days of the filing of a notice of a claim, but no later than the date that final payment is made, a contractor shall submit the claim to the appropriate procurement officer. On conditions the procurement officer considers satisfactory to the unit, the procurement officer may extend the time in which a contractor, after timely submitting a notice of claim, must submit a contract claim under a procurement contract for construction. An example of when a procurement officer may grant an extension includes situations in which the procurement officer finds that a contemporaneous or timely cost quantification following the filing of the notice of claim is impossible or impractical. 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 the 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 procurement agency is liable.

This provision is subject to the same language of Section C, 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. However, there exists considerably more discretion in the Board's determination of whether or not the claim itself is filed timely. Unlike Section A regarding the notice of claim, Section B states that the claim itself must be filed within 30 days of the filing of the notice, but no later than the date of final payment.[12]

Thus, untimely notice is sometimes a jurisdictional issue, and sometimes a defense to a claim, depending upon which clause is controlling -- the 30-day requirement for filing notice of a claim is jurisdictional; documentation of that claim is more a matter of discretion on the part of the Agency and the Board, and therefore falls more towards a defense to a claim.

Since October 1, 1996 the Procurement officer has been given authority (which the Board believes extends its authority as well, since it is our responsibility to review the procurement officer's decisions) to extend the time (so long as the initial notice is timely) within which Appellant can submit the full claim with supporting documentation, such as where quantification is impossible or impracticable. In Orfanos, the Board found that notice of claim was timely filed, and that the documentation of the claim was made within a reasonable time after cost quantification became possible:

> Appellant acted with reasonable promptness to determine its costs resulting from the State requiring a Near White Blast standard throughout the course of the entire project.

Were the Board to have found that documentation of the claim was not within a reasonable time, then it would have likewise have been bound to dismiss Orfano's claim.

Amicus also cites Allied Contractors, Inc., MSBCA 1884, 5 MSBCA ¶427 (1997) for the proposition that an evidentiary hearing on the merits was held after which the Board found that the contract requirements for notice as set forth in the Standard Specifications for Construction and Materials, 1982, (the Red Book) were not met. In that case, the Appellant strongly maintained pre-hearing that timely notice as required by contract provisions contained in the 1982 Red Book and timely claim documentation as required by statute had been given. The Board thus determined that a factual dispute about a required notice issue existed. Appellant, however, was unable to document in the course of the lengthy hearing its assertion that a timely claim notice of claim and claim documentation had been made. The instant appeal is distinguishable in that here Appellant has not seriously proposed that timely notice was given, and has rather argued that the requirement for timely notice should be waived.

The Respondent interposes the defense of sovereign immunity to the Amicus argument, as discussed by the Board below.

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[12] Under the current regulation, the Procurement Officer may extend the time within which the claim must be documented. See page 21, infra.

Sovereign Immunity
Statute and Regulations

This Board has the jurisdiction to determine the issue of its own jurisdiction to proceed. Highfield Water Co. v. Washington County Sanitary Dist., 295 Md. 410, 414 (1983); Sullivan v. Insurance Commissioner, 291 Md. 277, 281 (1981).

The State enjoys immunity from suit, whether or not the claim is meritorious, except in those instances where it has specifically waived its immunity as a matter of public policy. Department of Natural Resources v. Welsh, 308 Md. 54, 58, (1986); Calvert Associates Limited Partnership v. Department of Employment and Social Services, 277 Md. 372 (1976); Godwin v. County Comm'rs of St. Mary's Co., 256 Md. 326 (1970); Dunne v. State, 162 Md. 274, cert. denied, 287 U.S. 564 (1932); State of Maryland v. Balto. & O.R. Co., 34 Md. 344 (1871), aff'd, 88 U.S. 456 (1875). This is a policy question, in fact, which is not within the province of the judiciary, much less an administrative Board, to modify, but must be specially waived by the Legislature. See Katz v. Washington Suburban Sanitary Comm'n, 284 Md. 503, 507-8 (1979); Board of Trustees of Howard Community College v. John K. Ruff, Inc., 278 Md. 580, 590 (1976); ARA Health Services, Inc. v. Department of Public Safety and Correctional Services, 344 Md. 85, 91 (1996).

This sovereign immunity has been legislatively waived, e.g., Md. State Govt. Art. §12-104 (Supp. 1998) (torts); Md. State Govt. Art. § 12-201 (Supp. 1998) (contracts), but only upon certain conditions precedent. In order for a suit sounding in tort to be brought against the State, litigants must submit "a written claim to the Treasurer or a designee of the Treasurer within 1 year after the injury to person or property that is the basis of the claim." Md. State Gov't Code Ann. § 12-106(b)(1) (1995). Failure to comply with this claim submission deadline is an absolute bar to suit under the Maryland Tort Claims Act. See, e.g. Simpson v. Moore, 323 Md. 215,228 (1991), and Haupt v. State, 340 Md. 462, 470 (1995). The Court of Appeals has refused to create any judicial exceptions to the condition precedent to suit, particularly where the Legislature itself has chosen not to provide any exceptions to the deadline for filing of the claim. Simpson v. Moore, 323 Md. 215, 224-25 (1991).[13] This claim deadline applies despite the fact that the Statute of Limitations for torts is three years. Md. State Gov't Code Ann. §12-106 (1995).

Since the enactment of the General Procurement Law, Chapter 775, Acts 1980, this Board has had exclusive jurisdiction over most protests and contract claims relating to State procurements. Md. State Fin. & Proc. Code Ann. §15-211 (1995). However, that jurisdiction does not extend beyond what has been expressly conferred upon it by the Legislature. University of Maryland v. MFE Incorporated/NCP Architects, Incorporated, 345 Md. 86 (1997). This Board is quasi-judicial in nature, and only derives its authority to hear and decide appeals under the General Procurement Law and regulations promulgated thereunder and consistent therewith.

The 30-day time requirement which was part of this contract was based on the statutory and regulatory requirements of Maryland's General Procurement Law. At the time of this claim, the

[1] [3]In Simpson v. Moore, supra, the exception sought by the plaintiff was based on the argument (as is Appellant's here) that the State was not prejudiced by the failure to timely file the claim.

General Assembly has required that, "A protest or contract claim shall be submitted within the time required under regulations adopted by the primary procurement unit responsible for the procurement." Md. State Fin. & Proc. Code Ann. §15-217 (1995). Regulations adopted by the primary procurement unit responsible for the procurement (in this case, at least, the Board of Public Works) at COMAR 21.10.04.02(A) states that "a contractor shall file a written notice of a claim within 30 days after the basis of claim is known or should have been known, whichever is earlier". COMAR 21.10.04.02(C) states that such a notice of claim which "is not filed within the time prescribed . . . **shall** be dismissed." (Emphasis supplied.) Thus, the Respondent argues, the Board has no discretion in the instant case but to dismiss the claim if it should find that the Appellant knew or should have known of the grounds for the claim at any time prior to 30 days before the MdTA's receipt of the claim on July 19, 1996.

The Board submits that what is at stake, in fact, is the determination of "jurisdictional facts". The Board has operated on the premise that questions of timely filing of appeals are jurisdictional in that they are threshold questions. If the question of timely filing is raised by Respondent in an appropriate motion, and it is not satisfactorily refuted by the Appellant (finding all inferences in Appellant's favor), then the Board has no jurisdiction to hear the merits of the claim. However, if the Appellant asserts that it has in some fashion complied with the notice provision, or, as here, that there exists some reason why it should be excused, the Board must hear at least sufficient evidence to resolve these questions, even if an exhaustive hearing on the merits of the claim is not held.

The Board's treatment of bid protest appeals filed under COMAR 21.10.02 is instructive. Since its effective date of July 1, 1981, COMAR 21.10.02.03(B) has generally required that protests must be submitted to the Procurement Officer within 7 days of when the protester knew or should have known of the grounds of his protest, and that untimely protests shall not be considered. Thus if a protest has not been timely filed with the Procurement Officer, the Board has no jurisdiction to hear the appeal. Kennedy Temporaries v. Comptroller, 57 Md. App. 22 (1984). The Board has found that protests not submitted in this time period must be dismissed for lack of subject matter jurisdiction without regard to considerations of lack of prejudice to the State. See, Appeal of Ismart, MSBCA 1979, 5 MSBCA ¶417 (1997) (dismissing for lack of jurisdiction a protest that was one day late).

Since its effective date of January 9, 1989, COMAR 21.10.04.02 has required that notice of contract claims shall be submitted within 30 days and that such claims shall be dismissed if notice is not received within this time. Accordingly, contract 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.

Likewise, the jurisdiction of the State and Federal Courts is limited B through statutes of limitations, diversity citizenship and monetary threshholds, for example C by statute, so that the Courts are precluded from hearing and deciding issues of fact which go to the merits of the claim before them. However, courts are clearly willing to hear evidence which goes to the question of jurisdiction at a motions stage, before taking the next step and addressing the merits.

Appellant and the Amicus argue that issues of timeliness should be treated as factual disputes which are to be resolved by the Board. The Board agrees that issues of timeliness present a factual

dispute which it must resolve. However, the Appellant expands its argument to include whether the Board should consider if the State was prejudiced by the delay in determining whether or not it can address the merits in a case where the Board has determined that notice was not timely filed. This Board afforded the Appellant an opportunity to present whatever evidence and argument it wished to provide on the question of prejudice, and would in appropriate circumstances in the future allow an Appellant (or the Respondent) the same opportunity when it in good faith alleges that it must present evidence on a question posed to this Board in a Motion to Dismiss or for Summary Disposition. Nonetheless, the General Procurement Law and the regulations promulgated by the Board of Public Works do not equivocate on the question of dismissal of claims. In a minimum of words, both state that if a **notice** of claim is not filed timely, it **shall** be dismissed.

That a notice not timely filed shall be dismissed was not expressly stated in the General Procurement Law at the time applicable to this case. Thus, the General Procurement Law only required that contractors comply with whatever rules and regulations were promulgated by the procurement unit, vis., pursuant to COMAR 21.10.04.02, that notice of claim must be filed within 30 days of when the contractor knew or should have known of the basis of its claim. However, the Legislature affirmed the regulations which direct as to a procurement contract for construction that a notice of claim which is not filed within 30 days of when the contractor knew or should have known of the basis for its claim shall be dismissed, by amendment of the statute effective October 1, 1996; Md. Code Ann. Fin. & Proc. Art. §15-219 (1997 Supp). Further, the statute now also states that recovery under a contract claim is not allowed for any expense incurred "more than 30 days before the required submission of a claim . . ." Id.

Conclusion

In sum, the Board's subject matter jurisdiction is limited to that which has been specifically conferred upon it by the legislature in Title 15 of Division II of the State Finance and Procurement Article. University of Maryland v. MFE Incorporated/NCP Architects, Incorporated, 345 Md. 86 (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 Sections 15-211, 15-215, and 15-217 and 15-219 of the State Finance and Procurement Article. The Board finds that the lack of subject matter jurisdiction mandates dismissal regardless of allegations of lack of prejudice to the State arising from the delay.

For the foregoing reasons, the motion of Respondent to dismiss the appeal is granted. Wherefore, it is hereby Ordered, this 19th day of March, 1999, that the appeal is dismissed with prejudice.

Dated: March 19, 1999

_____
Candida S. Steel
Board Member

I concur:

_____

Robert B. Harrison III
Chairman

_____

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 2056, appeal of Cherry Hill Construction Inc., Under MdTA Contract No. KB-421-000-006.

Dated: March 19, 1999

Mary F. Priscilla
Recorder