

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

<b>In the Appeal of</b>	*	
<b>Mid-Atlantic General Contractors, Inc.</b>	*	
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<b>Under Maryland Department</b>	*	<b>Docket No. MSBCA 3212</b>
<b>of Transportation</b>	*	
<b>Maryland Aviation Administration</b>	*	
<b>Contract</b>	*	
<b>No. MAA-CO-18-004</b>	*	
	*	
<b>Appearance for Appellant</b>	*	<b>Kenneth K. Sorteberg, Esq.</b>
	*	<b>Andrew P. Gorini, Esq.</b>
	*	<b>Huddles, Jones, Sorteberg &amp;</b>
	*	<b>Dachille, P.C.</b>
	*	<b>Columbia, Maryland</b>
	*	
<b>Appearance for Respondent</b>	*	<b>Lydia B. Hoover, Esq.</b>
	*	<b>Assistant Attorney General</b>
	*	<b>Office of the Attorney General</b>
	*	<b>Contract Litigation</b>
	*	<b>Baltimore, Maryland Unit</b>
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**OPINION AND ORDER BY MEMBER MEIGHAN**

Respondent Maryland Aviation Administration (“MAA”) moved to dismiss Appellant Mid-Atlantic General Contractors, Inc.’s (“Mid-Atlantic”) appeal for failure to state a claim upon which relief may be granted because the three claims asserted in its appeal were untimely filed. Alternatively, MAA requests a summary decision because there is no dispute of any material facts that Mid-Atlantic’s claims were untimely. Mid-Atlantic’s opposition asserts that its claims were timely filed.

Upon consideration of MAA’s Motion, Mid-Atlantic’s Opposition, and MAA’s Reply, and neither party having requested a hearing, we find that there are no genuine issues of material

fact, and that MAA is entitled to prevail on its motion for summary decision as a matter of law because Mid-Atlantic's claims were untimely filed.

### **UNDISPUTED FACTS**

In the spring of 2019, MAA awarded Mid-Atlantic contract number MAA-CO-18-004-Task 3 (the "Contract") to repair Baltimore/Washington International Thurgood Marshall Airport storm water pump stations. Mid-Atlantic was to perform its contractual responsibilities by summer 2020, but Mid-Atlantic did not substantially perform the Contract until January 2021. This appeal stems from disputes about that delay and disputes about the quality of the work performed. The facts necessary to resolve the timeliness issue for both categories of disputes before us are as follows.

*Contract Delays:* One year into the Contract Mid-Atlantic began requesting extensions for additional time to perform its contractual duties due to the coronavirus disease ("COVID-19") pandemic.<sup>1</sup> MAA's project administrator, Michael Baker International ("MBI"), approved two of those requests with conditions, which Mid-Atlantic accepted. In May 2020, Mid-Atlantic submitted a third extension request to extend the schedule and increase costs due to COVID-19 implications. MBI indicated that it would approve a non-compensable extension with various conditions, but Mid-Atlantic did not provide a formal response of acceptance as required by the Contract. Consequently, MBI withdrew its offer.

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<sup>1</sup> On March 5, 2020, Governor Lawrence J. Hogan, Jr. declared a state of emergency for the outbreak of the coronavirus disease ("COVID-19"), a severe respiratory disease resulting in illness or death. State of Maryland, Proclamation, *Declaration of State of Emergency & Existence of Catastrophic Health Emergency – COVID-19* (Mar. 5, 2020), <https://governor.maryland.gov/wp-content/uploads/2020/03/Proclamation-COVID-19.pdf>. The state of emergency was renewed with various modifications until February 3, 2022. State of Maryland, Proclamation, *Termination & Rescission of the Proclamation of the State of Emergency & Catastrophic Health Emergency – COVID-19* (Feb. 3, 2022), <https://governor.maryland.gov/wp-content/uploads/2022/02/End-of-State-of-Emergency.pdf>.

*Work Quality:* In July 2020, MBI issued its first construction quality control plan deficiency notice (“First Deficiency Notice”) to Mid-Atlantic for allegedly failing to perform certain duties under the Contract. MBI stated that Mid-Atlantic was required to rectify the deficiencies, and it referenced the liquidated damages provisions in the contract, which would be assessed for each day that the project ran over the deadline. MBI also informed Mid-Atlantic that it would withhold \$28,012.50 for its failure to identify the non-conforming work outlined in the First Deficiency Notice.

MBI issued Mid-Atlantic a second construction quality control plan deficiency notice (“Second Deficiency Notice”) in October 2020 for failing to perform additional contractual duties. This notice restated the deficiencies outlined in the First Deficiency Notice and informed Mid-Atlantic that MBI was going to withhold an additional \$12,487.50 until all of the deficiencies were rectified. The Second Deficiency Notice again reminded Mid-Atlantic of the liquidated damages provision and that liquidated damages would be assessed per calendar day after the completion deadline.

MBI issued Mid-Atlantic’s third progress payment on December 18, 2020, which reduced the payment (as outlined in the First and Second Deficiency Notices) by (1) \$40,500 for the deficiencies;<sup>2</sup> and (2) \$49,500 for the liquidated damages.<sup>3</sup>

On January 7, 2021, Mid-Atlantic wrote a letter to Thomas Varughese, MAA’s procurement officer (“Procurement Officer”),<sup>4</sup> requesting a “damages meeting” to discuss

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<sup>2</sup> The \$40,500 was the total in the First Deficiency Notice \$28,012.50 and the Second Deficiency Notice \$12,487.50.

<sup>3</sup> The First and Second Deficiency Notices stated that the contract and technical provisions permitted MBI to impose liquidated damages in the amount of \$500 per calendar day over the project completion date. Both notices stated the project completion date was August 16, 2020.

<sup>4</sup> It is unclear from the record whether, at that time, Thomas Varughese was the procurement officer (“PO”). However, neither party disputes that he was the PO, and Mr. Varughese later wrote the final decision denying Mid-Atlantic’s claims and signed it as the PO.

“unfounded” liquidated damages and the impact of COVID-19 on the delays and construction quality control (“January 7th Notice” or “the Notice”). The Notice stated, “MAA/MBI has been put on notice - we have given you multiple letters documenting how this is hurting Mid-Atlantic. Since this is an ongoing situation, when the job is done and we calculate all our damages, we will file a claim against MAA/MBI.” Afterwards, the parties continued writing letters and discussing the issues raised in the January 7th Notice.<sup>5</sup> But it was not until eight months later, on August 11, 2021, that Mid-Atlantic filed three certified claims with MAA’s PO: (1) construction quality control claim; (2) liquidated damages claim; and (3) COVID-19 related extensions and extended performance costs claim. MAA’s PO issued a final decision denying all claims because they were untimely filed and addressed each on the merits. Afterwards, Mid-Atlantic timely appealed the PO’s decision of all three claims to us.

### **STANDARD OF REVIEW**

The Code of Maryland Regulations (“COMAR”) sets forth the legal standard for deciding whether to grant or deny a motion for summary decision. “The Appeals Board may grant a motion for summary decision if the Appeals Board finds that: (a) After 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.” COMAR 21.10.05.06D(2). This legal standard “is the same as that for granting summary judgment under Maryland Rule 2-501(a).” *Brawner Builders, Inc. v. State Highway Admin.*, 476 Md. 15, 31 (2021). And while we “must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones.” *See Crickenberger v. Hyundai Motor Am.*, 404 Md. 37, 45 (2008) (internal quotation marks and citation omitted). To defeat the motion for summary decision, “the non-

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<sup>5</sup> Mid-Atlantic does not assert that any of the letters following the January 7th Notice constituted another notice of claim.

moving party must produce admissible evidence demonstrating a dispute.” *Brawner Builders, Inc.*, 476 Md. at 31.

### DECISION

MAA contends that it is entitled to a summary decision because Mid-Atlantic’s notice of claims and claims were not timely filed, and Mid-Atlantic has not demonstrated any dispute of material facts regarding this issue. Mid-Atlantic’s position is that its January 7th Notice to the PO was a timely filed written notice of claims, and that the claims themselves were not due until 30 days after MBI issued its final determination in response to the January 7th Notice, which was issued on July 20th. MAA counters that even if Mid-Atlantic’s January 7th Notice was timely filed, then the claims themselves were still untimely filed because they were due within 90 days of January 7th or by April 7, 2021. Both parties agree that Mid-Atlantic’s claims were filed on August 11, 2021.

Contractors must comply with Maryland’s strict filing deadlines for procurement contract disputes. *See W.M. Schlosser Co., Inc. on behalf of W.G. Tomko, Inc.*, MSBCA No. 3211 (2022) (“The requirements for filing 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.”) (citing *Brawner Builders*, 476 Md. at 34-35). The Maryland Code sets forth the time requirements for filing a notice of claim and a claim, as well as the mandatory elements of a claim:

(a) Except to the extent a shorter period is prescribed by regulation governing differing site conditions, a contractor shall file a written notice of a claim relating to a procurement contract for construction within 30 days after the basis for the claim is known or should have been known.

(b) Unless extended by the unit, within 90 days after submitting a notice of a contract claim under a procurement contract for construction, a contractor shall submit to the unit a written explanation that states:

- (1) the amount of the contract claim;
- (2) the facts on which the contract claim is based; and

(3) all relevant data and correspondence that may substantiate the contract claim.

Md. Code Ann., State Fin. & Proc. (“SFP”) § 15-219(a)-(b). These deadlines and mandatory elements are restated and expanded upon in COMAR:

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. On conditions the procurement officer considers satisfactory to the unit, the procurement officer may extend the time in which a contractor, after timely submitting a notice of claim, must submit a contract claim under a procurement contract for construction. An example of when a procurement officer may grant an extension includes situations in which the procurement officer finds that a contemporaneous or timely cost quantification following the filing of the notice of claim is impossible or impractical. The claim shall be in writing and shall contain:

- (1) An explanation of the claim, including reference to all contract provisions upon which it is based;
- (2) The amount of the claim;
- (3) The facts upon which the claim is based;
- (4) All pertinent data and correspondence that the contractor relies upon to substantiate the claim; and
- (5) 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.

COMAR 21.10.04.02A-B. We must dismiss any claims that are not filed within the prescribed time. *See* COMAR 21.10.04.02C; *see also* *David A. Bramble, Inc.*, MSBCA No. 2823, 9-10 (2013) (denying appeal due to untimely-filed claim).

We will view the facts in the light most favorable to Mid-Atlantic and assume that its January 7th Notice was timely filed. However, Mid-Atlantic faced an additional deadline for

Mid-Atlantic's claims that cannot be rectified. Mid-Atlantic's claims were due by April 7th. We cannot excuse this seven-month delay. Mid-Atlantic has not cited any law or any Contract terms supporting its assertion that its claims were due after MBI's final determination. The law is clear—the filing of the notice of claim triggers the claim filing deadline and not, as Mid-Atlantic posits, a response to the notice of claim by the entity administering the contract (i.e., MBI).

Mid-Atlantic has not asserted estoppel as a defense nor presented any facts generating a genuine issue of material fact as to whether MAA is estopped from asserting that Mid-Atlantic's claims were untimely filed. Mid-Atlantic has also not demonstrated that it requested or received an extension from the PO, which may have permitted Mid-Atlantic's delay. *See* COMAR 21.10.04.02(B); *David A. Bramble, Inc.*, MSBCA No. 2823 at 10 (2013) (discussing possibility of receiving a claim filing extension). And, finally, Mid-Atlantic did not characterize its January 7th Notice as constituting both its notice of claims and actual claims. Our review of the January 7th Notice confirms that it does not include the components required by SFP § 15-219(b) to qualify as Mid-Atlantic's claims, which required the amount of the contract claims, the facts on which the contract claims were based, or any of the relevant data and correspondence that may substantiate the contract claims. In fact, the January 7th Notice states: "Since this is an ongoing situation, when the job is done and we calculate all of our damages, we will file a claim against MAA/MBI." Unfortunately, the law also does not permit Mid-Atlantic to wait until it performs the Contract to submit its claims.

Consequently, we conclude that there are no genuine issues of material facts and that MAA is entitled to judgment as a matter of law because Mid-Atlantic's claims were not filed in accordance with SFP § 15-219 and COMAR 21.10.04.2.

**ORDER**

Based on the foregoing, it is this 6th day of October 2022, hereby:

ORDERED that MAA’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/  
Stephanie M. Meighan, Esq.,  
Member

I concur:

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/s/  
Bethamy B. Brinkley, Esq.  
Chairman

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/s/  
Michael J. Stewart 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 3212, The Appeal of Mid-Atlantic General Contractors, Inc., under MAA Contract No. MAA-CO-18-004.

Date: October 6, 2022

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