

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeals of	*	
Oakmont Contracting, LLC	*	
Under MAA Contract No. MAA-CO-20-013	*	Docket Nos. MSBCA 3227 & 3228
Appearance for Appellant	*	Tracy L. Steedman, Esq.
	*	T. L. Steedman Law, LLC
	*	Forest Hill, Maryland 21050
Appearance for Respondent	*	Douglas G. Carrey-Beaver, Esq.
	*	J. Mitchell Kearney, Esq.
	*	Assistant Attorneys General
	*	Office of the Attorney General
	*	Contract Litigation Unit
	*	Baltimore, Maryland 21201
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OPINION AND ORDER BY MEMBER CHO

This matter is before the Board on Maryland Aviation Administration’s (“MAA” or “Respondent”) Motion to Dismiss or, in the Alternative, Motion for Summary Decision, for Lack of Jurisdiction filed December 21, 2022 (“Motion”). A hearing is not deemed necessary.

Upon consideration of the Motion, the Opposition filed by Appellant, MAA’s Reply, and the entire record, the Board grants Respondent’s Motion to Dismiss, and this consolidated appeal is dismissed with prejudice.

FACTS

On December 17, 2020, Respondent and Oakmont Contracting, LLC (“Oakmont” or “Appellant”) entered into Contract No. MAA-CO-20-013 (the “Contract”) for \$941,054.00. The work involved replacing bus wash equipment, replacing compressed natural gas detection devices and control panel, replacing interior light fixtures, concrete repair work, epoxy flooring, masonry

wall painting, and underground plumbing work. The Contract duration was to be 180 calendar days.

Oakmont began Contract work on December 21, 2020. Appellant alleges that it “issued multiple baseline schedules with projected substantial completion dates due to the obstacles it encountered regarding the defective contract documents,” and that it “remarkably completed the Project on May 19, 2022 in the face of defective design, adversity, condescension and intentional lack of cooperation by the MAA, its representatives and consultants.” Appellant further alleges that, as a result of MAA’s actions, Oakmont was forced to incur extra costs for changes, additional work and delays. Finally, Appellant alleges that “MAA erroneously assessed liquidated damages against Oakmont in the amount of \$500 per day since August 12, 2021 through May 19, 2022,” for a total amount of \$140,500.¹

On July 6, 2021, Appellant submitted two Potential Change Orders (“PCO”): PCO#6 (“Request for Equitable Adjustment - Electrical Work for Bus Wash Components”) requesting a total of \$52,137.45 for extra work; and PCO#7 (“Added Plumbing for the Bus Wash Equipment”) requesting a total of \$37,188.46.

By two separate emails dated January 20, 2022, Niqui Clark, P.E., Resident Engineer for the project with Hill International, Inc., rejected PCO#6 and PCO#7.

On July 8, 2022, Appellant submitted three more PCOs: PCO#20 (“REA for Existing Equipment Integration Failures with CNG System”) requesting 261 days of delay and extra costs of \$257,242.50; PCO#21 (“REA for OWS Cover Plate Design Issues”) requesting 294 days of delay and extra costs of \$292,005.00; and PCO#22 (“Cost to Install New Raceways for CNG

¹ Other than Oakmont’s allegation, the record does not contain any evidence that MAA assessed the alleged liquidated damages.

Detection Devices”) requesting 64 days of delay and extra costs of \$132,629.87. In three separate letters dated September 1, 2022, Ms. Clark rejected PCO#20, PCO#21 and PCO#22.

In an email to Ms. Clark dated October 4, 2022, Mr. Billy Tose from Oakmont requested “a written final decision” on PCO#6 and PCO#7, because “Oakmont had not received written final decision from the MAA.”² Ms. Clark confirmed in an email dated October 6, 2022, that the PCOs “were formally rejected” on January 20, 2022.

Mr. Tose again emailed Ms. Clark on October 7, 2022, stating that Oakmont “understand[s] that the MAA did not approve and/or rejected the change orders,” but that Oakmont was disputing “those initial decisions” for the reasons stated in his email. He ended his email with:

Per COMAR, if Oakmont disputes the rejections, which it does, Oakmont is required to request a final written decision before it can take further action regarding the erroneous initial rejections. Oakmont performed extra work for the MAA, and therefore is entitled to payment.

To which Ms. Clark responded in an email dated October 10, 2022:

Please provide specific COMAR section being referenced below. Also, per contract provisions Standard Provisions Section 9, PCOs 6 and 7 were not approved because there were no contract changes, or extra work authorized or ordered by RFI and/or field revision related to the change order requests. The system installed is constructed/installed per contract basis of design.

The record contains no further evidence of communications concerning the rejection of the PCOs.

The record also contains nothing that relates to or supports Appellant’s allegations concerning MAA’s assessment of liquidated damages.

Appellant filed its Notice of Appeal in MSBCA No. 3227 (relating to PCO#20, PCO#21, PCO#22 and assessment of liquidated damages) on September 29, 2022. The Notice of Appeal in

² The email exchange between Ms. Clark and Mr. Tose in October 2022 also discusses the status of PCO#23, as does Respondent’s Motion. However, neither of Appellant’s Complaints filed in this matter contains any allegations concerning PCO#23. Therefore, we make no findings or determinations concerning PCO#23 here.

MSBCA No. 3228 (relating to PCO#6 & PCO#7) was filed on October 27, 2022. We consolidated the two cases by Order dated November 4, 2022.

DECISION

The Board grants Respondent's Motion to Dismiss for lack of jurisdiction. Appellant did not file a notice of claim or a claim as required under State Fin. & Proc. § 15-219, and there is no final agency action of MAA from which an appeal properly could be taken.

Under the mandatory dispute resolution procedures for State procurement contracts established in Title 15, subtitle 2 of the State Finance and Procurement Article, a contractor must submit a contract claim to the procurement officer of the agency that awarded the contract. To properly initiate a contract claim, a contractor first "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." State Fin. & Proc. § 15-219(a). Then, contemporaneously with or within 90 days of submitting the written notice of claim, 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." *Id.* § 15-219(b).

By regulation, the claim must also contain a certification by an authorized official, officer, or general partner that "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 21.10.04.02B. An untimely claim "shall be dismissed." COMAR 21.10.04.02C.

When a claim satisfying the requirements of State Finance and Procurement § 15-219 and COMAR 21.10.04.02 has been submitted to a procurement agency, the agency is required to issue

a written decision to the contractor within 180 days after the procurement officer receives the claim. State Fin. & Proc. § 15-219(d)(2)(ii); COMAR 21.10.04.04E(2)(b). “Except for a contract claim related to a lease for real property, a bidder or offeror, a prospective bidder or offeror, a unit, or a contractor may appeal the final action of a unit to the [MSBCA].” State Fin. & Proc. § 15-220(a). For a contract claim, the appeal shall be filed “within 30 days after receipt of the notice of a final action.” *Id.* § 15-220(b)(2).

This Board’s jurisdiction, as established in State Finance and Procurement § 15-211(a), is “to hear and decide 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.” *Id.* § 15-211(a)(2). “A decision of the [Board] is final, subject to any judicial review.” *Id.* § 15-211(b).

Given this statutory and regulatory framework, the question in this case is whether Appellant’s submissions to Hill International, the project administrator for the Contract, constituted a notice of claim or a claim that triggered the mandatory dispute resolution process.

Here, the record is devoid of any evidence that a notice of claim or a claim satisfying the requirements of State Finance and Procurement § 15-219 and COMAR 21.10.04.02 was submitted to MAA’s Procurement Officer before Appellant filed its appeals with the Board.

A PCO request, such as the ones Oakmont submitted, is not a notice of claim or a claim, but “a demand for a change order and a refusal to perform directed work in the absence of issuance of a change order.” *Syscom, Inc.*, MSBCA No. 2268 at 5 (2002). The communications between Appellant and Ms. Clark regarding the submission and rejection of the five PCOs are “matters of contract administration over which the Board has no jurisdiction and not the dispute resolution process.” *Id.*

Because we dismiss this appeal based on lack of jurisdiction, we need not address Appellant’s other arguments. Consequently, Respondent’s Motion to Dismiss is granted.

ORDER

Based on the foregoing, it is this 3rd day of February, 2023 hereby:

ORDERED that Respondent’s Motion to Dismiss for Lack of Jurisdiction is GRANTED;

ORDERED that the Appeals filed in MSBCA No. 3227 and 3228 are DISMISSED with PREJUDICE; 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.

/s/
Sonia Cho, Esq., Member

I concur:

/s/
Michael L. Carnahan, Member

/s/
Lawrence F. Kreis, 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 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 Opinion and Order in MSBCA Nos. 3227 & 3228, Appeals of Oakmont Contracting, LLC, under MAA Contract No. MAA-CO-20-013.

Dated: February 3, 2023

/s/
Michael A. Dosch, Jr.
Deputy Clerk