

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of *
Rustler Construction, Inc. *

Under SHA Contract No. BA5525226R *

Docket No. MSBCA 3197

Appearance for Appellant *

Kenneth K. Sorteberg, Esq.
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Appearance for Respondent *

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OPINION AND ORDER BY MEMBER STEWART

Upon consideration of Respondent Maryland State Highway Administration’s (“SHA” or “Respondent”) Motion to Dismiss and, in the Alternative, Motion for Summary Decision (“Motion”), Appellant Rustler Construction, Inc.’s (“Rustler” or “Appellant”) Opposition, Respondent’s Reply, and counsels’ arguments at the March 23, 2022 hearing, the Board finds that there are no genuine issues of material fact and that the Respondent is entitled to prevail as a matter of law.

UNDISPUTED FACTS

On October 17, 2017, Respondent issued Invitation for Bids Contract No. BA5525226R F.A.P No. AC-NHPP-G-695-6(378)E, IS 695 IL, Noise Barrier No. 03596N0 from Noise Barrier No. 03592N0 to 100 ft North of Dogwood Road, Baltimore County (the “IFB”). The IFB required

the contractor to construct a noise barrier wall along a section of I-695 in Baltimore County. The IFB's scope of work included the drilling of 210 36" shafts (caissons) and the installation of concrete foundations that would support the noise barrier walls.

The IFB incorporates the SHA's *2017 Standard Specifications For Construction And Materials* (May 30, 2017 – June 30, 2018), which includes General Provisions ("GPs") 5.14 "Filing of Claim by Contractor," and 5.15 "Disputes." Both provisions are incorporated in the contract executed on February 27, 2018 (the "Contract"). Both GP 5.14(a) and GP 5.15(d) include a 30-day requirement for filing a written notice of claim. Neither the IFB, nor the Contract, contains a provision allowing or authorizing the submission of a notice of claim or claim via electronic means. Additionally, neither identifies the procurement officer ("PO") or contains the PO's contact information.¹

Respondent issued a Notice to Proceed to Appellant with a start date of March 13, 2018. The Contract required substantial completion by June 9, 2019, and Appellant achieved substantial completion on June 5, 2019. On August 6, 2019, Appellant's Director of Project Management, Bobby Vargas, submitted a letter that included a Request for Equitable Adjustment ("REA") seeking \$326,810.77. The REA letter was addressed to Ms. Wendy Wolcott, the District Engineer

¹ *The Maryland Procurement Manual* in Section 5.3 states:

Prior to contract award, the procurement officer is the sole point of contact for purposes of the solicitation, including any inquiries from vendors, State officials, or members of the public. Any State officials, including members of an evaluation committee that receive questions or comments regarding the procurement should direct those questions or comments to the procurement officer. Likewise, any correspondences or notices regarding the procurement, including answers to questions or amendments to the solicitation, are to be issued and published only by the procurement officer.

<https://procurement.maryland.gov/mpm-5-solicitation/> (last visited March 25, 2022)

Both the Statewide Invitation for Bids (IFB) and the Statewide Request for Proposals (RFP) Templates require an agency to list the person designated as the PO for the solicitation and his or her contact information on the "Key Information Summary Sheet." *State Procurement Templates and Solicitation Attachments & Appendices*: <https://procurement.maryland.gov/procurement-staff/> (last visited March 25, 2022). That information was not provided in this IFB.

for SHA District 4, but marked "Attention: Bruce Cain, ADE Construction, District 4." In the REA letter, Appellant alleged that it encountered substantially more subsurface obstructions in shaft drilling operations than it had anticipated based on both its review of the boring logs and the estimated obstruction quantities set forth in the IFB, thereby increasing the actual quantity of work it performed and causing an accompanying scheduling delay, thereby increasing Appellant's direct and indirect costs to complete the work.

On November 5, 2019, Respondent, through Abraham Kidane, Assistant District Engineer, Construction, SHA District 4 (signing on behalf of Ms. Wolcott), responded via letter and denied the REA. The denial letter stated that "should you have any questions or require additional information on this matter, please contact Mr. Mitu Dalwadi, Area Engineer -- Construction, at 410-229-2431 or MDalwadi@mdot.maryland.gov." Manisha Bhatt on behalf of Respondent emailed the denial letter to Appellant the following day, on November 6, 2019, with the message, "Please find attached. Please keep a copy for your records. No hard copy to follow."

Over the ensuing months, the parties engaged in additional discussions regarding the denial of the REA and their respective positions, culminating in a final virtual meeting on January 6, 2021. These discussions included Respondent offering to settle the REA by paying Appellant less than the amount of direct costs Appellant claimed in its REA, and did not include any amounts for indirect costs claimed by Appellant. On January 13, 2021, Mr. Dalwadi emailed Mr. Vargas and Darrick Ballreich on behalf of Appellant to follow up on the final virtual meeting. Appellant responded via email on January 15, 2021, stating, among other things, that Appellant could not accept Respondent's position on the value of its REA. On January 26, 2021, Mr. Kidane emailed Mr. Vargas and stated that Respondent would be denying the REA and would "issue a final District response regarding this matter."

On January 26, 2021, Ms. Bhatt, on behalf of the Respondent, emailed the formal REA denial letter to Appellant. It read "Please find attached. Please keep a copy for your records. A hard copy of this letter will also be sent via certified mail." The January 26th District 4 letter attached to the email stated, in part:

This is the final decision from District 4 regarding this issue; it is not the final decision of MDOT SHA. Per the provisions described in GP 5.14 of the Standard Specifications for Construction and Materials, you have 30 days from the date of this letter to file a written notice of claim **with the Procurement Officer**. That claim **may be submitted** to Mr. Stephen Bucy, Director Office of Construction, 7450 Traffic Drive, Hanover, Maryland 21076.

(Emphasis added.). This January 26th District 4 letter further states, "should you have any questions or require additional information on this matter, please contact Mr. Abraham Kidane, Assistant District Engineer Construction, at 410-229-2421 or AKidane@mdot.maryland.gov."

On February 9, 2021, Appellant sent an email response to Ms. Bhatt's January 26, 2021 email, and copied Mr. Kidane, Olugbenga Shonaiya, and Jim Otterbein. The February 9, 2021 letter attached to this email provided: "We are in receipt of your email received on 1/26/2021 regarding the above-referenced matter....please accept this as the required notice of our intent to file a claim...." Later on February 9, 2021, Appellant received a confirmatory email from Respondent's District Four generic email address stating "***Your email has been received* * We will review and respond accordingly."

On April 23, 2021, Appellant submitted its Claim via letter to Mr. Bucy. This Claim reiterated the contents of the REA and expanded upon Appellant's basis for its Claim and its rationale.² On April 26, 2021, Respondent sent Appellant an email which stated, "Please see attached acknowledgement letter on Rustler Construction DSC claim submission on contract

² In its Claim, Appellant cites the provisions in GP 4.04 "Variations in Estimated Quantities" and GP 4.05 "Differing Site Conditions" as its basis for entitlement to an equitable adjustment.

BA5525226R. Hard copy will follow in mail." This email was sent by Adetutu Onamade and was copied to Respondent's employees Mr. Bucy, Mr. Kidane, and Ms. Wolcott. A letter dated April 26, 2021, was attached, which stated that Respondent acknowledges receipt of Appellant's Claim, and ended by stating: "Please contact Ms. Adetutu Onamade, Assistant Division Chief, Engineering Support, Office of Construction, if there are any questions. Ms. Onamade can be reached at (443) 572-5247 or email: aonamade@mdot.maryland.gov."

On October 20, 2021, Mr. Bucy, via certified mail, sent his Final Decision to Appellant denying its Claim. It found the Claim was both untimely filed and meritless. Appellant filed its Notice of Appeal with this Board on November 17, 2021. Respondent filed its Motion on February 16, 2022, Appellant filed its Opposition on March 9, 2022, and Respondent filed its Reply on March 16, 2022. The Board held a hearing on Respondent's Motion on March 23, 2022.

STANDARD OF REVIEW

In deciding whether to grant a motion for summary decision, the Board must follow COMAR 21.10.05.06D(2): "[t]he 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." *Id.* 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). While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *See Crickenberger v. Hyundai Motor America*, 404 Md. 37 (2008); *Clea v. Mayor & City Council of Baltimore*, 312 Md. 662 (1988), *superseded by statute on other grounds*, MD. CODE ANN., STATE GOV'T § 12-101(a). 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. *See Beatty*, 330 Md. at 737-38.

DISCUSSION

The undisputed facts before the Board demonstrate that Appellant never filed a timely written notice of claim as required by COMAR 21.10.04.02.³ COMAR 21.10.04.02A & C provide:

A. Unless a lesser period is prescribed by law or by contract, a contractor shall file a written notice of a claim relating to a contract with the appropriate procurement officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier.

* * *

C. A notice of claim or a claim that is not filed within the time prescribed in Regulation .02 of this chapter shall be dismissed.

*Id.*⁴ The time requirement for filing a notice of claim set forth in both SF&P § 15-219(a) and COMAR 21.10.04.02A is mandatory, and neither the State agency nor the Board has the discretion to ignore or waive it. *See Brawner Builders*, 476 Md. 15, 34-35 (2021); *Kirk McKenzie*, MSBCA No. 3059 at 8 (2018); *David A. Bramble, Inc.*, MSBCA No. 2823 at 7-8 (2013); *Arundel Eng'g Corp.*, MSBCA Nos. 1940, *et al.* at 4 (1998).

The central issue in this Appeal is whether Appellant's email, sent on February 9, 2021 to Ms. Bhatt, which had a letter attached addressed to Ms. Wolcott, satisfies the requirements of the Contract and the Procurement Law regarding filing a written notice of claim. COMAR 21.10.04.02E requires that "[a] claim may be filed by electronic means only if expressly

³ Given this conclusion, the Board need not address the remaining grounds set forth in Respondent's Motion.

⁴ The 30-day period for filing a written notice of claim is set forth in MD CODE ANN., STATE FIN. & PROC. ("SF&P") § 15-219(a). The 30-day requirement for filing a written notice of claim is also set forth in GP 5.14(a) and GP 5.15(d).

permitted and in the manner specified by the contract.” Furthermore, COMAR 21.03.05.03B provides:

An attempt by a bidder, offeror, or contractor to conduct a transaction by electronic means, including any acknowledgement, bid, proposal, protest, or **claim**, does not satisfy the requirements of this title unless the solicitation or contract specifically authorizes the use of electronic means for the specified transaction.

(emphasis added). Neither the IFB, nor the Contract provides that a notice of claim or claim may be filed via electronic means. Although COMAR 21.03.05.02A provides that “[e]ach solicitation and contract shall state whether electronic transactions are permitted or required for that procurement,” it also provides that “[if] the solicitation or contract does not specify that electronic transactions are permitted or required, **bidders and offerors may not use electronic means for any part of the procurement.**” (emphasis added).

Appellant, in its Opposition to Respondent’s Motion, argues that the holding in *Engineering Mgmt. Services, Inc. v. Maryland State Highway Administration*, 375 Md. 211 (2003), requires the Board to hold a merits hearing because there are facts in dispute regarding whether Respondent is estopped from invoking the provisions of COMAR 21.10.04.02E and 21.03.05.03B due to its use of email during the procurement. The Court of Appeals recently clarified in *Brawner Builders* that “equitable estoppel is not a procedural panacea that spares all litigants who utter the phrase from summary disposition.” *Brawner Builders*, 476 Md. at 43. The Court made it clear that even where there are alleged factual disputes, if the factual disputes are irrelevant, they will not prevent the entry of summary judgment. *Id.* at 31 (citing *Seaboard Sur. Co. v. Richard F. Kline, Inc.*, 91 Md. App. 236, 244 (1992)). The fact that Respondent conducted transactions during the procurement via email is not relevant or material because COMAR 21.03.05.03B’s prohibition against electronic transactions clearly only applies to bidders, offerors, or contractors and not to the Respondent.

Respondent, in its Motion, alleges that Appellant’s February 9, 2021 notice of claim was not filed with the PO as required by the Contract in GP 5.14(a).⁵ Respondent’s Motion further asserts that [a]t all relevant times, the SHA Procurement Officer to whom claims had to be submitted was Stephen Bucy, Director of SHA Office of Construction.” However, there is nothing in Respondent’s Motion or the Exhibits thereto that shows that the identification of the PO was communicated to Appellant before the January 26th District 4 letter denying the REA.

Appellant, in its Opposition, argued Mr. Kidane was the proper PO to submit a notice of claim to based on the prior dealings of the parties in connection with the REA.⁶ Appellant then further argues that since it copied Mr. Kidane on its February 9, 2021 emailed notice of claim, it had submitted its notice of claim to the PO. The Board need not resolve this argument between the parties because, assuming *arguendo* that Mr. Kidane was the appropriate PO to accept the filing of a notice of claim, the IFB and Contract still do not allow a notice of claim to be filed with him or anyone else via electronic means.

Although Respondent clearly created considerable confusion regarding to whom and in what manner a notice of claim and claim should be filed, it is undisputed that Appellant knew the basis for its claim when it received Respondent’s January 26, 2021 email with the attached letter denying its REA. It is further undisputed that the letter advised Appellant that it had 30 days to file its written notice of claim and that it could submit it to Mr. Bucy. Finally, it is undisputed that Appellant filed its notice of claim by email on February 9, 2021 and that

⁵ COMAR 21.10.04.02A requires a written notice of claim to be filed with the “appropriate procurement officer.”

⁶ In support of its position Appellant cites COMAR 21.01.02.01B(67) which provides:

“Procurement officer” means any person authorized by a procurement agency in accordance with law or regulations to formulate, enter into, or administer contracts or make written determinations and findings with respect to them. The term also includes an authorized representative acting within the limits of authority.

Appellant filed no other written notice of claim conforming to the provisions of the Contract or COMAR until it filed its Claim on April 23, 2021 via letter to Mr. Bucy.

Based on the foregoing undisputed facts, including the material fact that Appellant filed its notice of claim only by email, which is not permitted, we hold that there are no material facts in dispute that would support an estoppel defense and that Appellant's notice of claim was not timely filed. Accordingly, Respondent is entitled to judgment as a matter of law.

ORDER

Based on the foregoing, it is this 27th day of April 2022, hereby:

ORDERED that Respondent's Motion to Dismiss and, in the Alternative, Motion for Summary Decision is GRANTED; and it is further

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

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

I concur:

/s/
Bethamy B. Brinkley, Esq.
Chairman

/s/
Lawrence J. Kreis, Jr., Esq.
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 Opinion and Order in Docket No. MSBCA 3197, The Appeal of Rustler Construction, Inc., under SHA Contract No. BA5525226R.

Date: April 27, 2022

/s/
Ruth W. Foy
Deputy Clerk