

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF MERIDIAN)
MANAGEMENT CORPORATION)
) Docket No. MSBCA 2248
Under DGS Contract No.)
CPB 96/00-0IS)

May 28, 2002

Board of Contract Appeals - Jurisdiction - The Board of Contract Appeals lacks jurisdiction to consider a claim in a non-construction contract that (assuming it is not filed contemporaneously with the notice of claim) is not filed within thirty days of the filing of the notice of claim. If final payment is made less than thirty days after the filing of the notice of claim, then the claim must be filed not later than the date of final payment.

APPEARANCE FOR APPELLANT: Donald C. Holmes, Esq.
Holmes, Schwartz & Gordon
Easton, MD

APPEARANCE FOR RESPONDENT: John H. Thornton
Assistant Attorney General
Baltimore, MD

OPINION BY BOARD MEMBER HARRISON

Respondent has moved to dismiss Appellant's appeal on several grounds involving jurisdiction. Appellant has responded and the Board has received argument of counsel on the matter.¹ The Board will dismiss the appeal on the ground that a timely claim was not filed under COMAR 21.10.04.02.B requiring dismissal of the claim under COMAR 21.10.04.02.C.

Findings of Fact

1. Appellant was awarded a five (5) year contract (Contract) for the maintenance of a State building on June 19, 1996.
2. Appellant argues that it filed six notices of claim (two in 1996 and four in 1998) asserting that work outside the basic requirements of the Contract was being required by the State and that Appellant wanted to be compensated for that work. The State denies that any notices of claim were filed that met the requirements of COMAR 21.10.04.02A.
3. Assuming arguendo that proper notices of claim were filed as required by COMAR

¹The Board requested and received additional written briefing on the issue of whether the failure to file a claim within thirty days of the filing of the notice of claim is jurisdictional.

21.10.04.02A, the record reflects and Appellant admits that while Appellant's claim (consolidating all six matters involved in the six alleged notices of claim) was filed on June 26, 2001, it was not submitted within 30 days of the filing of any of the six alleged notices. The consolidated claim filed on June 26, 2001 was, however, filed before final payment.

Decision

COMAR 21.10.04.02B provides:

B. Contemporaneously with or within 90 days of the filing of a notice of a claim on a construction contract, or 30 days of this filing on a nonconstruction contract, 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 sub-contractor, 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.

The parties agree and the Board finds that this Contract for the maintenance of a building is a nonconstruction contract. See COMAR 21.01.02.01(23) and (53). Accordingly, a claim (assuming as

is the case herein that the claim was not filed contemporaneously with the notice of claim) must be filed within 30 days of the filing of the notice of claim but no later than the date that final payment is made. Pursuant to COMAR 21.10.04.02C, a claim that is not filed within this time “shall be dismissed.”

Appellant argues that a proper reading of COMAR 21.10.04.02B does not raise a jurisdictional concern provided that the claim is filed before final payment. Because the claim herein was filed before final payment, although not within thirty days of the filings of the notices of claim, Appellant asserts that it was timely. Appellant also argues that because the State “continually refused to pay for anything extra” Appellant’s actions in allegedly giving its notices of claims, and then accumulating and submitting all the claims in one final package “to see if the [Procurement] Officer’s position would change, was appropriate.” The Board disagrees.

In Arundel Engineering Corporation v. Maryland Mass Transit Administration, Maryland Court of Special Appeals unreported, No. 554 (July 30, 2001), the Court of Special Appeals interpreted the language of COMAR 21.10.04.02B to require filing of a claim no later than 30 days of the filing of the notice of claim. The Court of Special Appeals’ ruling in Arundel primarily dealt with a factual setting involving the contemporaneous filing of the notice of claim and claim. However, the Court did specifically decide the issue of a timely filing of a claim following the filing of a notice of claim. The Court found on Claim 2042 that the contractor had complied with the 30-day notice-of-claim requirement of COMAR 21.10.04.02A but had not complied with the claim-filing requirement of COMAR 21.10.04.02B. The Court then held: “Therefore, the Board properly dismissed the claim under COMAR 21.10.04.02(C) for failure to file a timely claim.” Arundel at p. 17. In footnote 4 at pp. 11-12, the Court noted that:

⁴A contractor must file its claim before final payment if payment is made less than 30 days after the contractor filed notice of its intent to file a claim. COMAR 21.10.04.02B. At all times relevant to this appeal, the requirement to file a claim no later than 30 days after filing notice was absolute. The legislature did not provide for any exceptions. Effective October 1, 1996, the legislature allowed the procurement officer the discretion to extend the period for filing the claim itself, but only if the initial notice of claim was timely filed within 30 days of the date the contractor knew or should have known of the basis for its claim. St. Fin. & Proc. § 15-219(b) (1998 supp.). In 1999, the legislature extended the time for filing a claim to 90 days. St. Fin. & Proc. § 15-219(b) (1999 Supp.).

The legislation (referred to in the Court’s footnote) effective in 1996 and 1999 only applied to construction contracts. See St. Fin. & Proc. § 15-219 (2000 Supp.).² Claims in nonconstruction

²Appellant argues, citing Cherry Hill Construction, Inc., MSBCA 2056, 5 MSBCA ¶459 (1999), that the requirement to file the claim within thirty days of the filing of the notice of claim is not jurisdictional and that the Board has the discretion to determine that a claim is timely even if filed more than thirty days after the notice of claim was filed so long as final payment has not been made. We agree that in a construction contract the present day operative statutory and regulatory language may allow the Board to determine whether an agency’s refusal to extend the time for submission of the claim after the filing of the notice of claim was

contracts such as this one are still required to be filed within thirty (30) days of the filing of the notice of claim. The Court also observed that a contractor must file its claim before final payment if final payment is made less than thirty (30) days after the contractor filed notice of its intent to file a claim. Therefore the claim must be filed within thirty days of the filing of the notice of claim and be filed in less than thirty days if final payment is made less than thirty days from the filing of the notice of claim.

Appellant challenges the wisdom of deciding the 30 day - final payment issue on the basis of what counsel for Appellant describes as only a passing reference in the Arundel decision which primarily dealt with contemporaneous filing of the notice of claim and claim. The Board disagrees. The Court unmistakably said what it said in footnote 4 and at page 17 of the body of the opinion. Such statements seem justified by a plain reading of COMAR 21.10.04.02B. The Regulation was promulgated by the Board of Public Works.³ The Board of Public Works (BPW) may be compared to a legislative body. It has great powers conferred upon it by statute. In the procurement area, the General Assembly has granted the BPW the authority to control procurements such as this one including the authority to adopt regulations. See St. Fin. & Pro. § 12-101 (2000 supp.). The Board believes that an analysis of a BPW procurement regulation should be similar to an analysis of a legislative enactment. As noted by this Board in an early decision, Solon Automated Services, Inc., MSBCA 1117, 1 MSBCA ¶71 (1984) at p. 3:

A cardinal rule of statutory construction is that statutes should be construed to effectuate the Legislature's intent. Holly Cross Hospital of Silver Spring, Inc. et al. v. Health Services Cost Review Commission, 283 Md. 677 (1978); Suburban Uniform Company, Division of Big Boy's Army and Navy Stores, Inc., MSBCA 1053, March 19, 1982. In so doing, a statute should be interpreted, if possible, according to its plain language with words presumed to be used in their ordinary and popularly understood meaning unless there is reason to believe from the face of the statute that its words were intended to have some other meaning. Drews v. State, 224 Md. 186, 167 A.2d 341 (1961); Pressman v. Barnes, 209 Md. 544, 121 A.2d 816 (1956). "In the final analysis, in construing any statute requiring construction, courts must consider not only the literal or usual meaning of words, but their meaning and effect in light of the setting, the objectives and purposes of the enactment, with the real intention prevailing over the literal intention even though such a construction

unreasonable. See St. Fin. & Proc. §15-219(b) (2000 Supp.); COMAR 21.10.04.02B. This is not a construction contract and we conclude that the thirty (30) day claim filing requirement for non-construction contracts is absolute.

³Appellant suggests, citing Hoel - Steffen Construction v. United States, 456F.2d 760 (Ct. Cl. 1972) and Powers Regulator Company, GSBFA Nos. 4668, 4778, 4838, 80-2 BCA ¶14, 463, that this Board should interpret this BPW Regulation in a manner that would not require dismissal on jurisdictional grounds whenever the record reflects that the government is not prejudiced by lack of notice. This Board is bound by the regulations of the BPW. Therefore, assuming arguendo that the State was not prejudiced by the lack of the filing of a timely claim, the Board may only interpret the Regulation to not require dismissal if such a reading is consistent with the intent of the Regulation. As discussed below such a reading would be inconsistent with the intent of the Regulation.

may seem to be contrary to the letter of the statute. (citations omitted).” State v. Fabritz, 276 Md. 416, 422 (1975); see also Wilson v. State, 21 Md. App. 557, 567 (1974); Bickel v. Nice, 173 Md. 1, 192 A. 777 (1937).

While the focus in Solon supra was on legislation, we would view analysis of a BPW regulation in much the same fashion. First and foremost we would construe the regulation to effectuate the BPW’s intent. The plain language of COMAR 21.10.04.02B provides that the claim if not filed with the notice must be filed within 30 days thereafter, but no later than the date that final payment is made. Statutes (and regulations) should be read whenever possible in a manner that does not make language superfluous. If one were to accept Appellant’s argument that the claim may be filed at any time prior to final payment without regard to any thirty-day limitation, the thirty-day language would be rendered superfluous. Further, a regulation should be read in a way that makes sense; i.e., the meaning and effect of the words used in the regulation should be considered in light of the setting, objectives and purposes of the regulation in a manner that makes sense. Illogical or unreasonable results should be avoided. See Kaczorowski v. City of Baltimore, 309 Md. 505, 513 – 515 (1987). It makes sense to read the language of the Regulation under consideration (COMAR 21.10.04.02B) the way the Court of Special Appeals did in Arundel supra which reading requires the contractor to file its claim within thirty days of the filing of the notice of claim and to file such claim in less than thirty days if final payment is made less than thirty days following the filing of the notice of claim.

For the foregoing reasons, the Board hereby grants the Motion to Dismiss on grounds that a timely claim was not filed under COMAR 21.10.04.02B, thus requiring its dismissal under COMAR 21.10. 04.02C. Wherefore, it is Ordered this 28th day of May 2002 that the appeal is dismissed with prejudice.

Dated: May 28, 2002

Robert B. Harrison III
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 2248, appeal of Meridian Management Corporation under DGS Contract No. CPB 96/00-0IS

Dated: May 28, 2002

Loni Howe
Recorder