

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of

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HARBEL, INC.

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Docket No. MSBCA 3135

Under MD Dept. of Transportation

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Motor Vehicle Administration

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IFB No. V-CUM-17013-C

Appearance for Appellant

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Gorman E. Getty, III, Esq.

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Cumberland, MD

Appearance for Respondent

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OPINION AND ORDER BY CHAIRMAN BEAM

Respondent seeks to dismiss this Appeal on the grounds that Appellant's bid protest ("Protest") was untimely filed. For the reasons that follow, the Motion must be denied.

In its Motion to Dismiss, Respondent contends that Appellant had actual knowledge of the basis for its Protest on July 25, 2019, which is the date that it received via FedEx and email, a letter from the procurement officer ("PO") stating that its Minority Business Enterprise ("MBE")/Veteran Small Business Enterprise ("VSBE") waiver request had been denied and its bid had therefore been rejected as nonresponsive. The next day, July 26, 2019, Appellant sent an email and letter to the PO in which Appellant stated that it had received the PO's July 25th letter, advised that it intended to file a bid protest, and acknowledged that the Protest was due on or before August 1, 2019.

On August 1, 2019, Appellant sent its Protest via email and via UPS next day air to the PO. In this letter, Appellant acknowledged that the Protest would not arrive until August 2, 2019 and that the Invitation for Bids prohibited submission of a bid protest via email. The Protest arrived via UPS on August 2, 2019. On August 14, 2019, Respondent issued a final decision letter stating that the Protest was denied because it had been untimely filed. On August 21, 2019, Appellant noted this Appeal.

In its Response to the Motion, Appellant contends that Respondent's computation of time for filing the Protest is in error and contends there is a statutory basis supporting its argument that the Protest was not required to be filed until August 2, 2019.

In the context of a motion to dismiss for the alleged failure to file a timely claim, we assume the truth of all well-pleaded facts and all reasonable inferences that may be drawn therefrom. *See, e.g., U.K. Constr. & Mgmt., LLC*, MSBCA No. 2773 (2011). "A Motion to Dismiss may be granted only in the event of a failure to state a legally sufficient cause of action. At the early stage of the litigation, ambiguities are resolved in favor of the appellant and the Board examines the claim from the perspective of assuming the truth of all facts alleged by appellant." *Id.* at 2.

As we stated in *Business Interface of Maryland, LLC*, MSBCA No. 3065 (2018), the Court of Appeals made it abundantly clear that "the issue of untimely notice of a claim would be a defense and a factual question to be determined during the course of a full hearing on the merits, and not a jurisdictional bar to the pursuit of a contractor's claim." *Engineering Mgmt. Services, Inc. v. Maryland State Highway Admin.*, 375 Md. 211, 241 (2003). The Court determined that the filing of a timely claim is not a condition precedent to the existence of a claim, or to the exercise of the Board's jurisdiction. *Id.* at 236-40. Likening the requirement to a statute of limitations, the Court explained that because a condition precedent can be met by

estoppel (or inducement, fraud, or waiver), and estoppel is a factual matter which can be determined only upon a full hearing on the merits, "it is inappropriate to view a statute [of limitations], which exists as a condition precedent to a claim in a summary judgment context, to be a matter of subject matter jurisdiction to which issues of estoppel and waiver may not be considered [under Maryland administrative law]." *Id.* at 240-41 (citing *Ohio Cas. Ins. Co. v. Hallowell*, 94 Md.App.444, 459 (1993)). We believe the same legal analysis and conclusion applies in the context of bid protests, which are required to be filed within seven (7) days of the date when a party knows or should have known, whichever is earlier, the basis for its protest pursuant to COMAR 21.10.02.03B.

Therefore, in the context of a motion to dismiss, when facts regarding the timeliness of a claim or bid protest are in dispute (*i.e.*, when a contractor knew or should have known that it had a basis for a bid protest or claim), and where we are required to assume the truth of the facts pled by Appellant (and all reasonable inferences therefrom) in Appellant's favor, we cannot make findings of fact regarding the timeliness of a bid protest without a full evidentiary hearing on the merits.

It is only in the context of a motion for summary decision, where there is no genuine dispute of material fact that a bid protest was untimely filed, that the Board may dispose of an appeal at this juncture. That is not what was filed here: Respondent filed a Motion to Dismiss, not a motion for summary decision, and Respondent has not alleged that there are no genuine disputes of material fact entitling Respondent to prevail as a matter of law.

ACCORDINGLY, it is this 26th day of September 2019, hereby:

