BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Consolidated Appeals of A-Del Construction, Inc.	*	
	*	**Docket Nos. MSBCA 3127 and 3128**
Under SHA Contract No. HA3485370	*	
	*	
Appearance for Appellant	*	**Edward Seglias, Esq. (*Pro Hoc Vice)* Jackson S. Nichols, Esq. Cohen, Seglias, Pallas, Greenhall & Furman, P.C. Washington, D.C.**
	*	
Appearance for Respondent	*	**Sonia Cho, Esq. Jason R. Potter, Esq. Assistant Attorneys General Office of the Attorney General Contract Litigation Unit Baltimore, Maryland 21202**

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PER CURIAM OPINION AND ORDER BY THE BOARD

The Board conducted a merits hearing on these Consolidated Appeals on November 3, 4, and 9, 2021. At the close of all evidence offered by Appellant, A-Del Construction, Inc. ("A-Del"), Respondent, the Maryland State Highway Administration ("SHA"), made an oral Motion for Judgment ("Motion") on the record pursuant to COMAR 21.10.05.06E. After considering all witness testimony, the admitted exhibits, and the arguments made by counsel, the Board unanimously granted Respondent's Motion and stated that an Order and Opinion setting forth the basis for its decision would be forthcoming. The Board further stated that the appeal time would run from the issuance of this Opinion.

FINDINGS OF FACT

On March 9, 2015, Appellant was awarded SHA Contract No. HA3485370, F.A.P. No. AC-STP126(20)E (the "Contract"), for work to be performed on the project known as MD 22 at MD 462 Capacity Improvements (the "Project"). The purpose of the Project was to reconstruct the intersection of the Aberdeen Thruway (MD 22) and Paradise Road (MD 462) in Aberdeen to improve intersection safety and add additional traffic capacity. Respondent issued the Notice to Proceed on April 21, 2015, and Appellant started work in August of 2015.

The statement of work under the Contract included the installation of two sound barriers along MD 22 Eastbound ("EB") and Westbound ("WB") east of its intersection with MD 462. It required the drilling of subsurface shafts of 25 feet in length or five feet of competent "rock sockets," whichever occurred first. On July 28, 2016, after Appellant had already been working on the Project for nearly a year, Appellant subcontracted the drilling work to Baltimore Pile Driving & Marine Construction, Inc. ("BPDI"). The Subcontract between Appellant and BPDI included the same pricing in the Description of Work for the drilling of shafts and rock sockets as required by Appellant's Contract, but BPDI further required that "Other Prices" be included in the Subcontract for casing, rock drilling, and rock hammering because it was anticipated that these additional methods for drilling through rock would be needed.

Shortly after BPDI started drilling work on the Project, it reported to Appellant that it was hitting hard rock. In response to these reports, Appellant's Project Manager, Kevin Dunlap, sent a September 15, 2016 letter to Respondent requesting approval to use "an alternative method of drilling the rock sockets...due to the hardness of the rock on the job." Mr. Dunlap stated that BPDI was having difficulty drilling through the rock with the existing standard equipment and requested additional compensation for the proposed use of the alternative method "to offset the differential

in cost incurred." Wendy Wolcott, Respondent's Metropolitan District Engineer for District 4, denied Appellant's request for additional compensation the next day, on September 19, 2016.

About a month after Respondent's denial letter, BPDI submitted to Appellant three proposed change orders to the Subcontract ("PCOs"),[1] pursuant to which Appellant agreed to pay BPDI additional compensation for BPDI's use of the alternate drilling methods and use of casing. The first PCO, dated October 19, 2016, allowed BPDI to charge Appellant $796.00 per linear foot ("LF") for the use of a 36" diameter cluster hammer drill. The second PCO, dated October 27, 2016, allowed BPDI to charge Appellant $290.00 per LF for the use of steel casing to preserve the integrity of the drilled shafts. The third PCO, also dated October 27, 2016, allowed BPDI to charge Appellant $485.00 per LF for use of a 36" rock drilling core barrel.[2] BPDI performed and completed its work on the Project from approximately August 2016 through January 2017.

On December 30, 2016 and January 6, 2017, Peter J. Robey, Vice President of BPDI, sent letters to Appellant concerning BPDI's equipment that had been damaged while drilling. Nearly three weeks later, on January 24, 2017, Appellant sent a letter to Jesse Free, Respondent's Project Manager, asking Respondent to investigate two separate incidents in which BPDI's drilling equipment had been damaged by alleged buried debris on the Project site. Appellant explained that BPDI had claimed that on November 21, 2016, while drilling at the Eastbound caisson foundation 43 (#43 MD 22, EB), it encountered metal conduit below grade at an approximate

[1] At the hearing, Appellant insisted on using the term "proposed change orders" rather than "change orders." When questioned about this by the Board, Appellant explained that PCOs were "proposed" until they were fully executed, and would not become "change orders" until all parties had signed them. The Board inferred from Appellant's insistence on calling them "proposed" change orders that Appellant believed, and wanted the Board to believe, that they had not been fully executed because Respondent had not approved them. However, nothing in these PCOs, all of which were fully executed by Appellant and BPDI, required the approval of, or execution by, Respondent. In fact, no signature line was included in the PCOs for Respondent to sign. Therefore, Appellant proceeded at its own risk when it agreed to pay and, in fact, began paying, BPDI additional money under these PCOs without first having received any approval from Respondent to cover the additional costs that Appellant had incurred by virtue of signing the PCOs.

[2] The rates used in all three PCOS are the exact same rates that BPDI included as "Other Prices" in its quote and which were incorporated into the Subcontract.

depth of six feet, which caused catastrophic damage to the four bits, the scouring heads, brass fittings, and canister of its 36" cluster hammer, requiring a major rebuild of the canister and rental of another canister to use while it was being repaired.

Appellant further explained that BPDI had also claimed that on December 27, 2016, while drilling at the Westbound caisson foundation 38 (#38 MD 22, WB), it encountered "concrete fragments and what appeared to be metal shavings...consistent with previous obstructions encountered at various elevations on the West side proving to be buried concrete debris, some of which possessed rebar reinforcement" at an approximate depth of 16 feet, which caused catastrophic damage to seven bits, scouring heads, brass fittings, and the base and canister of its 36" cluster hammer. Appellant's January 24th letter stated that if the damage to BPDI's equipment was found to be due to a differing site condition, Respondent must compensate Appellant via an equitable adjustment to the Contract so that Appellant could compensate BPDI. On March 7, 2017, Ms. Wolcott sent a letter to Appellant denying its request.

Nearly a month later, on April 5, 2017, Mr. Dunlap sent a Notice of Claim letter on behalf of BPDI to Steven Marciszewski, Director of Construction for Respondent, for equipment damaged on November 21 and December 27, 2016.[3] On November 20, 2017, Jacob R. Yohe, Appellant's Project Manager who replaced Mr. Dunlap, sent another Notice of Claim letter on behalf of BPDI to Mr. Marciszewski for "additional costs sustained by BPDI as a result of encountering a substantial amount of hard rock material during the course of the Project which was not anticipated at the time of the bid."[4]

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[3] Neither the Invitation for Bids ("IFB") nor the Contract and Addenda thereto identified the procurement officer ("PO") for the Project or provided any information to offerors, including Appellant, regarding who was to act in this capacity for purposes of accepting bid protests and/or contract claims. Nevertheless, after inquiries by Appellant to various individuals employed by Respondent, Appellant was advised to send its notice of claim to Mr. Marciszewski.

[4] In his November 20, 2017 Notice of Claim letter for the use of rock drilling, Mr. Yohe stated that the claim amount was anticipated to be in excess of $269,155.23. At the hearing on the merits, Mr. Yohe was unable to determine or explain how this number was derived.

On April 18, 2017, BPDI filed suit against Appellant in the Circuit Court for Harford County, Case No. 12-C-17-000948 (the "Breach of Contract Action"), alleging that Appellant had breached the parties' Subcontract by failing or refusing to pay the amount due to BPDI for work fully performed on the Project. Appellant filed a counterclaim asserting, among other things, that BPDI had likewise breached the parties' Subcontract and that BPDI had engaged in fraud and misrepresentation by overbilling Appellant. On June 25, 2018, the Circuit Court stayed the Breach of Contract Action "pending the conclusion of the related administrative proceedings."

Nearly one year later, on October 2, 2018, Appellant filed two separate claims on behalf of BPDI (the "Claims").[5] In one Claim it requested an equitable adjustment in the amount of $73,835.00 for encountering differing site conditions that damaged BPDI's drilling equipment on November 21 and December 27, 2016 (the "Equipment Damage Claim"). In the other Claim, it requested an equitable adjustment in the amount of $717,785.04 for additional costs "related to enhanced drilling means and methods used to drill through buried debris and related unforeseen material" (the "Enhanced Drilling Methods Claim").

[5] The Board would be remiss not to mention its concern as to whether the Notices of Claim and Claims were timely filed with the PO. Although the Board raised this issue at the hearing, it was a not a primary argument asserted by Respondent in its own defense. This is perhaps because Respondent continues to implement an internal informal dispute resolution process. Although the Board understands that such an internal process may help in resolving issues short of filing a formal claim, there is no current regulation that provides for such a process or that stays the time requirements for filing a notice of claim under COMAR 21.10.04.02 while this internal process is pursued.

Once a timely notice of claim is filed in a construction procurement, the PO has the discretion to extend the time to file the claim. Here, the Claims were filed after the 90-day period required by COMAR. Appellant had requested extensions and claimed to have received approval of these requests from Respondent. However, a closer reading of Respondent's letters in response to these extension requests shows that Respondent acknowledged receipt of the requests for extensions, but never specifically granted them.

When addressing the Board's concerns regarding the impact that this internal process has on the filing of timely notices and claims, counsel for Respondent, to her credit, stated that she was not arguing that this was fair, but was simply defending Respondent's position. Because these Consolidated Appeals are being decided on other grounds, the Board will not render any decision on this issue, at this time. But we do believe it is necessary nonetheless to offer this word of caution: both contractors and State agencies should be mindful of the risk associated with pursuing informal internal dispute resolution processes without first filing a timely notice of claim once the basis for a claim is known, or should have been known, whichever is earlier. To the extent there is a conflict as to when and with whom a notice of claim or claim should be filed, the requirements set forth in COMAR will always take precedence over any conflicting directive issued by an agency.

Both Claims contained a Subcontractor's Certification of Claim ("Certification") signed by BPDI's President, David B. Lawrence. The Certification for the Equipment Damage Claim was executed June 22, 2017, and the Certification for the Enhanced Drilling Methods Claim was executed September 18, 2018. Although both Certifications contained the language required by COMAR 21.10.04.02B(5) certifying that the Claims were "made in good faith, and that the exhibits, documents, reports and photographs appended hereto in support of such claims are accurate and complete, and the amount requested accurately reflects the Contract adjustment for which I believe the Administration is liable," both Certifications also contained a footnote in which BPDI directly contradicted the assertion required by COMAR regarding the Administration's liability:

> [1]BPDI does not take a position regarding the identity of the person(s) or entity(ies) who may have been responsible for causing the foreign construction debris referenced in its claim to be located in the substrata where the construction activities of BPDI occurred and which form the basis of this claim.

Because of this contradictory language in both Certifications, it would have been unclear to the PO, as it was to this Board, whether BPDI was asserting that Respondent was liable for its damages or whether BPDI believed that someone else was liable (*e.g.*, Appellant).

On April 25, 2019 Stephen A. Bucy, Respondent's current Director of the Office of Construction, issued Respondent's final decision letters denying both Claims as not meeting the criteria required for a differing site condition. Appellant appealed both denials to the Board on May 20, 2019. The enhanced drilling methods Appeal was docketed as MSBCA No. 3127, and the damaged equipment Appeal was docketed as MSBCA No. 3128. The Board consolidated both Appeals on June 20, 2019.

On October 17, 2019, BPDI filed a second lawsuit against Appellant in the Circuit Court for Harford County, Case No. C-12-CV-19-00103 (the "Declaratory Judgment Action"), this time

seeking a declaratory judgment that Appellant's Administrative Claim against Respondent requesting additional compensation for BPDI's drilling work was not a "pass-through" claim; rather, that Appellant, not Respondent, was solely responsible for paying BPDI under the terms of the parties' Subcontract and the three PCOs. BPDI alleged that Appellant was liable for BPDI's damages to its equipment because Appellant's site preparation work generated large amounts of construction debris and rather than fully perform the debris removal, Appellant instead used some of it as backfill material in the areas of the drilling site where the grade had to be raised. BPDI further alleged that Appellant had formulated its bid on the Project without taking into consideration, or reasonably contemplating, that the enhanced drilling methods (such as those included as "Other Prices" in the Subcontract) would be necessary on the Project.

Throughout the course of the litigation in this Appeal, as well as the litigation in the Circuit Court actions, Mr. Lawrence asserted that he had not asked Appellant to file or pursue a pass-through claim on BPDI's behalf and, indeed, had not authorized it, because Mr. Lawrence did not believe that Respondent was liable for BPDI's damages. For example, at Mr. Lawrence's Deposition on October 20, 2020 in this Appeal, Mr. Lawrence testified as follows:

> Q. Okay. Mr. Lawrence, BPDI has never asked A-Del to pass through any claims to SHA on BPDI's behalf, is that correct?
> A. The best I am aware of.
> MR. NICHOLS: I'm sorry, could you repeat that question?
> Q: BPDI has never asked A-Del to pass through any claims to SHA on BPDI's behalf; is that correct?
> A. Do you want me to answer it again?
> MR. GODDARD: Yes.
> Q. Yes.
> A. Yes, to the best of my knowledge. Even--okay.
> Q. When A-Del indicated that it was going to be filing pass through claims on behalf of BPDI, BPDI asked A-Del not to do that, correct?
> A. Yes.
> Q. BPDI here in this case is not saying that SHA owes BPDI any money, correct?
> A. Yes.

Similarly, in the Declaratory Judgment Action, Mr. Lawrence included the following allegation in his Complaint:

> 24. At no time did BPDI request, or authorize, A-Del to pursue a 'pass through' claim on its behalf before the MDOT/SHA in regard to the costs associated with the Enhanced Drilling Methods.

Under cross examination at the three-day hearing on the merits of these Consolidated Appeals, Mr. Lawrence admitted that the statement made in Paragraph 24 of his Complaint was still true as of that day. Mr. Lawrence was also questioned directly by the Chairman of the Board regarding his position as to Respondent's liability. Mr. Lawrence equivocated in his responses, but ultimately testified that at the time he signed the Certifications he was unsure who was liable and that he was "going to stand by [his] document as it is signed."[6]

At the hearing on the merits, Mr. Lawrence was admitted as an expert in drilling and excavating who had significant prior experience working on SHA projects. He was familiar with the Project site and knew that moisture and material would be falling into the shafts during excavation, which would require the use of casings. In addition, as reflected in BPDI's allegations in its two Circuit Court Complaints, as well as in Mr. Lawrence's testimony at the hearing, it was evident to Mr. Lawrence that an unknown quantity of shafts would require casing, rock drilling, and rock hammering, knowledge of which was further evidenced by his inclusion of "Other Prices" in his quote to Appellant, which was incorporated into the Subcontract.

In addition to Mr. Lawrence's testimony, the Board heard testimony from three additional witnesses called by Appellant: Appellant's Project Manager, Mr. Yohe; its Project Superintendent, Travis M. Yetter; and BPDI's Vice President, Mr. Robey. Mr. Yohe took over as Project Manager

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[6]Mr. Lawrence equivocated, in part, because of information he was later told that made him question whether Appellant was responsible for the alleged differing site conditions. But no evidence was ever offered to support this information and thus it was never proven to be true.

from Kevin Dunlap in October of 2017, months after BPDI had finished work on the Project. He did not participate in preparing Appellant's bid on the Project and was not an expert in drilling or excavating. He did not have any personal knowledge related to onsite drilling and testified exclusively based on Appellant's internal records.

Mr. Yohe also testified that Appellant's claim for costs in its Enhanced Drilling Methods Claim was based solely on BPDI's billing records. Nevertheless, he asserted in an Affidavit filed in the Declaratory Judgment Action that BPDI's drilling logs were not reliable records of BPDI's drilling activities on the Project because there were numerous discrepancies between BPDI's drilling logs and Respondent's drilling logs (including differences in the length of casing used, the time BPDI claims to have spent drilling, and the depth to which BPDI claims to have drilled). Mr. Yohe also asserted that, in numerous instances, BPDI erred in its performance and in its means and methods by drilling holes that were several inches in diameter too wide. On cross examination at the hearing on the merits, Mr. Yohe admitted that there were numerous inconsistencies in BPDI's drilling logs and in its pay applications concerning the depth of shafts drilled and the number of shafts cased.

For example, in BPDI's drilling log for Caisson EB 24, as well as for EB 34, BPDI claimed to have drilled ten feet (10') in depth, yet on its Applications for Payment ("Pay App") submitted to Appellant, it certified that it had drilled 20 feet in depth for each caisson. Similarly, in BPDI's drilling log for Caisson EB 45, BPDI claimed to have drilled 15 feet in depth, whereas on its Pay App it certified that it had drill 20 feet in depth. BPDI's drilling log for Caisson EB 60 makes no reference to the use of any casing, but on its Pay App, it certified that it used ten feet (10') of casing.[7]

[7] Counsel for Respondent identified a total of 36 examples that were similar in nature to these inconsistencies out of the total 46 shafts for which additional payment was sought.

In many instances, BPDI billed for drilling more than the required 25 feet. For example, BPDI's drilling log for Caisson EB 15 shows a drilling depth of 25 feet, yet its Pay App certifies a depth of 28 feet. Similarly, BPDI's drilling log for EB 18 shows a drilling depth of 25 feet, whereas its Pay App certifies a depth of 33 feet.[8]

Although Mr. Yetter was onsite during BPDI's drilling operations, he was not an expert in drilling. As early as August 2016, Mr. Yetter knew that BDPI was asking to use casings to support drill shafts and that BPDI had encountered issues with rock when drilling, requiring BPDI to switch from an auger drill to a rock hammer.

At the close of evidence in Appellant's case, Respondent moved for judgment. After hearing argument from counsel, the Board recessed to consider the Motion. After the recess, the Board granted Respondent's Motion.

OPINION

The Board grants Respondent's Motion for Judgment on several grounds. First, both of Appellant's Claims contained defective certifications. Second, Appellant failed to file a proper "pass-through" claim. Third, Appellant failed to file any direct claim. Based on the foregoing, the Board does not have jurisdiction to hear or render an opinion on these Consolidated Appeals. Finally, even if Appellant were able to overcome all of these procedural hurdles, Appellant failed to meet its burden and prove by a preponderance of evidence that it was entitled to either of the equitable adjustments it had requested.

Defective Certifications

COMAR 21.10.04.02B(5) provides that a claim shall contain:

> [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,

[8] Counsel for Respondent identified a total of 66 examples that were similar in nature to these inconsistencies.

and the amount requested accurately reflects the contract adjustment **for which the person believes the procurement agency is liable.**

Id. (emphasis added). Thus, in order to have a valid claim that complies with COMAR, an authorized representative of either a contractor or a subcontractor must not only assert, but also certify, to the best of that person's knowledge and belief, all of the following: (i) the claim is made in good faith, (ii) all of the supporting data are accurate and complete, and (iii) the amount requested in the claim accurately reflects the amount of the equitable adjustment that the person believes the state agency is liable for paying. It is this last requirement that Appellant failed to satisfy.

The Board addressed the mandatory requirements for filing a valid claim in a series of cases from 1999-2003. In 1999, the Board considered whether an untimely-filed notice of claim deprived the Board of subject matter jurisdiction in light of the appellant's allegation that the State had not suffered any prejudice that mandated dismissal of the claim. *See Cherry Hill Construction, Inc.*, MSBCA No. 2056 (1999). The Board stated that it "only has jurisdiction over a claim that is timely filed under and 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 [sic] to the Board . . . ." *Id.* at 16. The Board concluded that the appeal must be dismissed regardless of whether the State had suffered any prejudice. *Id.*

In 2002, in another decision discussing whether the Board lacked subject matter jurisdiction to hear an appeal due to an untimely-filed notice of claim, the Board distinguished between the requirements for filing a notice of claim and the requirements for filing the claim itself. *See Morrison's Health Care, Inc.*, MSBCA No. 2253 (2002). The Board explained that the "substantive" contents of the claim must be filed within 30 days after the notice has been filed, and must include a certification signed by a senior official, officer, or general partner of the

contractor and include, among other things, an assertion that the "amount requested accurately reflects the contract adjustment for which the person believes the procurement agency is liable." *Id.* at 4.[9]

In 2003, the Board considered whether the Board lacked subject matter jurisdiction because of an alleged failure to file a proper claim. *See Absolute Environmental Contractors, Inc.*, MSBCA No. 2266 (2003). The Board focused on the requirements set forth in COMAR 21.10.04.02B(5) regarding the certification of the claim and the contents required to be included therein, noting its recent decision in *Morrison's Health Care* and acknowledging that the requirement for certification is substantive. Although the appellant in *Absolute* had failed to file a formal written certification as required by COMAR, the Board determined that the contractor had complied with each of the substantive requirements for what must be contained in the certification by virtue of two letters the contractor had submitted to the procurement officer and his testimony at trial. *Id.* at 6-7.

The Board acknowledged that this was a "retreat" from its decision in *Cherry Hill*, wherein the Board determined that prejudice was not a relevant consideration. *Id.* at 7. In *Absolute*, however, the Board *did* take prejudice into consideration, concluding that it would not dismiss the appeal since the State had not been materially prejudiced by the appellant's failure to file a formal written certification because the letters to the procurement officer and his testimony at trial fulfilled the substantive requirements of the certification. The Board specifically held that its "retreat" from *Cherry Hill* was "limited to the issue of certification under the particular facts of this appeal."

[9]*Morrison's Health Care* was not an appeal of a denial of claim concerning a construction contract, thus the requirement that a claim be filed within 30 days of filing a notice of claim. In a claim concerning a construction contract, a contractor has 90 days after filing its notice of claim to file its claim.

The Board noted in *dicta* "that COMAR 21.10.04.02C only requires dismissal of a claim or notice of claim that is not timely filed; failure to certify a claim does not appear to require dismissal." However, the Board's limitation of its decision to only the facts in *Absolute* left the door open for the dismissal of future claims, under different factual scenarios, when there are missing or defective certifications.

We hold that the language of COMAR 21.10.04.02B(5) is mandatory, not discretionary. The regulation provides that a claim *shall* contain "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." Failure to satisfy each of these requirements renders the purported claim invalid for failure to comply with COMAR. A person asserting a claim must be fully willing to stand behind the claim; otherwise, it must be dismissed.

In these Consolidated Appeals, neither of the Certifications submitted by BPDI contains an unequivocal assertion that Respondent is liable for the damages BPDI incurred. Although they both include the language contained in COMAR, that "the amount requested accurately reflects the Contract adjustments for which I believe the Administration is liable," they then disavow that assertion in a footnote that specifically contradicts the COMAR-required assertion of State liability by stating that "BPDI takes no position regarding the persons or entities who may be responsible...." Thus, BPDI failed to definitively assert in either Certification that Respondent is liable for the damages incurred by BPDI that are being sought in the equitable adjustments requested by Appellant.

Unlike in *Absolute*, neither Appellant nor BPDI has otherwise complied with the substantive requirements of COMAR 21.10.04.02B(5). There are no letters to the PO that cure BPDI's failure to certify that Respondent is liable for BPDI's damages. At the hearing, when the Board's Chairman directly questioned BPDI's President, Mr. Lawrence, regarding his position on who he believed was liable for BPDI's damages, he repeatedly equivocated, but ultimately decided to "stand by [his] document as it is signed." Additionally, in not one, but two separate Harford County Circuit Court actions, he took a distinctly different position, each time asserting that Appellant was liable for BPDI's damages. Moreover, in a sworn Affidavit filed in the Declaratory Judgment Action, he stated that the equipment repair costs were not in the nature of a "pass-through" claim and that Appellant was liable for these damages. Finally, in his deposition in these Consolidated Appeals, his sworn testimony was that BPDI never asked Appellant to file a "pass-through" claim and that BPDI was not asserting that Respondent owed BPDI any money.

We find that Mr. Lawrence's testimony at the hearing lacked credibility.[10] It seemed that Mr. Lawrence had specifically been prepared to support Appellant's theory of the case that Respondent is liable for BPDI's damages, rather than Appellant itself being liable to BPDI.[11] The evolution of Mr. Lawrence's testimony—from (i) a refusal to take a position on liability in the Certifications, to (ii) taking a position in the Circuit Court actions that Appellant was liable for BPDI's damages rather than Respondent, a position that his deposition in these Consolidated Appeals further supports, to (iii) finally, albeit reluctantly, taking the 11th hour position at the

[10] The Board does not use the term "lacks credibility" in relation to Mr. Lawrence's testimony as a euphemism for lying in this instance. We believe that Mr. Lawrence was truthful initially and that he equivocated at the hearing because he was struggling internally with what he knew and/or assumed to be true, and with what Appellant needed him to say to support its case against Respondent.

[11] We note that although Mr. Lawrence is represented by counsel in the Circuit Court actions, he was not formally represented by his own counsel at the hearing on the merits in these Consolidated Appeals. In a traditional pass-through claim, the general contractor typically authorizes the subcontractor to pursue its claim in the general contractor's name using the subcontractor's own chosen counsel. Here, however, Appellant used its own counsel, rather than BPDI's counsel, and pursued the pass-through claims purportedly on behalf of BPDI.

hearing on the merits that Respondent is likely liable based on information he was told but which was never proven—does not sufficiently cure the failure to properly certify the two Claims. In addition, it materially prejudices Respondent by failing to properly put it on notice as to who Appellant claims is responsible for its damages.

Absent an express and written assertion that Respondent is liable for the damages being sought in the equitable adjustments requested by Appellant, purportedly on BPDI's behalf, there can be no valid claim. We hold that under the facts of these Consolidated Appeals, the Board does not have jurisdiction to hear Appellant's Claims filed on behalf of BPDI.

Improper Pass-Through Claims

Even if there had been properly filed claims with valid certifications thereby giving this Board jurisdiction to hear these Consolidated Appeals, we would still grant Respondent's Motion because Appellant failed to file proper "pass-through" claims. Appellant's position when filing the Claims, and in all of its pleadings before the Board, was that it was "passing through" BPDI's claims and was not asserting its own claims.

Generally, when a subcontractor suffers damages while working for a general contractor on a State contract, wherein the subcontractor believes its damages were caused by, or the responsibility of, the State, the subcontractor cannot file a claim for these damages against the State—only a contractor that has a written procurement contract with a State agency may file a claim against the State due to the limited waiver of sovereign immunity in contract actions enacted by the General Assembly. *See* MD. CODE ANN., STATE GOV'T. §12-201; *Brawner Builders v. State Highway Administration,* 476 Md. 15 (2021); *Davidsonville Diversified Services,* MSBCA No. 1339 (1988); *Boland Trane Assoc., Inc.*, MSBCA No. 1084 (1985); *Jorge Company, Inc.*, MSBCA No. 1047 (1982). Because Appellant has a written procurement contract with Respondent and

BPDI does not, any claim for damages that BPDI believes are Respondent's responsibility must be "passed through" by Appellant; or, stated differently, Appellant must "stand in the shoes of BPDI and pursue BPDI's claims against the State."[12] *See id.*

Here, however, as discussed *supra*, BPDI has repeatedly failed to assert, unequivocally, that Respondent is liable for its damages. As such, absent an assertion that Respondent is liable for BPDI's damages contained in a timely and properly filed valid claim, there is nothing for Appellant to pass through. Appellant cannot stand in the shoes of BPDI if BPDI cannot unequivocally assert that Respondent is liable for its damages. Although the Maryland Rules allow for alternative pleading in actions filed in Maryland courts, the requirements set forth in COMAR are clear: the party seeking an equitable adjustment must not only assert, but also certify, in writing, that the State is liable for the damages incurred, which, in this case, both Appellant and BPDI have failed to do.

Moreover, Appellant cannot "stand in the shoes" of BPDI and legitimately file or pursue a pass-through claim that has not been requested or authorized by BPDI. A pass-through claim belongs to a subcontractor, not a contractor that already has a contract with the State. If a subcontractor does not want to pursue a pass-through claim and does not authorize a contractor to file and pursue a pass-through claim on its behalf, particularly as here, where the subcontractor does not assert the State is liable for its damages, there can be no legitimate or valid pass-through claim. A valid pass-through claim must be filed and pursued by a contractor, *on behalf of* a subcontractor, only in cases where the subcontractor requests and authorizes the contractor to do

[12] We are not aware of any provision in Title 15 of the State Finance and Procurement Article or in Title 21 of COMAR that specifically authorizes "pass-through" claims. However, they have been regularly filed with State agencies and then appealed to this Board. At the federal level, these claims, also known as "sponsored" claims, are only allowed if the prime contractor can make a claim against the government based on the subcontractor's theory of recovery. This limitation is based upon the *Severin* doctrine, named after the case of *Severin v. United States Court of Claims*, 99 Ct. Cl. 435 (1943), which holds that a prime contractor cannot sponsor a subcontractor's claim against the government if the prime contractor has no liability to the subcontractor for the costs or damages at issue.

so, based on the subcontractor's good faith belief that the State is liable for the damages incurred by the subcontractor.

No Direct Claim Filed

Appellant, perhaps recognizing the error in the form of its pleadings, abruptly changed its position during oral argument when opposing Respondent's Motion for Judgment and asserted that the purported Claims filed with Respondent were actually direct claims rather than "pass-through" claims. Unfortunately, however, neither notices of claim nor claims on behalf of Appellant were ever filed with the PO. As such, the Board lacks jurisdiction to hear Appellant's direct claims.[13]

Even if the Board were to construe the Notices of Claim and Claims filed by Appellant "on behalf of BPDI" as direct claims, rather than as "pass-through" claims, the Claims nevertheless fail for the same reasons that the "pass-through" claims fail. The Certifications required by COMAR 21.10.04.02B(5) are defective because they were not signed by Appellant (the party asserting that Respondent is liable for the amount of the equitable adjustment it seeks), and the party that *did* sign the Certifications has failed to assert unequivocally that Respondent is liable for its damages. Finally, it would be unduly prejudicial to Respondent to allow Appellant to completely change the nature of its Claims from "pass-through" claims to direct claims after the close of all of Appellant's evidence at the hearing on the merits.

Failure to Prove Differing Site Conditions

Even if Appellant overcame the procedural defects discussed *supra* and the Board were required to address the merits of either BPDI's "pass-through" claims or Appellant's direct claims, the Board would grant Respondent's Motion on the grounds that Appellant has failed to

[13] MD. CODE ANN., STATE FIN. & PROC. §15-211(a) limits the Board's jurisdiction to hearing and deciding all appeals arising from the final action of a unit on a contract claim by a contractor or a unit concerning: (i) breach; (ii) performance; (iii) modification; or (iv) termination.

meet its burden and prove by a preponderance of the evidence that it was entitled to equitable adjustments under to the Differing Site Conditions provision in the Contract.

GP-4.05(a),[14] the applicable provision in the Contract, defines a "differing site condition" as

> (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 inherent in work of the character provided for in this Contract.

Id. [15] In *Richard F. Kline, Inc.*, MSBCA No. 2092 (2000) at 10-11, the Board established the elements for proving a differing site condition: Appellant must meet the burden of proving by a preponderance of the evidence that

1. the solicitation affirmatively indicated or represented the subsurface conditions which form the basis of the claim;
2. it acted as a reasonable, prudent contractor in interpreting the solicitation;
3. it reasonably relied upon the indications of subsurface conditions contained in the solicitation;
4. the subsurface conditions actually encountered differed materially from those indicated in the solicitation;
5. the actual subsurface conditions must have been reasonably unforeseeable; and
6. its claims for excess costs must be shown to be solely attributable to the materially different subsurface conditions.

Id. (relying on *Weeks Dredging & Construction, Inc. v. United States*, 13 Ct. Cl. 193, 218-219 (1987)). Appellant has requested an equitable adjustment in the amount of $717,785.04 in the Enhanced Drilling Methods Claim and a $73,835.00 equitable adjustment in the Damaged Equipment Claim. We address each of these Claims individually.

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[14] *MDOT SHA 2008 Standard and Supplemental Specifications for Construction and Materials* (July 2008 - May 2017).

[15] The definition of a differing site condition in GP-4.05(a) mirrors that of Federal Acquisition Regulation 52.236-2(a) Differing Site Conditions. *See* 48 C.F.R. §52.236-2 (2020).

Enhanced Drilling Methods Claim

The SHA Foundation Boring Logs (the "Boring Logs"), which were included in the IFB, document the boring samples taken at different locations and at various depths, with each boring generally containing multiple soil samples at different depths. Only Mr. Lawrence was able to testify regarding the locations and composition of these soil samples: "what I recollect is that they were down the center of the original Route 22 before widening ever happened...[n]ot just in our drill areas, but also the other areas where — excavation or putting utilities and so forth." He explained that they are always taken "prior to or during the design phase" of a project and "they'll do borings through any of the deep excavations" where utilities or a foundation of some sort will be placed. He further explained that they "try to get as close to where you're going to do the work as they possibly can."

According to Mr. Lawrence, the samples allow for the identification of top soils, clays, structural soils, and rock, such as limestone or granite; whether it is heavily fractured or weathered; and whether the hole has water. Mr. Lawrence acknowledged that although the samples in these Boring Logs did not provide information on whether there were any abandoned utilities or metals, it did reflect the need for "rock shafts" and "rock sockets" as well as the need for casing and use of a cluster hammer in one area of the Project.

Based on Mr. Lawrence's testimony and our review of the Boring Logs, we conclude that the Boring Logs affirmatively indicated and clearly represented the presence of moisture, sand, gravel, and silty clay, as well as weathered and solid rock (including amphibolite and metagabbro, *a.k.a.* "black granite") at various and numerous locations within the general area where shafts for the sound barrier caissons needed to be drilled and excavated. Given the presence of these materials in the boring samples taken by Respondent and included in the IFB, as well as their locations and

depths, a prudent contractor should reasonably assume, as did BPDI, that there would be a need for drilling through solid rock to construct the caissons and sound barriers on the Project.

At the time Appellant submitted its bid on the Project, it did so without the benefit of having BPDI as its drilling subcontractor to assist it in preparing the bid. Appellant erroneously assumed, and attempted to show at the hearing, that the Boring Logs did not accurately reflect the subsurface conditions at the site because they did not show the presence of any significant solid rock or boulders, that enhanced drilling methods would not be needed, and that the shafts for the caissons for the sound barriers could be constructed mainly via augur drilling. Mr. Lawrence and BPDI, however, clearly anticipated that enhanced drilling methods would be needed, as evidenced by BPDI's inclusion of the "Other Prices" in its quote to Appellant that was also included in the Subcontract.

Based on the foregoing, we hold that Appellant failed to produce sufficient evidence to show that its interpretation of the Boring Logs was reasonable. In fact, its reliance on the Boring Logs to support its assumption that it would not need enhanced drilling methods was unreasonable. We further hold that the subsurface rock that BPDI encountered did not differ materially from the presence of rock that was reflected in many of the soil borings. Finally, given the soil composition in the samples contained in the Boring Logs, we hold that it was reasonably foreseeable that a drilling contractor would encounter subsurface rock requiring enhanced drilling methods, as further evidenced by BPDI's inclusion of pricing for these methods in its quote to Appellant.

Notwithstanding the foregoing, even if Appellant had proven that the subsurface conditions differed materially from what was represented in the Boring Logs and that its claims for excess costs were solely attributable to the materially different subsurface conditions, the Board is not convinced that these claimed costs are adequately supported by the evidence. Appellant's costs

under its Enhanced Drilling Methods Claim were based solely on BPDI's billing records, yet Mr. Yohe asserted in an Affidavit that BPDI's drilling logs were not reliable records because there were numerous discrepancies between BPDI's drilling logs and Respondent's drillings logs (including differences in the length of casing used, the time that BPDI claimed to have spent drilling, and the depths to which BPDI claims to have drilled). Mr. Yohe also admitted at the hearing that there were numerous inconsistencies in BPDI's drilling logs and pay applications concerning the depth of shafts drilled and the number of shafts cased. In short, the documentation Appellant offered to support its damages calculation was shown to be contradictory and, therefore, inconclusive.

Damaged Equipment Claim

Appellant was unable to prove exactly what caused the damage to BPDI's equipment on November 21 and December 27, 2016, but alleges that the damages on November 21, 2016 were caused by abandoned metal conduit, and that the damages on December 27, 2016 were caused by buried construction debris. Since the IFB makes no overt representations regarding the possibility of encountering buried abandoned conduit or construction debris at the Project site, the only relevant element Appellant must prove is that the two alleged unknown physical conditions encountered could not reasonably be anticipated by Appellant based upon its review of the Contract documents, its inspection of the Project site, and its general experience, if any, in the area.

No one from BPDI, Appellant, or Respondent that was present either on November 21, 2016 or December 27, 2016 testified at the hearing on the merits regarding the materials struck by BPDI's drill. Mr. Lawrence had no firsthand knowledge of what materials were struck—he simply relied on information reported to him by his employees. He did testify that neither rock nor concrete would damage the cluster hammers used on those dates; only metal could cause the

catastrophic damage that occurred. Mr. Lawrence opined on what materials he believed had damaged BPDI's equipment and how those materials came to be subsurface at the Project:

> Okay. I don't remember because it's been five years now, but one piece in one shaft, and I don't know, I mean, it's eastbound and westbound. But on the eastbound side, we hit a piece, and on the westbound side we hit a piece. And (indiscernible) about the confusion, but we hit a steel pipe that was like an existing utility that's been abandoned because they're -- I guess, when they tore the houses down, they abandoned a lot of utilities, and left them in the ground. So we hit a steel pipe on one side of the road, and I just don't remember if that was the east or west. And on the opposite side of the road, we hit a piece of steel conduit that was buried. And I just don't remember which piece was on which side of the road.

Mr. Lawrence's expert opinion was that the damage to one of the cluster hammers included sheared off cutter buttons and that "the only thing that sheers those off is like if you went through a piece of RCP pipe, something that's got reinforced concrete in it, that little wire even in that thing can destroy a rock that little piece of wire, it just wipes the buttons right off."

Other than photographs of the alleged abandoned conduit and construction debris, no other evidence was offered to prove that the subsurface conditions BPDI encountered had, in fact, caused the damages to BPDI's equipment. However, assuming *arguendo* that BPDI hit abandoned metal conduit on November 21, 2016 and that this metal conduit caused the damages to BPDI's cluster hammer, the PO's April 25, 2019 Final Decision Letter demonstrates that Appellant knew of the presence of abandoned reinforced concrete pipe ("RCP")[16] conduit at the project site:

> In its [Request for Information] #7 dated May 3, 2016, A-Del identified the existence of a 48" RCP pipe along MD 22 WB between 564+27 — 566+20 LT that interfered with the installation of the new proposed 48" RCP pipe. SHA responded that portions of the existing pipe would have to be removed to facilitate the installation of the new pipe and that portions of the existing pipe also appeared to interfere with the footprint of caissons #33 and #34. Knowing that this existing pipe posed a potential obstruction to the installation of nearby caissons, A-Del should have determined the location of the remaining existing pipe to ensure that it would not interfere with other caisson shafts.

[16] RCP is a type of piping used for directing the flow of liquids or water underground that is reinforced with steel.

Appellant provided no credible evidence to contradict the PO's assertion that Appellant was aware of the existence of underground pipe. Thus, it appears, although it was not proven, that the damage to BPDI's equipment was caused by something Appellant knew could possibly be a problem.

Likewise, assuming *arguendo* BDPI hit buried construction debris (*i.e.*, "concrete with metal shavings consistent with rebar reinforcement") on December 27, 2016, the statement of work for the Project required road-widening work to be performed by Appellant that included, among other things, deep-cut excavations; demolition of sidewalks, curbs, and gutters; as well as clearing, grubbing, and backfilling to grade; all prior to BPDI's beginning its drilling operations.[17]

A large part of Mr. Yohe's testimony, and almost all of Mr. Yetter's testimony, was an attempt to demonstrate that Appellant's backfill operations could not have been responsible for the materials that BPDI alleged had damaged its drilling equipment because any backfilling and grading in the area where BPDI was drilling would not reach the depth (*i.e.*, negative 16 feet) at which the cluster hammer was reported to have struck the metal reinforced concrete on that date. However, Mr. Lawrence's expert opinion contradicted this assertion:

> If we're into rock, and you've literally at this point say – say you pick up a piece of metal at elevation negative four, okay, a negative number. The piece of metal comes down that's underneath there. Just like I said, you've got seven cutter heads. And you're now coming down and you're in rock. As that piece of metal makes it way underneath there, and you're grinding back and forth, all your other cutter heads are still pursing or evacuating to the next negative elevation. So you could pick it up at four, but it might take you to negative six or seven by the time you've wipe out enough of those carbon buttons to where it's not going to advance any further.

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[17] In his December 30, 2016 letter to Appellant's Project Manager, Mr. Dunlap, Mr. Robey stated that what BPDI hit was "consistent with previous obstructions" on the Westbound side of MD 22, which proved "to be buried concrete debris, some of which possessed rebar reinforcement." In the Declaratory Judgment Action, BPDI alleged that Appellant's site preparation work generated large amounts of construction debris and rather than fully perform the debris removal, Appellant instead used some of it as backfill material in the areas of the drilling site where the grade had to be raised.

In short, Mr. Lawrence opined that it was possible that the obstruction encountered by the cluster hammer was located at a much shallower depth. He explained that it is impossible to determine when metal has been hit by the hammer—after striking metal, the damage happens over time as the drilling continues to occur; it is only when the drill stops advancing downward in the shaft that it becomes clear that the damage has occurred.

Mr. Yetter's testimony makes it clear that Appellant controlled the Project site before BPDI started drilling operations. In fact, Appellant demolished and removed a concrete swale.[18] Although Mr. Yetter testified as to how carefully the construction debris was removed from the drilling field during backfilling, this does not exclude the possibility that a piece of construction debris was not removed from the drilling field or somehow found its way into the backfill.

Appellant had notice that RCP was present in the area where BPDI was to drill caisson shafts. Appellant had control over the Project site before BPDI commenced work and it did demolition work that created construction debris as part of its site preparation work. Appellant failed to prove by a preponderance of the evidence the depth at which the obstructions were actually hit.

In short, Appellant has failed to prove that the presence of either of the obstructions BPDI encountered could not have reasonably been anticipated when BPDI began its drilling work, nearly a year after Appellant had been given the notice to proceed on the Project.

Based on all of the foregoing, we affirm the PO's denial of Appellant's requests for equitable adjustments based on the existence of a differing site condition.

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[18] Concrete swales are concrete channels used to catch and direct surface runoff. Construction involves the installation of a concrete channel 12, 18, 24 or more inches wide, four or more inches thick, installed across the length of the area to be protected. Two steel rebars are embedded in the concrete to provide strength.

ORDER

Based on the foregoing, it is this 4th day of January 2022 hereby:

ORDERED that Respondent's Motion for Judgement is GRANTED; and it is further

ORDERED that a copy of any papers filed by any party in a subsequent action for judicial review or appeal shall be provided to the Board, together with a copy of any court orders issued by the reviewing court.

/s/
Bethamy Beam Brinkley, Esq.
Chairman

/s/
Lawrence F. Kreis, Jr., Esq.
Member

/s/
Michael J. Stewart Jr., Esq.
Member

<u>Certification</u>

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.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Per Curiam Order and Opinion in MSBCA Nos. 3127 and 3128, the Consolidated Appeals of A-Del Construction, Inc., under SHA Contract No. HA3485370.

Dated: <u>January 4, 2022</u>

/s/
Ruth W. Foy
Deputy Clerk