

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

**In the Appeal of** \*  
**W.M. Schlosser Co., Inc. on behalf of** \*  
**W.G. Tomko, Inc.** \*

**Under MTA Contract No. T-0705-0340** \*

**Docket No. MSBCA 3211**

**Appearance for Appellant** \*

**Michael J. Cohen, Esq.**  
**General Counsel**  
**W.M. Schlosser Co., Inc.**  
**Hyattsville, Maryland**

**Appearance for Respondent** \*

**Mary Cina Chalawsky, Esq.**  
**Assistant Attorney General**  
**Office of the Attorney General**  
**Contract Litigation Unit**  
**Baltimore, Maryland**

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**OPINION AND ORDER BY MEMBER STEWART**

Upon consideration of Respondent Maryland Transit Administration’s (“MTA” or “Respondent”) Motion to Dismiss or, in the Alternative, for Summary Decision (“Motion”), Appellant W.M. Schlosser Co., Inc.'s (“Schlosser” or “Appellant”) Response, Respondent’s Reply, and no party having requested a 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 March 7, 2017, MTA issued an Invitation for Bids to demolish the existing Kirk Bus Facility Building at 2300 Kirk Avenue and construct a new Bus Storage Facility on the former Kirk Bus Division Site under Contract No. T-0705-0340 (“IFB”). Appellant was awarded the Contract, which was signed on January 15, 2018. The Contract’s scope of work included the installation of seven rooftop HVAC Units (“RTUs”). W.G. Tomko, Inc. (“Tomko”) was the

mechanical subcontractor hired by Appellant to furnish and install the RTUs and associated piping.

Exhibit A of the Contract incorporated the Contract Specification Book, which included MDOT's General Provisions. General Provision ("GP") 5.14, Claims, provides:

(a) The Contractor shall file a written notice of claim for extension of time, equitable adjustment, extra compensation, damages, or any other matter (whether under or relating to this Contract) with the procurement officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier.

(b) Contemporaneously with or within 30 days of the filing of a notice of a claim, but no later than the date that final payment is made, a Contractor shall submit the claim to the appropriate procurement officer.

\* \* \*

(d) A notice of claim or a claim that is not filed within the prescribed time shall be dismissed.

On June 25, 2020, Tomko sent Project Change Order ("PCO") COR-014 to Appellant requesting \$234,944.51 in costs for additional work under the Contract to "[d]esign, draw, fabricate, and deliver custom RTU pipe chase dog houses."

On June 29, 2020, Appellant transmitted Tomko's PCO COR-014 to Respondent, as Maryland Transit Administration Letter - 153 ("MTAL-153"). Therein, Appellant requested \$244,224 in additional costs and general contractor markup for custom RTU pipe enclosures. On July 6, 2020, Respondent denied PCO COR-014/MTAL-153.<sup>1</sup>

On December 23, 2020, Tomko submitted to Appellant PCO COR-014B for \$281,131.66 in costs for additional work performed under the Contract. Tomko claimed additional costs to "design, draw, fabricate, deliver, and install custom RTU pipe enclosures."

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<sup>1</sup> Although this denial was passed on to Tomko, it is unclear from the record exactly when it was passed along.

On January 6, 2021, Appellant transmitted Tomko's PCO COR-014B to Respondent, as MTAL-193. Appellant requested \$330,608 on behalf of Tomko for estimated costs for additional work performed that was not included in the Contract. On January 14, 2021, Respondent denied PCO COR-014B/ MTAL-193. On January 18, 2021, Appellant advised Tomko that PCO COR-014B/MTAL-193 had been denied by Respondent.

On May 3, 2021, Tomko submitted a claim letter (“Tomko Claim”) to Heather Martin, DOT Procurement Officer II,<sup>2</sup> requesting \$281,131.66 in costs for additional work to design, draw, fabricate, deliver, and install custom RTU pipe enclosures. Tomko copied Appellant on the May 3<sup>rd</sup> letter. On May 17, 2021, Jodie Biden, Manager, Project Controls, Procurement Officer<sup>3</sup>, Office of Engineering and Construction, sent a letter to Tomko advising it that its May 3<sup>rd</sup> letter was not a valid claim because Tomko had no standing to assert a direct claim against Respondent. Tomko’s only contract was its subcontract with Appellant.

On July 15, 2021, Appellant contemporaneously submitted a notice of claim and claim (the “July 15<sup>th</sup> Notice of Claim & Claim”) to Respondent seeking \$302,505.33 for additional work performed by Tomko and another of its subcontractors. Appellant alleged that the cost for additional work to design, draw, fabricate, deliver, and install custom RTU pipe enclosures should be borne by Respondent as it was a contract change. Appellant requested \$278,416.36<sup>4</sup> on behalf of Tomko, \$9,703.00 on behalf of the other subcontractor, and \$14,405.97 as a 5% markup for Appellant.

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<sup>2</sup> Neither the IFB nor the Contract identifies the procurement officer for this procurement.

<sup>3</sup> References to the Procurement Officer (“PO”) *infra* refer to Ms. Biden.

<sup>4</sup> In its July 15th Notice of Claim & Claim, Appellant requested \$2,715.30 less than previously requested on behalf of Tomko in COR-014B/MTAL-193 due to the removal of one of Tomko’s subcontractor’s warranty charge, as well as the adjustment of markups on that subcontractor’s cost for overhead and profit by Tomko, thereby reducing the amount claimed by Appellant on behalf of Tomko from \$281,131.66 in COR-014B/MTAL-193 to \$278,416.36.

On January 7, 2022, the PO denied Appellant's July 15<sup>th</sup> Notice of Claim & Claim. The PO explained that pursuant to both COMAR 21.10.04.02, and the Contract's GP 5.14, Appellant's July 15<sup>th</sup> Notice of Claim & Claim was untimely and must be dismissed. The PO stated that

[a]lthough Schlosser was advised on July 6, 2020 that COR-014/MTAL-153 was denied, and again on January 14, 2021 that COR-014B/MTAL-193 was denied, Schlosser did not file a claim until July 15, 2021, well beyond the mandatory deadline . . . required by the Contract as well as the applicable COMAR regulations.

The PO also found that even if Appellant's Claim had been timely filed, it was denied on the merits.

Appellant filed its Notice of Appeal with this Board on February 8, 2022. Respondent filed this Motion on February 18, 2022. Appellant filed its Response on March 10, 2022. Finally, Respondent filed its Reply on March 16, 2022. Neither party requested a hearing on Respondent's Motion.

### **STANDARD OF REVIEW**

In deciding whether to grant a motion for summary decision, the Board must follow COMAR 21.10.05.06O(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 and claim as required by both GP 5.14 and COMAR 21.10.04.02. GP 5.14 clearly provides that a contractor must file a written notice of claim within 30 days after the basis for the claim is known or should have been known, whichever is earlier, and that a claim must be filed either with the notice of claim or within 30 days thereafter. GP 5.14 also mandates that an untimely filed notice of claim or claim be dismissed.

GP 5.14 is in accord with COMAR 21.04.02, which provides:

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.

B. Contemporaneously with or within 90 days of the filing of a notice of a claim on a construction contract, or 30 days of this filing on a nonconstruction contract, but no later than the date that final payment is made, a contractor shall submit the claim to the appropriate procurement officer.

\* \* \*

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.

The requirements for filing of a timely notice of claim and claim are mandatory, and neither a State agency nor the Board has the discretion to ignore or waive them. *See Brawner Builders v. State Highway Admin.*, 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). Further, 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; *A-Del Constr., Inc.*, MSBCA Nos. 3127 & 3128 (2022); *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).

It is undisputed that Tomko, a subcontractor of Appellant, does not have a written procurement contract with Respondent for work on the Contract, and that any notice of claim or claim for work on the Contract must be made by Appellant on Tomko's behalf.<sup>5</sup> Tomko's May 3<sup>rd</sup> Claim does not satisfy the requirements of GP 5.14 and COMAR 21.10.04.02 because, as a subcontractor, it lacked standing to file it.

It is undisputed that Appellant knew PCO COR-014/MTAL-153 was denied on January 6, 2020, and that PCO COR-014B/MTAL-193 was denied on January 14, 2021. Yet Appellant waited 374 days and 182 days, respectively from these denials to file its July 15<sup>th</sup> Notice of Claim & Claim, which the Board must find was untimely filed.

Appellant incorrectly argues that the holding in *Eng'g Mgmt. Servs. v. Md. State Highway Admin.*, 375 Md. 211 (2003), requires the Board to deny Respondent's Motion and hold a full hearing on the merits on the issue of the timeliness of its July 15<sup>th</sup> Notice of Claim & Claim. Recently, in *Brawner Builders*, 476 Md. at 42-43, the Maryland Court of Appeals clarified its decision in *Eng'g Mgmt. Servs.* by stating:

Our decision in *Engineering Management Services* simply restates the general rule that it is often inappropriate to grant summary disposition where there are factual issues related to knowledge, motive, or intent because such issues may require "greater than usual factual development[.]" *Berkey v. Delia*, 287 Md. 302, 306 (1980). But this general rule is not absolute, as we have oft observed summary

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<sup>5</sup> Also commonly referred to as a "pass-through" or "sponsored" claim.

judgment may be appropriate notwithstanding the presence of factual issues concerning knowledge, motive, or intent so long as there are “no genuine issue[s] of material fact,” *id.*, and the facts are not susceptible “to inferences supporting the position of the party opposing summary judgment[.]” *Clea v. Mayor and City Council of Balt.*, 312 Md. 662, 677 (1988).

*Id.* The Court found no error with the Board granting summary decision to the State, based on timeliness, when there were no genuine issues of material fact disputing when the Contractor had knowledge of its claim. In this Appeal, there is no dispute that both Tomko and Appellant knew the basis for their claim against Respondent more than 30 days before Appellant filed its July 15<sup>th</sup> Notice of Claim & Claim, and it is therefore appropriate to resolve this Appeal via summary decision.

Accordingly, the Board concludes there are no genuine issues of material fact and that the Respondent is entitled to judgment as a matter of law.

### **ORDER**

Based on the foregoing, it is this 22<sup>nd</sup> day of April 2022, hereby:

ORDERED that Respondent’s 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.

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

I concur:

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/s/  
Bethamy B. Brinkley, Esq., Chairman

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/s/  
Lawrence F. 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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Opinion and Order in Docket No. MSBCA 3211, The Appeal of W.M. Schlosser Co., Inc., on behalf of W.G. Tomko, Inc., under MTA Contract No. T-0705-0340.

Date: April 22, 2022

\_\_\_\_\_/s/  
Ruth W. Foy  
Deputy Clerk