

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

<b>In the Appeal of</b>	*	
<b>Brawner Builders, Inc.,</b>	*	
<b>FBO Faddis Concrete Products, Inc.</b>	*	
<b>&amp;</b>	*	<b>Docket No. MSBCA 3098</b>
<b>Faddis Concrete Products, Inc.</b>	*	
<b>Under</b>	*	
<b>Maryland State Highway Administration</b>	*	
<b>Contract No. HO2485126</b>	*	
<b>Appearance for Appellants</b>	*	<b>Paul A. Logan, Esq.</b>
	*	<b>Jodi S. Wilenzik, Esq.</b>
	*	<b>Post &amp; Schell, P.C.</b>
	*	<b>Philadelphia, PA</b>
<b>Appearance for Respondent</b>	*	<b>Sonia Cho, Esq.</b>
	*	<b>Assistant Attorney General</b>
	*	<b>Contract Litigation Unit</b>
	*	<b>Baltimore, MD</b>
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**OPINION AND ORDER BY MEMBER STEWART**

Based on the undisputed facts, the Board denies this Appeal because a timely notice of claim was not filed by the contractor on behalf of its subcontractor.

**UNDISPUTED FACTS**

Brawner Builders, Inc. ("Brawner") and Respondent, Maryland State Highway Administration ("SHA"), entered into SHA Contract No. HO24851256 (F.A.P. No. NH-95-3 (197)E) (the "Contract") for the construction/extension of a noise barrier in Howard County along the southbound roadway of I-95 beginning 5,000 feet north of MD 100 in a northerly direction to Montgomery Road for a total project length of approximately 0.38 miles (the "Project").

On January 24, 2013, Brawner issued Purchase Order No. 1167-001 to Faddis Concrete Products, Inc. ("Faddis") to provide sound-absorbing concrete panels and access doors for the Project. Faddis executed the Purchase Order on February 5, 2013 and Brawner on February 7, 2013.

On May 2, 2014, Respondent sent a letter to Brawner with the subject line "Panel Discrepancy" stating that the concrete wall panels used on the Project contained aggregate from an unapproved source and that Respondent could not verify the required strength. Respondent asked Brawner to advise how it intended to remediate the situation.

On May 8, 2014, Brawner sent a letter to Respondent explaining Respondent's prior approval of the concrete wall panels in question. Brawner stated that it was merely a customer purchasing an approved product from a source pre-approved by Respondent. Brawner further stated its understanding that all panels produced and delivered on the Project as of the date of its letter were from an approved source and accepted by Respondent. Brawner asked Respondent to confirm this fact. Finally, Brawner noted that all parties involved, including Faddis, had been harmed by this breakdown in the fabrication, inspection, and acceptance procedure at a concrete precast facility approved by the Respondent, and Brawner reserved its rights to extend the duration of the contract and seek monetary compensation if it should become necessary. Brawner requested Respondent consider a temporary shutdown of the Project until a mutually acceptable resolution was reached and promised to "continue to work with all parties in any way possible to help facilitate an expedient resolution."

On May 9, 2014, Respondent sent a letter to Faddis outlining in great detail alleged deficiencies in the production of the concrete panels at its Downingtown, Pennsylvania plant (the

“Pennsylvania Plant”) and directed Faddis to suspend production of exposed aggregate panels pending corrective action.

On June 9, 2014, Ms. Michelle Armiger, on behalf of Respondent, emailed officials at Virginia Department of Transportation (“VDOT”) and Pennsylvania Department of Transportation (“PennDOT”) stating that Respondent had been experiencing ongoing non-compliance issues concerning exposed aggregate sound wall panels at Faddis’ Pennsylvania Plant and at Faddis’ plant in King George, Virginia. Ms. Armiger also stated that Respondent had directed Faddis to suspend production at the Pennsylvania plant for six months, that the Federal Highway Administration was involved, and that Respondent may be pursuing a case with the Office of the Inspector General. Ms. Armiger’s email then asked whether officials in Pennsylvania and Virginia experienced non-compliance issues with Faddis similar to the ones Respondent had experienced.

On June 23, 2014, Faddis sent three (3) letters. The first letter was sent to Respondent stating that Faddis “hereby supplements the notices of claims previously submitted by [Brawner] and furnished to [Respondent’s] counsel by our attorney.” Faddis stated that Respondent’s direct communication with Faddis, “albeit not contract specific,” had resulted in the halting of operations at Faddis’ Pennsylvania Plant. Faddis also referred to communications between Respondent and VDOT and PennDOT regarding the issue with construction of the concrete panels, and stated that “Faddis therefore supplements all prior notices” and that Faddis reserved the right to recover damages related to “the idling of Faddis’ plant and equipment” and for “interferences” with other contracts it had with VDOT and PennDOT.

The second letter Faddis wrote on June 23, 2014 was to Brawner. Faddis requested that Brawner provide it with the notice of claim letter it sent to Respondent related to the panel

discrepancy issue. Faddis also requested that Brawner furnish a copy of the second letter to Respondent as a supplemental notice of claim regarding damages Faddis allegedly suffered as a result of Respondent's communications with VDOT and PennDOT.

The third letter from Faddis was sent by Paul A. Logan, counsel for Faddis, to Scott D. Morrell and Lance M. Young, Assistant Attorneys General ("AAG") for Respondent. Mr. Logan stated: "please accept this letter as Faddis' notice of claim to [Respondent] of its entitlement to recover all damages caused by the actions of [Respondent], most especially what appears to be interferences with Faddis' qualifications in Maryland and other states and Faddis's supply contracts, including those for [Respondent's] projects." Mr. Logan also stated: "[b]e advised that Faddis' and Brawner's prior claim notices in compliance with the contract remain."

On June 24, 2014, AAG Morrell sent an email to Mr. Logan advising him that Brawner, the prime contractor that had a contract with Respondent, had to file its claim with the procurement officer, and also apprised Mr. Logan of the requirements for filing a claim as set forth in Title 15, Subtitle 2 of the State Finance & Procurement Article of the Annotated Code of Maryland and COMAR 21.10.04. AAG Morrell also informed Mr. Logan that if Faddis desired to make a tort claim against Respondent, then it needed to file a notice of claim pursuant to Title 12 of the State Government Article of the Annotated Code of Maryland.

On July 16, 2015, Faddis filed a complaint against Brawner in the United States District Court for the Eastern District of Pennsylvania (the "Federal Complaint") alleging that (i) it had a direct contract with Brawner but not with Respondent for the Project; (ii) Brawner was obligated to pass through any claim it had against Respondent concerning its actions connected with the Project; and (iii) Faddis sent the June 23, 2014 letter requesting Brawner give supplemental notice

to Respondent of its claim.<sup>1</sup> In the Federal Complaint, Faddis filed several causes of action, including breach of contract for failing to pass through its claim to Respondent, interference with Faddis' statutory rights, and unjust enrichment.

On August 11, 2015, Brawner's attorney sent a letter to Mark Crampton, District Engineer for Respondent, forwarding a copy of the Federal Complaint, stating that "we further believe you are the appropriate procurement officer to receive same," and that "[Brawner] intends to defend this claim. If the State requires any further information, please contact this office directly. **Please consider this a 'Notice of Claim'.**" (emphasis added). The letter also referenced the provision of Brawner's contract regarding the filing of claims by a contractor, Respondent's General Provision 5.14.<sup>2</sup>

On August 21, 2015, Respondent wrote back to Brawner's attorney acknowledging "receipt of your Notice of Claim."

On December 7, 2017, the federal case was settled and dismissed.

On May 31, 2018, Mr. Logan sent AAG Morrell a letter asking Respondent to issue a final decision on Faddis' and Brawner's claims. On September 6, 2018, having received no response from Respondent, Faddis and Brawner filed this Appeal.

On October 5, 2019, Respondent filed a Motion to Dismiss, or, in the Alternative, for Summary Decision. On November 28, 2018, Appellant filed a timely Response in opposition to the Motion, and on December 19, 2018, Respondent filed its Reply. A hearing on Respondent's Motion was held on April 5, 2019.

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<sup>1</sup> The federal case was later transferred to the United States District Court for the District of Maryland.

<sup>2</sup> General Provision 5.14 mirrors the provisions of COMAR 21.10.04.02 and its provisions regarding the time limits for filing a written notice of claim and claim, the requirements for the contents of a claim, and the mandate that a notice of claim or claim not filed within the prescribed time shall be dismissed.

At the hearing on April 5, 2019, counsel for Faddis and Brawner asserted that Brawner first gave Respondent notice of Faddis' claim via Brawner's May 8, 2014 letter to Respondent, and that Faddis' Federal Complaint, forwarded with Brawner's August 11, 2015 letter to Respondent, constituted its claim.

### **STANDARD FOR MOTION FOR SUMMARY DECISION**

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 of 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).

### **OPINION**

Respondent asserts five grounds for granting its Motion: (1) Faddis, a subcontractor under the contract that is the subject of this Appeal, does not have a written procurement contract with Respondent and, therefore, does not have standing to file this Appeal; (2) Brawner, the general contractor under the contract that is the subject of this Appeal, is not represented by an attorney as

required by COMAR 21.10.05.03.03A:<sup>3</sup> (3) Brawner did not file a timely notice of claim or a claim on behalf of Faddis as required by MD CODE ANN., STATE FIN. & PROC. (“SF&P”) §15-211(a) and COMAR 21.10.04.02: (4) there is no final agency action from which to file this appeal:<sup>4</sup> and (5) Faddis’ claims asserted against Respondent are barred by the doctrine of sovereign immunity because the State has limited its waiver of sovereign immunity via MD Code Ann., State Gov. (“SG”), §12-201(a) to contractual claims arising out of a written procurement contract. The Board addresses the grounds of Respondent’s Motion as follows.

#### STANDING OF FADDIS TO FILE A CONTRACT CLAIM

In *Jorge Company, Inc.*, MSBCA No. 1339 (1982), this Board held that under the SF&P Art., the COMAR regulations promulgated pursuant thereto, and §12-201 of the SG Art., only a person or contractor who has a written procurement contract with the State may file an appeal of a contract claim to this Board. The Board concluded that a subcontractor’s claim must be passed through the prime contractor that has a written procurement contract with the State unless a provision in the subcontract or another agreement between the parties contains assignment or liquidation language allowing the subcontractor to bring a claim under its own name. *Id.* at 3. n.6.<sup>5</sup>

Faddis, relying on the definitions in the SF&P Art. and COMAR, makes a novel argument that it has standing to bring a contract claim in its own name. Faddis argues that it may file a contract claim directly with Respondent because it has a written procurement contract with Respondent insofar as its Pennsylvania Plant is on the State of Maryland’s list of qualified

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<sup>3</sup> Respondent withdrew this ground on the record at the hearing on April 5, 2019.

<sup>4</sup> Respondent argues that no claim meeting the requirement of COMAR 21.10.04.02B was filed on behalf of Faddis that required final agency action via a decision by the procurement officer or, in the absence thereof, a deemed denial. Since the Board only has jurisdiction per SF&P §15-211(a) to hear appeals arising from the final action of a unit, Respondent argues that the absence of a final agency decision deprives the Board of jurisdiction to hear this Appeal.

<sup>5</sup> The Purchase Order issued to Faddis by Brawner contains no such language.

producers/manufacturers that are pre-approved to provide precast concrete walls to Respondent.<sup>6</sup> Faddis argues that the Approval Requirements is a “procurement contract” between Faddis and Respondent that is supported by consideration (*i.e.*, payment of the annual certification/recertification fee) for the acquisition of supplies, services, construction, construction-related services, architectural services, or engineering services.

The Board rejects Faddis’ argument and concludes that Faddis does not have a written “procurement contract” with Respondent. Accordingly, Faddis does not have standing to file a contract claim directly with Respondent. Any contract claim Faddis had concerning the Project had to be filed as a pass-through claim by Brawner on behalf of Faddis. *See, Jorge Company, Inc.*, MSBCA No. 1339 (1982).

TIMELINESS OF BRAWNER’S NOTICE OF PASS-THROUGH  
CLAIM ON BEHALF OF FADDIS

Respondent argues that Brawner failed to file a timely notice of claim on behalf of Faddis per COMAR 21.10.04.02A (*i.e.*, within thirty (30) days after Faddis knew or should have known the basis for its claim) and failed to file a valid claim on behalf of Faddis per COMAR 21.10.02.04B (*i.e.*, within ninety (90) days after filing notice of the claim). The time limits for filing a notice of claim and claim are set forth in COMAR 21.10.04.02 and are promulgated under the authority of SF&P §15-219(a) and (b). The Board has held that these time limits are mandatory. *See, David A. Bramble, Inc.*, MSBCA No. 2823 (2013).

We begin our analysis of whether Brawner’s notice of claim was timely filed by first considering when Faddis knew or should have known it had a claim related to the Project and

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<sup>6</sup>Pre-approval requires an annual certification/recertification process set forth in *Maryland Highway Administration Precast Plant Approval Requirements* (the “Approval Requirements”). Producers pay a fee when first certified and again at recertification. There is a cost reimbursement schedule allowing producers seeking pre-approval for the first time or those seeking recertification to be reimbursed for costs associated with certification of their plants under certain circumstances.



when it notified Brawner of the basis of its claim. According to Respondent, Faddis had actual knowledge of its claim sometime before June 23, 2014, or at the very latest on June 23, 2014, as evidenced by Faddis' June 23<sup>rd</sup> letter to Brawner. Respondent argues that the June 23<sup>rd</sup> letter put Brawner on notice that Faddis had a basis for a claim against Respondent and that Brawner had to pass through notice of Faddis' claim to Respondent. Thus, Respondent argues, per COMAR 21.10.04.02A, notice of Faddis' pass-through claim was required to be filed by Brawner within 30 days of Faddis' June 23<sup>rd</sup> letter to Brawner (*i.e.*, by July 24, 2014). Respondent argues that Brawner's notice of claim on behalf of Faddis was not filed until August 11, 2015, more than a year after Faddis had actual knowledge of Faddis' claim.

In Faddis' June 23<sup>rd</sup> letter to Brawner, Faddis requested that Brawner provide it with prior notices of claim "sent to the [Respondent] related to the above contract for the abatement of time/liquidated damages and payment of additional costs incurred by Faddis...." Faddis further requested that Brawner "furnish to the [Respondent] a copy of this letter which serves to supplement the prior notice and advise the [Respondent] of the continuing and additional damages related to Respondent's 'notices' to VDOT and PennDOT." The remainder of the June 23<sup>rd</sup> letter clearly stated that Faddis suffered and continued to suffer damages due to Respondent's halting of production of aggregated concrete panels at its pre-approved Pennsylvania Plant.

Faddis' June 23<sup>rd</sup> letter to Brawner unequivocally notified Brawner that Faddis believed it had a claim against Respondent, and it also set forth the grounds for Faddis' claim. No reasonable person receiving a letter containing such requests could infer otherwise, and Appellants do not dispute that Faddis was asserting a basis for a claim at this time. Given the undisputed fact that both Faddis and Brawner actually knew the basis for Faddis' claim as of June 23, 2014, we need not consider whether Faddis should have known the basis for its claim sooner.

Because Faddis knew it had a claim against Respondent and notified Brawner of the basis of its claim as of June 23, 2014, we must next consider when Brawner gave proper notice to Respondent of Faddis' claim and whether such notice was timely. This requires analysis of whether: (1) Brawner's May 8<sup>th</sup> letter constitutes a proper notice of claim or, if not, (2) whether Faddis' June 23<sup>rd</sup> letter to Respondent constitutes proper notice of claim. Although we are required to resolve all inferences in favor of the party opposing summary decision (in this instance, Brawner), those inferences must be reasonable ones. *See, Clea v. City of Baltimore*, 312 Md. at 678.

Brawner's May 8<sup>th</sup> letter to Respondent was in direct response to Respondent's "Panel Discrepancy" letter of May 2, 2014. In its May 8<sup>th</sup> letter, Brawner explained that it was merely a customer purchasing an approved product from a source pre-approved by Respondent. Brawner stated that it understood all panels produced and delivered on the Project as of the date of its letter were from an approved source and accepted by Respondent. Brawner asked Respondent to confirm this fact. The May 8<sup>th</sup> letter also states:

As of the date of your [May 2, 2014 letter], we were made aware of [Respondent's] position and as such, we reserve our rights to extend contract performance including but not limited to an extension of contract and monetary compensation. **We are not requesting either at this time** but reserve our right to do so should it become necessary. (emphasis added).

The language of this letter informs Respondent that Brawner did not waive its right to pursue a claim *in the future* if Respondent and Faddis did not resolve the issue between them. Brawner's letter expresses Brawner's belief that Faddis and Respondent could resolve the issue and promised to help resolve it "in any way possible." We conclude that nothing in this language can reasonably be construed to be a proper notice of Faddis' claim by Brawner to Respondent.

We further conclude, for the reasons stated previously regarding Faddis' lack of standing, that Faddis' June 23<sup>rd</sup> letter to Respondent attempting to give "supplemental" notice of its claim directly to Respondent is not a proper notice of claim. Only Brawner had standing to assert a claim or give notice of a claim on behalf of Faddis.

There is no genuine dispute that Brawner filed a "Notice of Claim" via its letter to Respondent on August 11, 2015. The letter referenced the specific provision of the Contract for filing claims and noted that Brawner believed the addressee was the procurement officer. Brawner's August 11 letter also clearly stated: "Please consider this a 'Notice of Claim.'" Based on the undisputed facts, and having resolved all reasonable inferences in favor of Brawner, we conclude that Faddis had actual knowledge of the basis for its claim on June 23, 2014, that Brawner was provided notice of Faddis' claim and thus had actual knowledge of the basis of Faddis' claim on June 23, 2014, and that a proper notice of claim had to be filed by July 24, 2014. Further, we conclude that no notice of claim was filed by Brawner on behalf of Faddis on or before July 24, 2014, and that the notice of claim filed by Brawner on behalf of Faddis on August 11, 2015, was untimely.

Since Brawner failed to file a timely notice of claim on behalf of Faddis, we need not address the remaining grounds for dismissal or summary decision asserted by Respondent in its Motion.

### **ORDER**

Based on the foregoing, it is this 17th day of May 2019, hereby:

ORDERED that Respondent's for Motion Summary Decision is GRANTED, and it is further



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 contested cases.

**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 ten 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. 3098, Brawner Builders, Inc., Benefit of Faddis Concrete Products, Inc. & Faddis Concrete Products, Inc., under Maryland State Highway Administration Contract No. HO2485126.

Dated: 5/12/19

15/  
Ruth W. Foy  
Deputy Clerk