

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
Milani Construction, LLC	*	
Under SHA Contract No. PG6985280	*	Docket No. MSBCA 3184
Appearance for Appellant	*	Dana A. Reed, Esq.
	*	Baltimore, Maryland 21239
	*	P. Sean Milani-nia, Esq.
	*	Fox Rothschild, LLP
	*	Washington, DC 20006
Appearance for Respondent	*	Kerry B. Fisher, Esq.
	*	Assistant Attorney General
	*	Office of the Attorney General
	*	Contract Litigation Unit
	*	Baltimore, Maryland 21201

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OPINION AND ORDER BY MEMBER CHO

The Board conducted a merits hearing in this Appeal on November 17, 2022. At the close of Appellant’s case, Respondent Maryland State Highway Administration (“SHA”), moved for judgment pursuant to COMAR 21.10.05.06E. The Board unanimously granted Respondent’s motion and stated that a written decision would be forthcoming. This Opinion and Order sets forth the bases for the Board’s decision.

PROCEDURAL BACKGROUND AND FINDINGS OF FACT

Milani Construction LLC (“Appellant” or “Milani”) is a construction firm specializing in bridge and highway construction and has performed such work for the State of Maryland over many years. One of those projects is State Highway Administration Contract No. PG6985280 (the “Contract”) which involves the replacement and widening of bridges and re-profiling a portion of I-95/I-495 over Suitland Parkway, spanning 1.39 miles. Milani was awarded the Contract on June

21, 2018, for its bid price of \$29,880,000.00, with a notice to proceed date of August 23, 2018. The original completion date was September 17, 2021.

The Contract contemplated the use of impact protection vehicles, which are vehicles equipped with crash cushions and other features designed to protect the workforce and the driving public in the event of collisions (“Protection Vehicle” or “PV”). Pay Item No. 1020 in the Contract provided for the use of PVs at an estimated quantity of 200 days. Milani’s bid price for Item No. 1020 was \$2,100.00 per day.

On September 23, 2019, SHA’s project manager on the Contract wrote an email to Appellant stating that, as of August 21, 2019, the actual quantity of PVs used had reached 125% of the estimated quantity, that “an equitable adjustment in the Contract price shall be made upon demand of either party,” and that “protection vehicle payment is on hold[] from 8/21/2019 until this matter is resolved.” Appellant’s Exhibit 2. The email further identified nine dates on which payment had been “made by error” by SHA and stated that “those payments will be deducted from the estimate.” *Id.*

This was followed by a letter dated October 10, 2019 from the District Engineer to the President of Milani informing him that SHA was withholding payment for PVs and demanded “an equitable price adjustment on this item for additional quantities over 125% of the estimated quantity.” SHA asserted that it was “obvious that Milani’s price [of \$2,100 per unit day] is significantly higher than the average of numerous other bidders during that timeframe,” and requested that Milani provide SHA with (1) a price breakdown of its PV base unit bid price; (2) its actual unit cost for the PV bid item that fell below the 125% of the estimated quantity, and (3) its actual unit cost for unit days that exceed 125% of the estimated quantity.

Appellant disputed SHA's allegations concerning the PV line item price and offered to provide information showing that SHA was wrong. The parties exchanged additional letters and held meetings (including their respective counsel), to attempt resolution.

On December 2, 2019, the parties entered into a Memorandum of Agreement ("MOA") concerning the payment for PVs under the Contract.¹ In exchange for Milani's production of certain documents relating to the price breakdown of its unit bid price for PVs and the actual unit cost for the PV days under the 125% estimated quantity threshold, SHA agreed as follows:

After receiving the aforementioned information from Milani, MDOT SHA shall pay Milani the Protection Vehicle contract line item bid price for all Protection Vehicle unit days that are unpaid as of the date of this agreement, and for all Protection Vehicle unit days used through the duration of the project. This agreement does not limit or otherwise affect the right of either party to file a demand for an equitable adjustment pursuant to GP 4.04 of the contracts.

Appellant's Exhibit 3 (December 2, 2019 Memorandum of Agreement). The MOA was signed by Mr. Stephen A. Bucy, SHA Procurement Officer ("PO"), on behalf of Respondent. Mr. Saeed Milani-nia signed on behalf of Milani as its President.

Milani produced the information requested on December 16, 2019. In an email dated December 19, 2019, Mr. Bucy acknowledged that Milani had provided SHA with the information required by the MOA. Further, Mr. Bucy instructed the district level personnel:

Since Milani has provided the information required, please pay them for all justified quantities used over 125% of the estimated quantities that we have held. Per the terms of the agreement, we will continue to pay the bid price through the duration of the contracts – at which time Milani will provide additional information to OOC [SHA Office of Construction] and we'll determine if further VEQ [variation in estimated quantities] action is necessary.

¹ The December 2019 Memorandum of Agreement covered two separate SHA contracts, PG6985280 and BA0835180. This consolidated Appeal concerns only PG6985280, and the Board makes no findings of fact or law concerning BA0835180 in this Opinion and Order.

Appellant's Exhibit 4. Mr. Milani testified that Respondent paid Appellant the full bid price of the PV line item as agreed in the MOA.

About nine months later, in a letter dated September 30, 2020, Milani requested that Respondent reduce the retainage being withheld on the Contract from 5% to 1%, under TC-7.05(a)(3) of the 2017 MDOT SHA Standard Specifications for Construction and Materials ("SHA Standard Specifications"). The SHA District Office denied the request on November 24, 2020. Noting that Respondent has discretion for any variation in retainage (increase or decrease), the District Office denied the request because SHA anticipated pursuing a GP-4.04 equitable adjustment on the PV pay item since that "line item quantity is anticipated to significantly overrun the estimated quantity."

Milani brought the District Office's denial to the attention of the PO in a November 25, 2020 letter, and Mr. Bucy affirmed the District's denial on December 2, 2020. Milani filed its notice of claim on December 18, 2020, followed by the claim on January 5, 2021.² The PO denied the claim in the final decision issued on June 29, 2021.

Milani appealed the PO's denial of the claim to this Board on July 27, 2021. In its complaint, filed on August 25, 2021, Milani asserted that: (1) "SHA waived any right to deprive Milani of payment of its full contract price for the PVs" by executing the MOA; (2) SHA either breached the Contract or abused its discretion when it refused to reduce the retainage because its decision had no rational basis; and (3) SHA committed a violation of Due Process of the Maryland Constitution by withholding retainage without first filing an affirmative claim under GP-4.04 for a reduction in contract price for the Protection Vehicles.

² Again, Appellant's January 5, 2021 claim addressed both BA0385180 and PG6985280, but BA0385180 is not at issue in this Appeal and we make no findings of fact or law concerning that contract.

As to relief sought, Appellant requested a determination that “Milani is entitled to a reduction of the retainage being held by SHA ... in the amount of not less than \$1,094,309,” and pre-decision and post-decision interest on that amount.

The project was determined to be substantially complete as of September 29, 2022. Based on that determination, on October 4, 2022, Milani requested that retainage be reduced from 5% to 1%. Subsequently, SHA reduced the retainage to 1% and, on November 4, 2022, Milani received a check in the amount representing the release of 4% of retainage.

At the merits hearing, Appellant requested a total amount of \$200,861.24, which was the amount that Appellant calculated to be pre-decision interest due on the retainage amount improperly withheld by Respondent. *See* Appellant’s Exhibit 5.

DECISION

The Board grants Respondent’s Motion for Judgment because Appellant failed to meet its burden to prove by a preponderance of the evidence that it was entitled to a reduction of retainage at the time Appellant made its request on September 30, 2020.

Each SHA construction contract is subject to a variable retainage under TC-7.05(a)(3) of the SHA Standard Specifications, which states in relevant part:

... Any variation in retainage (increase or decrease) will be at the discretion of the Administration and the District Engineer. Those meeting the minimum qualifications may have retainage reduced upon request of the Contractor with consent of surety. ...

Minimum Qualifications are as follows: After 50 percent project completion and upon request, Contractors with ‘A’ evaluations for the last two years may be reduced from 5 percent to 1 percent. Project completion percentage will be based upon actual work completed (excluding monies paid for stored materials). An interim evaluation of the current project would need to be completed and would need to be an ‘A’.

At 50% project completion and upon request, Contractors with ‘B’ evaluations or any combination of ‘A’ or ‘B’ evaluations for the last two years may be reduced from 5 percent to 2.5 percent, and remain at that level until released upon final

payment. Project completion percentage will be based upon actual work completed (excluding monies paid for stored materials). An interim evaluation of the current project would need to [be] completed and would need to be an 'A' or 'B'.

Contractors with 'C' evaluations or any combination of 'C' and 'D' evaluation for the past two years will begin and remain at 5% for the life of the project.

Contractors with a 'D' evaluation for the last two years will begin at 5%. Project performance will be evaluated monthly with the retainage being raised to 10% for continued 'D' performance.

In its September 30, 2020 request, Appellant asked for retainage on the Contract to be reduced from 5% to 1% "for two reasons": (1) it had received 'A' contractor evaluations for 2018 and 2019; and (2) over 50% of the Contract work had been completed.

In denying Appellant's request, Respondent relied on the discretion given to SHA for any variation in retainage under TC-7.05(a)(3). As an additional reason for its denial, Respondent stated that based on Milani's high PV line item bid price, Respondent anticipated making an equitable adjustment claim at the conclusion of construction.

Appellant asserts, first, that Respondent waived its discretion to reduce retainage by executing the MOA. "[W]aivers of sovereign immunity, which are in derogation of common law, are strictly construed in favor of the State." *Brawner Builders, Inc. v. Maryland State Highway Admin.*, 476 Md. 15, 32 (2021). A waiver must be written, clear and explicit. Here, however, the MOA contains no language concerning retainage, let alone an explicit waiver by SHA giving up its discretion to decrease or increase retainage. Rather, the MOA settled a dispute between the parties concerning the PV line item payment under the Contract, without affecting the right of either party to make an equitable adjustment claim in the future. We do not find that Respondent waived the discretion it had under TC-7.05(a)(3) by signing the MOA.

Further, we do not find that Respondent breached any term of the MOA. Nothing in the MOA promised Milani that SHA would reduce retainage at 50% project completion. In so far as

Appellant argues that SHA “deprive[d] Milani of payment of its full contract price for the PVs,” Mr. Milani-nia admitted at the hearing that SHA did, in fact, pay Milani the full PV line item bid price as agreed in the MOA.

Finally, there is no merit to the assertion that Respondent violated Appellant’s Due Process under the Maryland Constitution by withholding retainage without first filing an affirmative claim. The Contract gave Respondent the right to withhold retainage as well as the discretion not to reduce retainage. The amount of retainage SHA withheld was not “a disputed contract claim” or an “alleged debt” that required Respondent first to file an affirmative claim. *Cf. Star Computer Supply, LLC*, MSBCA 3002 (2018). Absent a clear and explicit waiver, Respondent could not commit a violation of law by exercising a valid contractual right. Moreover, not every breach of contract action against the State amounts to a due process violation. *See Rowe v. Baltimore County*, 2022 WL 2440803 at *18 (2022) (“a government does not take property or deprive a person of property without due process merely because it withholds payment ... on the basis of a plausible but erroneous understanding of its statutory or contractual obligations.”).

For the reasons stated above, Respondent’s Motion for Judgment is granted.

ORDER

Based on the foregoing, it is this 5th day of December 2022 hereby:

ORDERED that Respondent’s Motion for Judgment is GRANTED; and it is further

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

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 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 hereby certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA No. 3184, Appeal of Milani Construction, LLC, under SHA Contract No. PG6985280.

Date: December 5, 2022

/s/
Ruth W. Foy
Clerk