

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

<b>In the Appeal of</b>	*	
<b>Patriot Medical Laboratories, LLC</b>		
<b>d/b/a CIAN Diagnostics</b>	*	<b>Docket No. MSBCA 3232</b>
<b>Under MDH Contract No. M00B0600439</b>	*	
<b>Appearance for Appellant</b>	*	<b>Michael A. Miller, Esq.</b>
		<b>Scott A. Livingston, Esq.</b>
	*	<b>Rifkin Weiner Livingston LLC</b>
		<b>Bethesda, Maryland 20814</b>
	*	
<b>Appearance for Respondent</b>	*	<b>Randi Lifson, Esq.</b>
		<b>Assistant Attorney General</b>
		<b>Office of the Attorney General</b>
	*	<b>Baltimore, Maryland 21201</b>
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**OPINION AND ORDER BY MEMBER CHO**

Upon consideration of the Motion for Summary Decision or, in the Alternative, Motion for Partial Summary Decision (“Motion”) filed by Appellant Patriot Medical Laboratories, LLC d/b/a CIAN Diagnostics (“CIAN”), the Cross-Motion for Summary Decision and Opposition to Appellant’s Motion for Summary or Partial Summary Decision (“Cross-Motion”) filed by Respondent Maryland Department of Health (“MDH”), and Appellant’s Opposition to Cross-Motion for Summary Decision and Reply to Respondent’s Opposition to Appellant’s Motion for Summary or Partial Summary Decision (the “Reply”), and neither party having requested a hearing, the Board denies Appellant’s Motion and grants Respondent’s Cross-Motion.

**UNDISPUTED MATERIAL FACTS**

The parties entered into MDH Contract No. M00B0600439 effective April 29, 2020, for the provision of clinical laboratory testing services for COVID-19 through emergency procurement (the “Emergency Contract”). Under the Emergency Contract, Respondent agreed to

pay Appellant \$98 for each polymerase chase reaction (“PCR”) test performed. As a result of four modifications dated July 14, 2020, September 10, 2020, December 28, 2020 and April 13, 2021, the term of the Emergency Contract was ultimately extended to December 31, 2021, the price per PCR test was reduced to \$93, and both PCR and point of care (“POC”) testing services were added to the Annapolis Testing Site. Collectively, the four modifications increased the Emergency Contract’s total value to \$64,840,960.

On April 28, 2021, MDH issued an invitation for bids (“IFB”) for the provision of statewide PCR testing services. Respondent intended to award the contract to three (3) bidders. Section 4.9.2 of the IFB stated:

Award of this contract will not be final and complete until after: (1) the Contractor submits complete and satisfactory documentation required under the Contract and/or documentation required by the Procurement Officer; and (2) the Contract is signed by the Department following any required approvals of the Contract, including approval by the Board of Public Works if such approval is required.

Further, under Section 4.9.3:

[T]he Contractor with the lowest Bid price will be given the right of first refusal to provide the requested services. If that Contractor is unwilling or unable to perform the requested services, the Contractor with the next lowest Bid price will be asked to provide the requested service, and so forth. Each Contractor will have 1 Business Day to respond to a service request before a request is made to the next subsequent Contractor.

Pursuant to Paragraph 3.3 of Attachment M to the IFB, “[t]he Contractor’s performance under the Contract shall commence as of the date provided in a written NTP [Notice to Proceed].”

On June 1, 2021, Appellant submitted a bid price of \$25 per PCR test in response to the IFB and became one of three vendors that were awarded a contract (the “New Contract”). Appellant was the lowest bidder.

Appellant signed the New Contract on September 1, 2021. According to paragraph 3.1 of the New Contract:

The term of this Contract begins on the date the Contract is signed by the Department [of Health] following any required approvals, including approval by the Board of Public Works, if such approval is required (the “Effective Date”) and shall continue until 17 Nov 2022 (“Initial Term”).

The Board of Public Works (“BPW”) approved the contract award to the three vendors on October 20, 2021. The BPW Agenda Item from the meeting noted that Appellant was “currently providing these services by way of emergency procurement. This contract will replace the award of contract #M00B0600439.”

Respondent signed the New Contract on December 1, 2021. However, due to a “network security incident” within MDH, Respondent did not send a fully executed copy of the New Contract to Appellant until February 18, 2022.

From December 1, 2021 through December 31, 2021, Appellant “performed 80,328 tests pursuant to written requisitions and orders submitted by persons authorized by MDH to order laboratory testing services.” Amended Complaint (“Am. Compl.”) ¶ 71.

On December 30, 2021, Sam Mullapudi, Appellant’s CEO, sent an email to Dennis Schrader, Secretary of MDH, requesting that the “[Emergency] Contract be extended until March 31, 2022, and the new contract takes effect as of April 01, 2022.” He explained that Appellant was “in the midst of extraordinary supply chain problems” which resulted in a substantial increase in Appellant’s material and labor costs since Appellant submitted its bid for the New Contract. He wrote further, in part:

I am writing you on the last workday of the year as my company’s procurement contract with the State for COVID-19 testing (the “Original Contract”) expires on December 31<sup>st</sup>, and this matter is of great concern for the public health of all Marylanders. ...

...

Our Original Contract with the State reimbursed us at a level sufficient to survive these increased costs. However, the Original Contract expires on December 31<sup>st</sup> and the new contract will reimburse us at the rate of only about \$25 per test,

meaning that we would lose money on every one of the PCR tests we are presently running.

Even worse, the State would have our Original Contract expire retroactively on December 1<sup>st</sup> instead of the original sunset date of December 31<sup>st</sup>, and the new contract with its lower reimbursement rate would retroactively commence on December 1<sup>st</sup>. This means that our work in December, which we have already completed and booked on the premise that it would be paid according to the Original Contract, will actually only be paid according to the new contract at a much lower rate.

(paragraph numbers omitted). There is no evidence that Mr. Schrader agreed to the requested extension of the Emergency Contract.

On January 2, 2022, Appellant submitted Invoice No. 381 to Respondent seeking payment for all 80,328 tests performed during December 2021 at \$93 per test. Am. Compl. ¶¶ 89, 90.

From January 1, 2022 through February 17, 2022, Appellant performed 152,294 tests pursuant to written requisitions and orders submitted by persons authorized by MDH to order laboratory testing services. *Id.* ¶ 80.

On February 18, 2022, Respondent sent a copy of the fully executed New Contract to Appellant. *Id.* ¶¶ 82, 85. Also on the same day, Respondent sent to Appellant a written Notice to Proceed under the New Contract. *Id.* ¶¶ 83, 86.

On May 17, 2022, Appellant submitted Invoice Nos. 482 and 483 for tests completed in January 2022 as well as from February 1 through February 17, 2022. Both invoices sought payment at the rate of \$93 per test. *Id.* ¶¶ 93, 94.

On June 9, 2022, Respondent made two payments to Appellant. The first amount of \$1,557,750 represented payment for 16,750 tests completed between December 1 and December 9, 2021 at \$93 per test. *Id.* ¶ 97. This payment exhausted the funding remaining on the Emergency Contract for the PCR tests. Affidavit of Thaddaeus B. Hubbard, Chief of General Accounting for MDH, at ¶ 6. The second amount of \$1,589,450 represented payment for the 63,578 tests

completed in the remainder of December 2021 at the rate of \$25 per test. Am. Compl. ¶ 98. The difference between the invoiced amount and the paid amount was \$4,323,304. *Id.* ¶ 99.

On June 27, 2022, Appellant’s attorney sent a letter to Jim Beauchamp, the Procurement Officer (“PO”), titled “Reservation of Rights with Respect to Partial Payment and Notice of Claims.” In this letter, Appellant stated:

To summarize, for the period of December 1, 2021, through February 18, 2022, CIAN has submitted invoices for \$93/test. On June 22, 2022, MDH made a payment of less than \$93/test, which, in turn, gives rise to the claims, **notice for which is hereby filed**. MDH has made partial payments of \$25/test for 215,052 tests, as noted, and CIAN reserves the right to follow up this **notice of claim** and submit full claims within 90 days to recover \$68/test, covering approximately December 9, 2021, through February 18, 2022.

Assuming MDH denies such claims for \$93/test, CIAN reserves the right to note appeals to the MSBCA and to request a declaration that MDH is obligated to pay an additional \$68 per test for the lab services.

June 27, 2022 letter at 6-7 (emphasis added). Appellant calculated the total “Disputed Balance” to be \$14,623,536 for tests performed from December 9, 2021 through February 17, 2022. Appellant included the amount owed for tests performed from January 1 through February 17, 2022, because it “anticipated that MDH would pay” \$25 per test based on the June 9, 2022 payment in which Respondent applied the rate of \$25 per test to December 2021. Am. Compl. ¶ 102.

By letter dated July 7, 2022, Mr. Beauchamp questioned whether Appellant’s June 27 letter was “intended to be a notice of claim and claim under COMAR 21.10.04.02A and B” and noted that “[i]f it is intended to be a claim, ... it does not comply with the requirements of COMAR 21.10.04.02B. Until I receive a claim complying with that regulation, I cannot investigate or determine the proper disposition of CIAN’s claim.”

On August 30, 2022, Appellant’s attorneys sent a letter to Mr. Beauchamp titled “Claims for damages for breach of contract MDH Control # M00B0600439 Laboratory Services

Agreement, Contract MDH/OPASS 21-19050, and/or Other Emergency Contracts (COVID-19 Laboratory).” In this letter, Appellant stated:

The purpose of this letter is to request that [MDH] take final agency action on the claims arising out of the above-referenced contracts. This letter supplements CIAN’s letter of June 27, 2022 (revised June 29, 2022), among other things, and responds to MDH letters of July 7, 2022, and August 4, 2022. We also identify the amount of the claims under COMAR 21.10.04.02B(2) and submit the Certificate under COMAR 21.10.04.02B(5) ..., as requested in your letter of July 7, 2022.

...

We appreciated the willingness of MDH to discuss and negotiate partial settlement of claims on the merits over the past several months. In accordance with your letter of July 7, 2022, this letter reflects a restatement of, and supplement to, the earlier notices of CIAN’s claims. We incorporate by reference CIAN’s letter of June 27 (revised June 29, 2022) and documents attached thereto. We request that MDH treat this as a claim in compliance with COMAR 21.10.

August 30, 2022 letter at pp. 1, 16. The total amount of Appellant’s claim was \$14,679,296, representing the additional compensation of \$68 per test for the 215,872 tests performed between December 10, 2021 and February 17, 2022, based on the premise that Appellant should have been paid for all tests performed at the rate of \$93 under the Emergency Contract.

On January 11, 2023, the PO issued his final decision denying Appellant’s claim on timeliness grounds and on the merits. On February 6, 2023, CIAN noted its appeal here.

### **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.” *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.” *Browner Builders*, 476 Md. at 31.

### DECISION

The Board grants Respondent’s Cross-Motion because the undisputed facts demonstrate that Appellant did not file a timely claim as required by Maryland procurement law.

A “contract claim shall be submitted within the time required under regulations adopted by the primary procurement unit responsible for the procurement.” MD. CODE ANN., STATE FIN. & PROC., § 15-217(b). COMAR 21.10.04.02A states that “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.” In addition, as relevant here, COMAR 21.10.04.02B sets forth the following requirements for filing a claim:

Contemporaneously with or within ... 30 days of this filing on a nonconstruction contract ... a contractor shall submit the claim to the appropriate procurement officer. ... 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.

The statutory time limits are mandatory. *Browner Builders*, 476 Md. at 34-35; *Manekin Constr., Inc. v. Maryland Dep’t of Gen. Servs.*, 233 Md. App. 156, 197 (2017) (stating that “contract claims arising out of state procurement contracts are subject to statutorily-prescribed administrative

procedures.”). “A notice of claim or a claim that is not filed within the time prescribed in Regulation .02 ... *shall be dismissed.*” COMAR 21.10.04.02C (emphasis added).

Moreover, the certification requirement also “is mandatory, not discretionary.” *A-Del Constr., Inc.*, MSBCA Nos. 3127 & 3128 at 13 (2022). A claim “shall contain ... a certification.” COMAR 21.10.04.02B(5). “Failure to satisfy each of these requirements renders the purported claim invalid for failure to comply with COMAR.” *A-Del Constr.*, at 13.

Respondent argues that Appellant’s claim accrued as of December 29, 2021 because, based on the communications between the parties during late 2021, Appellant knew or should have known “that there were insufficient funds in the [Emergency] Contract to cover all of the December tests” and that “MDH had no intention of using the expired contract to pay January and February invoices.”

Appellant, on the other hand, asserts that it was not until June 9, 2022, when Respondent made only a partial payment of its invoice for tests performed in December 2021, that it knew the basis for its claim, and that its June 27, 2022 submission was filed within 30 days of June 9, 2022.

We accept Appellant’s assertion that it knew the basis for its claim as of June 9, 2022, and that Appellant’s June 27, 2022 letter served as a timely notice of claim under COMAR 21.10.04.02A. We do not agree, however, that the June 27, 2022 letter also served as a claim under COMAR 21.10.04.02B. Despite Appellant’s characterization of it as the “Initial Claim,” its June 27 letter was not a valid claim because Appellant did not submit the certification required by COMAR 21.10.04.02B(5). *See A-Del Constr.*, at 13. Therefore, it was necessary for Appellant to file a valid claim within 30 days of June 27, 2022, *i.e.*, no later than July 27, 2022.

It is undisputed that on August 30, 2022, Appellant filed a claim with the PO that complied with the content requirements of COMAR 21.10.04.02B, including the certification. The claim,

however, was untimely because it was filed well over 30 days after its June 27, 2022 notice of claim. Although the June 27 letter stated that Appellant “reserve[d] the right to follow up this notice of claim and submit full claims within 90 days to recover \$68/test,” the Board is not aware of any legal or factual basis for Appellant to unilaterally allow itself an extension of time within which to file a claim.

Because we reach this conclusion based on the undisputed facts, we need not reach the parties’ arguments concerning the merits. Accordingly, there are no genuine issues of material fact, and Respondent is entitled to summary decision as a matter of law.

**ORDER**

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

ORDERED that Appellant’s Motion for Summary Decision or, in the Alternative, Motion for Partial Summary Decision is DENIED;

ORDERED that Respondent’s Cross-Motion for Summary Decision and Opposition to Appellant’s Motion for Summary or Partial Summary Decision 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.

\_\_\_\_\_  
/s/  
Sonia Cho, Esq., Member

I concur:

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/s/  
Senchal Dashiell Barrolle, Esq., Member

\_\_\_\_\_  
/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. 3232, Appeal of Patriot Medical Laboratories, LLC d/b/a CIAN Diagnostics, under MDH Contract No. M00B0600439.

Date: September 7, 2023

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/s/  
Ruth W. Foy  
Clerk