

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

<b>In the Appeals of</b>	*	
<b>Joseph B. Fay Company</b>	*	
<b>Under SHA Contract No. FR3885171</b>	*	<b>Docket Nos. MSBCA</b>
	*	<b>3165, 3219 &amp; 3226</b>
<b>Appearance for Appellant</b>	*	<b>Dirk Haire, Esq.</b>
	*	<b>Fox Rothschild LLP</b>
	*	<b>Washington, DC 20005</b>
<b>Appearance for Respondent</b>	*	<b>Joel H. Oleinik, Esq.</b>
	*	<b>Craig H. DeRan, Esq.</b>
	*	<b>Assistant Attorneys 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**

Upon consideration of the Motion for Partial Summary Decision as to Superior Knowledge Claim (“Motion”) filed by Maryland State Highway Administration (“SHA” or “Respondent”), the Opposition filed by Joseph B. Fay Company (“Fay” or “Appellant”), SHA’s Reply, and oral argument heard on May 31, 2023, the Board denies Respondent’s Motion.

**FACTS**

In October 2017, Appellant was awarded SHA Contract No. FR3885171 for reconstruction of the interchange between MD 85 and I-270 in Frederick County. During contract performance, Fay encountered subsurface rock conditions at various project locations which it alleges were materially different from the boring data provided by SHA in the bidding documents. The presence of unanticipated rock resulted in damages for which Appellant filed three claims for equitable adjustment, and all of them were denied by the Procurement Officer (“PO”).

Fay appealed each of the PO's decisions to this Board. In MSBCA No. 3165, Fay seeks \$2,267,053.64 in damages and an extension of time of 83 calendar days; in MSBCA No. 3219, \$553,432.37 in damages; and in MSBCA No. 3226, \$261,761.11 in damages. The complaint in each case seeks relief for "Differing Site Conditions." The Board ultimately consolidated all three cases.

Subject to the several amended scheduling orders issued in these proceedings, the parties have engaged in written discovery. Under the then-current scheduling order, Appellant made its initial expert disclosures on November 1, 2021, including the "Final Expert Report of Mark C. Gemperline, Ph.D." from The Vertex Companies, Inc., a geotechnical consultant retained to opine on whether differing site conditions existed on the project. Subsequently, on March 17, 2023, Appellant produced "Supplemental Superior Knowledge Expert Report of Mark C. Gemperline, Ph.D."

On April 17, 2023, Respondent filed its Motion on the basis that this Board lacks jurisdiction with respect to "the superior knowledge claim newly asserted by Appellant," and seeks to "preclud[e] Fay from pursuing such a claim in this proceeding." SHA asserts that the supplemental expert disclosure and report "represent the first indication by Fay that it intends to pursue a superior knowledge claim and that it intends to do so with respect to all three rock claims."

## **DECISION**

The issue is whether the proposed opinion testimony concerning "superior knowledge" in the supplemental report of Appellant's geotechnical expert constitutes a brand new "claim" over which the Board lacks jurisdiction.

As established in State Finance and Procurement § 15-211(a), the Board has jurisdiction "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). “Contract claim” is “a claim that relates to a procurement contract” and includes “a claim about the performance breach, modification or termination of the procurement contract.” *Id.* § 15-215(b). A “claim” is “a complaint by a contractor or by a procurement agency relating to a [procurement] contract.” COMAR 21.10.04.01B(1).

If Appellant were now asserting a new “superior knowledge claim,” there is no question that we would lack jurisdiction because, as Appellant conceded at the hearing, such a claim was never put before the PO for final agency action from which an appeal properly could have been taken.<sup>1</sup> Here, there is no dispute that all three PO decisions addressed only “differing site conditions” claims.

Respondent asserts that this Board lacks jurisdiction over “the superior knowledge claim newly asserted by Appellant” in the March 17, 2023 supplemental expert report, which was “the first indication by Fay that it intends to pursue a superior knowledge claim.” SHA points out that the superior knowledge doctrine, as recognized in federal procurement jurisprudence, has distinct elements of proof that require consideration of facts and issues separate and apart from those relating to the differing site conditions claims.

Appellant responds that it is not asserting any new “claim,” but that it is offering expert testimony to provide further support for a finding of differing site conditions. Appellant claims that the March 17, 2023 supplemental expert report was intended to “amplify” a statement in the November 1, 2021 initial expert report that related to SHA’s “superior knowledge of site

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<sup>1</sup> We do not address in this Opinion and Order whether the superior knowledge doctrine is recognized in Maryland as a valid or distinct cause of action.

conditions.”<sup>2</sup> Dr. Gemperline is expected to offer his opinion concerning how SHA’s superior knowledge about the conditions would have alerted bidders to actual site conditions if such information had been included in the solicitation documents.

On the record as it exists, we do not find that Dr. Gemperline’s supplemental expert report constitutes a new “claim.” It is not a pleading, but rather proposed expert testimony disclosed to Respondent as part of discovery. Appellant has not amended its complaints to add any “superior knowledge claim” and, as Appellant’s counsel stated at the hearing, has no plans to do so.

Further, the parties represent that no depositions have occurred to date. If Respondent’s objection is that Appellant should not be allowed to introduce any evidence regarding superior knowledge, then Dr. Gemperline’s deposition should provide fertile ground for cross examination. Depending on what discovery reveals, superior knowledge may even become a non-issue. As it stands, however, Respondent’s Motion seeks to dismiss a “claim” that has yet to be filed. The Board cannot act on a possible “indication” that Appellant “intends to pursue a superior knowledge claim.”

If any later change in circumstances leads Respondent to believe that a new claim has been filed – through subsequent filings with the Board or additional facts learned in discovery – Respondent may renew its Motion for our consideration.

For the foregoing reasons, Respondent’s Partial Motion for Summary Decision is denied.

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<sup>2</sup> “Despite having superior knowledge of site conditions, MDOT did not represent TOR in Contract Documents at scales that could be reasonably consequential to construction. Rather, they placed this burden on the bidding contractors who were less informed about TOR topography. Failure of MDOT to reasonably define TOR, or how it was to be estimated using the information contained in Contract Documents, has resulted in an otherwise unnecessary debate regarding whether a differing condition exists rather than more simply debating the appropriate compensation for the time and cost incurred by the contractor to address it.” Final Expert Report of Mark C. Gemperline, Ph.D., November 1, 2021, at 17-18.

**ORDER**

Based on the foregoing, it is this 7th day of June 2023 hereby:

ORDERED that Respondent’s Motion for Partial Summary Decision as to Superior Knowledge Claim 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/  
Senchal D. Barrolle, 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.

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I hereby certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA Nos. 3165, 3219 & 3226, Appeal of Joseph B. Fay Company, under SHA Contract No. FR3885171.

Date: June 7, 2023

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/s/  
Ruth W. Foy  
Clerk