

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

<b>In the Appeal of</b>	*	
<b>Milani Construction, LLC</b>	*	
<b>Under SHA Contract No. PG7805270</b>	*	<b>Docket No. MSBCA 3199</b>
<b>Appearance for Appellant</b>	*	<b>Dana A. Reed, Esq.</b>
	*	<b>Baltimore, Maryland 21239</b>
	*	<b>P. Sean Milani-nia, Esq.</b>
	*	<b>Morgan M. Tapp, Esq.</b>
	*	<b>Fox Rothschild, LLP</b>
	*	<b>Washington, DC 20006</b>
<b>Appearance for Respondent</b>	*	<b>Kerry B. Fisher, Esq.</b>
	*	<b>Assistant Attorney General</b>
	*	<b>Office of the Attorney General</b>
	*	<b>Contract Litigation Unit</b>
	*	<b>Baltimore, Maryland 21202</b>

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**OPINION AND ORDER BY MEMBER CHO**

This is the latest in a series of appeals filed by Appellant, Milani Construction, LLC (“Milani”), against Respondent, State Highway Administration (“SHA”), claiming interest owed on alleged late payments. The Board heard argument on the parties’ cross motions for summary decision on March 22, 2023. Having considered both motions, responses and replies thereto, as well as counsels’ arguments, we find that there are no genuine issues of material fact and Respondent is entitled to prevail as a matter of law.

**UNDISPUTED FACTS**

Milani is a construction firm specializing in bridge and highway construction and has performed such work for the State of Maryland over many years. Milani was awarded SHA Contract No. PG7805270 involving improvement and reconstruction of ramps on MD-337,

Allentown Road, in Prince George's County (the "Contract"). The original contract amount was \$4,787,981.86. Notice to proceed was issued March 24, 2015. SHA ultimately granted a 665 calendar-day time extension on the Contract.

On August 19, 2020, Milani submitted to SHA a request for an equitable adjustment ("REA") in the amount of \$1,629,351.36 for additional work performed on the Contract. Erica Rigby, Acting District Engineer for District 3 responsible for administering the Contract, responded by letter dated September 29, 2020, acknowledging receipt of Milani's "claim for delay costs in the amount of \$1,629,351.36" and requesting that Milani provide additional information to SHA for its review and analysis. Ms. Rigby indicated that once the information was provided, SHA "will be prepared to meet and discuss the results of our analysis." Milani responded by letter dated September 30, 2020, and supplied the requested information.

By letter dated October 27, 2020, Ms. Rigby acknowledged receipt of Milani's claim for delay. The letter stated, in relevant part:

After review of your proposed price and negotiations between Milani and the Area Engineer, MDOT SHA the District 3 Office of Construction agrees and initiates the change order as detailed below pending final approval from MDOT SHA's Office of Construction. No time extension is associated with this activity.

The October 27, 2020 letter listed the price of \$1,564,000.00 for "REA Settlement." Subsequently, Milani "confirmed the negotiated amount" by letter dated November 5, 2020.

On February 10, 2021, SHA sent to Milani Change Order No. 18, which included the date of October 27, 2020 and the price of \$1,564,000.00, as agreed. Milani executed the change order and returned it to SHA by letter dated February 23, 2021.

On March 26, 2021, Change Order No. 18 received all necessary signatures.

On April 13, 2021, Milani signed Progress Estimate No. 57 confirming that it had complied with MD. CODE ANN., STATE FINANCE & PROCUREMENT (“SF&P”) §17-106 requirement for contractor certification. Progress Estimate No. 57 included the payment for Change Order No. 18.

Milani received payment of \$1,564,000.00 on April 27, 2021.

On May 4, 2021, Milani submitted to SHA “an invoice for interest due on account of SHA’s late payment.” It requested interest accrued from December 27, 2020 to April 27, 2021, in the amount of \$46,662.90. Milani believed that this timeframe “included a reasonable amount of time for the review and approval by the Office of Construction noted in SHA’s October 27 letter, and for SHA to take the steps required for payment.” Compl. ¶ 17.

The District Engineer for District 3 issued her decision on Milani’s request on June 16, 2021, stating that Milani was entitled to \$18,510.72 in interest, from December 27, 2020 to February 12, 2021, the date on which Milani received the unexecuted change order.

On July 8, 2021, Milani filed its Notice of Claim with the Procurement Officer (“PO”) from District 3’s June 16, 2021 decision, and then filed its Claim on July 28, 2021.

The PO denied Milani’s Claim by letter dated October 26, 2021. Milani appealed the PO’s final decision to this Board on November 22, 2021.

### **STANDARD OF REVIEW**

The Board may grant a motion for summary decision if: “(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.” 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-moving party must produce admissible evidence demonstrating a dispute.” *Brawner Builders, Inc.*, 476 Md. at 31.

## DECISION

The question in this case is when SHA’s payment of \$1,564,000.00 became due for purposes of determining whether Milani is entitled to any interest for late payment.

Appellant claims that Respondent failed to make a timely payment for Change Order No. 18 and that it is entitled to \$46,662.90 in interest accrued from December 27, 2020 to April 27, 2021. Appellant argues that an authorized change order should have been issued within 30 days of October 27, 2020, when the District Engineer for District 3 sent the “REA Settlement” letter agreeing to the price to be paid for the additional work Milani performed under the Contract.

Respondent counters that payment was timely because it was made on April 27, 2021, which was within 30 days of Milani’s execution of the written certification under SF&P § 17-106 on April 13, 2021. Consequently, Respondent asserts that no interest is owed.

SF&P § 15-103 provides that it “is the policy of the State to make a payment under a procurement contract within 30 days: (1) after the day on which payment becomes due under the procurement contract; or (2) if later, after the date on which the unit receives an invoice.” See also COMAR 21.06.09.05.

“Payment” is defined as including “all required processing and authorization by the Comptroller of the Treasury ... and may be deferred, delayed, or set-off as applicable...” COMAR 21.06.09.01B. “Late payment” is “any amount that is due and payable by law under a written procurement contract, without deferral, delay or set-off ... and remains unpaid more than 45 days

after an agency receives a Proper Invoice.” COMAR 21.06.09.01A. “Proper invoice” is “a bill, written document, or electronic transmission, readable by the agency, provided by a vendor requesting an amount that is due and payable by law under a written procurement contract for property received or services rendered,” and the supporting documentation must include the contractor’s federal employer identification or Social Security number, the procurement contract or purchase order number (or an adequate description of the procurement contract), and any other documentation required by regulation or the procurement contract. COMAR 21.06.09.01; *see* COMAR 21.06.09.02.

Before any payment can be made, however, a contractor must sign a written certification that its suppliers have been paid and will be paid in a timely manner. *See* SF&P § 17-106 (Certification of payments).

In the event of a late payment by the State, a contractor may be paid interest:

(a) *In general.* – Except as provided in § 15-105 of this subtitle, interest shall accrue at the rate of 9% per annum on any amount that:

- (1) is due and payable by law and under the written procurement contract; and
- (2) remains unpaid more than 45 days after a unit receives an invoice.

(b) *Interest accrual.* – Interest shall accrue beginning on the 31st day after:

- (1) the day on which payment becomes due under a procurement contract; or
- (2) if later, the day on which the unit receives an invoice.

SF&P § 15-104 (Interest on late payments). *See also* COMAR 21.06.09.06A. Not relevant here, SF&P § 15-105 sets forth circumstances under which the State is not liable for interest.

Having considered the parties’ positions against this statutory and regulatory backdrop, the Board is not persuaded by Appellant’s argument that the October 27, 2020 letter from Acting District Engineer in District 3 constituted a “written acceptance letter” that has “the same force and effect as a change order” under SF&P § 15-112(a)(2).

First, as we found in *Milani Construction, LLC*, MSBCA No. 3198 (2023), the application of SF&P § 15-112(a)(2) is limited to when and under what circumstances change orders are required for a contractor to perform work and does not apply to determining when payment becomes due and payable by law or under a procurement contract.

Second, the language of the October 27, 2020 letter confirms that SHA District 3 agreed to the price of \$1,564,000.00 as a result of negotiations with Milani, and that it would initiate a change order for that amount “pending final approval from MDOT SHA’s Office of Construction.” Only a PO has the authority to bind the State pursuant to a properly executed change order and, here, nothing in the October 27 letter suggests that it had, or was intended to have, “the same force and effect as a change order.” Instead, the letter states that it is an “REA Settlement.”

It is unfortunate that payment for work already performed took as long as it did.<sup>1</sup> However, as we have previously held, Respondent had no obligation to make payment on the change order until all required signatures were obtained, and a contractor is “timely paid” if payment is received within 30 days of the last signature on the change order. *Milani Construction, LLC v. SHA*, MSBCA 3181 (2022). In addition to a fully signed change order, SF&P § 17-106 requires that Respondent first obtain a certification in writing that a contractor has paid its suppliers before making a payment.

There is no dispute that Change Order No. 18 was fully signed on March 26, 2021, and that Appellant provided the SF&P § 17-106 written certification on April 13, 2021. Appellant was paid on April 27, 2021, which was within 30 days of April 13, 2021. Respondent’s payment was timely, and no interest accrued.

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<sup>1</sup> The REA was submitted on August 19, 2020 after the additional work had been completed, but payment was not made until April 27, 2021.

For the reasons stated above, Respondent’s Motion for Summary Decision and Dismissal of Appeal is granted, and Appellant’s Motion for Summary Decision is denied.

**ORDER**

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

ORDERED that Respondent’s Motion for Summary Decision and Dismissal of Appeal is GRANTED; it is further

ORDERED that Appellant’s Motion for Summary Decision is DENIED; 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.

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/s/  
Sonia Cho, Esq., Member

I concur:

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

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/s/  
Michael L. Carnahan, Jr., 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 decision in MSBCA No. 3199, Appeal of Milani Construction, LLC, under SHA Contract No. PG7805270.

Date: May 3, 2023

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/s/  
Ruth W. Foy  
Clerk