

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

<b>In the Appeal of</b>	*	
<b>E &amp; R Services, Inc.</b>	*	
	*	<b>Docket No. MSBCA 3240</b>
<b>Under MD State Highway Administration</b>	*	
<b>Contract No. MO5935870</b>	*	
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<b>Appearance for Appellant</b>	*	<b>Matthew G. Hjortsberg, Esq.</b>
	*	<b>Bowie &amp; Jensen, LLC</b>
		<b>Towson, Maryland</b>
<b>Appearance for Respondent</b>	*	<b>Justin E. Fine, Esq.</b>
	*	<b>Douglas G. Carrey-Beaver, Esq.</b>
	*	<b>Assistant Attorneys General</b>
	*	<b>Office of the Attorney General</b>
	*	<b>Contract Litigation Unit</b>
		<b>Baltimore, Maryland</b>
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**OPINION AND ORDER BY MEMBER KREIS**

Appellant, E & R Services, Inc. (“ERS”) elected to proceed under the Optional Small Claims (Expedited) procedures set forth in COMAR 21.10.06.12. These procedures are available when the amount in dispute is under \$50,000. Small Claims are heard by one Board Member, rather than the normal three-member panel and, when possible, a short decision shall be rendered within 120 days after the Maryland State Board of Contract Appeals (“MSBCA” or “Board”) receives written notice of the appellant’s election.<sup>1</sup>

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<sup>1</sup> COMAR 21.10.06.12C(3) states that written decisions will be short and contain only summary findings of facts and conclusions. COMAR 21.10.06.12C(4) further states that a decision issued under this regulation shall have no value as precedent.

Pursuant to COMAR 21.10.06.12C(1), the undersigned scheduled a July 6, 2023 informal telephone conference with ERS and Respondent, Maryland Department of Transportation, State Highway Administration (“SHA”) to identify and simplify issues, establish simplified procedures, and set an expedited schedule. This conference resulted in a July 12, 2023 Scheduling Order that, among other things, set deadlines for the parties to file a joint statement of facts, a joint statement of documents, cross motions for summary decision, and responses to the cross motions. It further set a September 28, 2023 motions hearing.<sup>2</sup>

ERS’s Motion sought summary decision based on entitlement/merits only. It claimed SHA was responsible for 80 days of pre-construction delay resulting in \$39,755.90 in damages. SHA’s Motion asserted both that ERS’s notice of claim was untimely filed, and that even if it was timely, ERS caused the delay and was not entitled to any damages or time extensions. Having considered all pre-hearing information submitted by the parties and all arguments made at the September 28, 2023 hearing, the Board denies ERS’s Motion and grants SHA’s Motion.

### **UNDISPUTED MATERIAL FACTS**

On March 26, 2020, SHA published the invitation for bids for Contract No. MO5935870 (“IFB”). The IFB was for a road-construction project in Montgomery County, Maryland to upgrade the intersection near Maryland Route 185/Connecticut Avenue and Jones Bridge Road. The work for this project included widening and resurfacing the road, improving drainage, relocating utilities, and adding pedestrian safety features.

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<sup>2</sup> At the conference, both parties advised the Board that they believed the Motions would resolve the Appeal without the need for a merits hearing.

In August 2020, ERS timely submitted its bid in the amount of \$6,994,808.03. In an October 5, 2020 letter, SHA notified ERS that the bid was accepted (“Notice of Award” or “NOA”). The letter further advised ERS that “no work may commence prior to the submission and Engineer’s approval of an Initial Project Schedule.”

After the NOA, SHA and ERS entered into a construction contract (“Contract”).<sup>3</sup> The 2019 MDOT SHA Standard Specifications for Construction and Materials (“MDOT SHA Specifications”) were incorporated into the IFB and Contract. MDOT SHA Specification 103.03 required ERS to set up, equip, and make the field office ready for use, as approved by the Engineer, at least five days prior to commencement of other work on the project.

MDOT SHA Specification 109.03.01 required ERS to prepare and submit an initial critical path method schedule (“ICPM”) within 20 days of the NOA and advised ERS that no work may start on the Project until the ICPM is accepted.<sup>4</sup> MDOT SHA Specification 109.03.01.02(b) further required ERS to include in the ICPM 70 days of time, from Bid Opening to Notice to Proceed (“NTP”), to allow for administrative Contract execution requirements. Additionally, it required that the project schedule duration used in the ICPM shall be “from the **anticipated NTP date** through the Contract Substantial Completion Date as identified in the IFB” (emphasis added).

MDOT SHA Specifications 308.01.01 and 308.03.05 required ERS to designate and submit for approval, at least 10 days prior to starting work, the name and credentials of an Erosion and Sediment Control Manager (“ESCM”). One of the ESCM’s duties was to attend a Pre-Construction Erosion and Sediment Control Meeting (“ESC Meeting”) with the SHA.

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<sup>3</sup> The stipulated facts do not address when the Contract was signed.

<sup>4</sup> The Initial Project Schedule referenced in the NOA is the ICPM required by this specification.

On November 9, 2020, ERS delivered a check to the landlord of the property for the field office. The field office location was accepted by SHA on March 9, 2021, and the lease was ultimately signed on April 16, 2021.

On January 11, 2021, SHA issued the NTP. SHA held the pre-construction meeting on January 29, 2021. At this meeting, SHA agreed it would arrange the ESC Meeting, and it set a Contract completion date of June 30, 2023.

On February 16, 2021, ERS submitted the name and credentials of its ESCM to SHA. On March 23, 2021, SHA sent an email scheduling a virtual ESC Meeting for March 29, 2021, which meeting took place as scheduled.

On April 6, 2021, ERS submitted its first ICPM to SHA, which SHA sent back to ERS on April 20, 2021, requiring it to revise and resubmit it. ERS submitted the revised ICPM to SHA on May 13, 2021, and SHA approved it on May 20, 2021.

On June 14, 2021, ERS began construction. The Stipulated Facts submitted by the parties are silent as to what transpired over the next year on the project.

On June 6, 2022, SHA sent ERS a show-cause letter concerning its intent to terminate the Contract for default (“Show Cause Letter”). It alleged ERS had only performed approximately 5% of the work and that it was solely responsible for a 154-calendar day delay primarily associated with its late submission of its ICPM. ERS responded to the Show Cause Letter on June 10, 2022, contending, among other things, that SHA was responsible for 129 of the 154 days of delay. On July 1, 2022, SHA terminated ERS for default. ERS responded to the termination for default on July 8, 2021, again contending that SHA was responsible for certain delays.

On August 1, 2022, ERS filed a time impact analysis (TIA #1) with SHA requesting an 80-day time extension from June 30, 2023 to September 20, 2023 to complete the project. The delay of 80 days was calculated by counting the number of days between January 11, 2021 [NTP] and March 29, 2021 [SHA holds ESC Meeting].

On August 18, 2022, SHA sent a letter to ERS rescinding the termination for default. That same day, SHA, ERS, and the surety signed a written agreement (“Agreement”) to rescind the termination for default, which acknowledged that ERS had submitted TIA #1 and stated that ERS “maintains the right to seek a time extension and compensation.” The Agreement also included the provision that SHA “expressly agrees [ERS] has reserved all rights to seek time extensions and compensations for Owner caused delay.” That provision further stated: “Nothing contained in this Agreement shall be construed to enhance, impair, or otherwise alter the rights, remedies, or defenses of the parties, the same being fully and expressly reserved.”

On December 2, 2022, the SHA District 3 office issued a decision denying TIA #1. In response, ERS filed both a December 9, 2022 Notice of Claim and, later, a March 2, 2023 Claim with the procurement officer (“PO”).

On May 9, 2023, the PO denied the Claim both on timeliness grounds and on the merits, and ERS filed a timely appeal to the Board on June 6, 2023.

### **STANDARD OF REVIEW**

In deciding whether to grant a motion for summary decision, the Board must follow COMAR 21.10.05.06D(2): “[t]he Appeals Board may grant a proposed or final summary decision if the Appeals Board finds that (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.” *Id.* The standard of review for granting or denying

summary decision is the same as for granting summary judgment under Md. Rule 2-501(a). *See Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726 (1993). To defeat a motion for summary judgment, the opposing party must show that there is a genuine dispute of material fact by proffering facts that would be admissible in evidence. *See Beatty*, 330 Md. at 737-38.

## **DISCUSSION**

### **1. Timeliness**

Prior to addressing the parties' cross motions concerning delay, the Board must first address SHA's assertion that ERS's Notice of Claim was not timely filed. A contractor must follow statutorily prescribed deadlines when pursuing a claim. "Unless a lesser period is prescribed by law or by contract, a contractor shall file a written notice of 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." MD. CODE ANN., STATE FIN. & PROC., § 15-219(a); *see also* COMAR 21.10.04.02A. Moreover, "[a] notice of claim ... that is not filed within the time prescribed in Regulation .02 ... shall be dismissed." COMAR 21.10.04.02C.

SHA asserts that it told ERS to begin work on January 11, 2021 and that any delay ended on June 14, 2021, when ERS started construction.<sup>5</sup> SHA also asserts that when ERS started construction, it knew or should have known the basis for its Claim and, therefore, had to submit its Notice of Claim within 30 days of June 14, 2021. Alternatively, SHA asserts that, at the latest, ERS knew or should have known the basis for its Claim on June 6, 2022, when it received SHA's Show Cause Letter that informed ERS that SHA was holding ERS solely responsible for

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<sup>5</sup> ERS is only claiming 80 days of delay from January 11, 2021 through March 29, 2021.

154-calendar days of pre-construction delay.<sup>6</sup> Accordingly, SHA argues that ERS's December 9, 2022 Notice of Claim was untimely filed.

ERS asserts that the Agreement rescinding the termination for default preserved its right to pursue TIA #1 and prevented SHA from raising a timeliness defense. Alternatively, it asserts that it did not know the basis for its Claim until December 2, 2022, when SHA denied its delay request relating to TIA #1. Accordingly, ERS argues that its December 9, 2022 Notice of Claim was timely filed.

The Board disagrees with ERS's position that the Agreement prevents SHA from raising a timeliness defense in response to TIA #1. Although the Agreement in paragraphs 4 & 11 expressly reserves ERS's right to seek time extensions and compensation for delay, it also specifically reserves SHA's defenses, which include timeliness.

The Board further disagrees that ERS knew or should have known the basis for its Claim on June 14, 2021, when it started construction. ERS could not have reasonably known the basis for its Claim on that date because it was just starting construction and still attempting to get the project on track with acceleration efforts and recovery schedules, and could not have anticipated that SHA would deny these efforts.

The question the Board is left with is whether there was some date between the start of construction and December 2, 2022, when SHA denied TIA #1, that ERS knew or should have known the basis for its Claim. Absent from the Stipulated Facts submitted by the parties is any information regarding what transpired in the year between June 14, 2021 and issuance of the Show Cause Letter. Additionally, the Board is not persuaded that the statement in the Show Cause Letter, that the 154-calendar days of delay was solely attributable to ERS, is enough to

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<sup>6</sup> The 154 days covers the period from January 11, 2021 through June 14, 2021 and includes the 80 days that ERS is requesting.

find that ERS knew or should have known the basis for its Claim on that date. The Show Cause Letter was the start of an ongoing back and forth between ERS and SHA that resulted both in a termination for default and then a reinstatement.

Based on the foregoing, this Board finds that there are material disputes of fact as to both what happened between June 14, 2021 and June 6, 2022 and as to whether ERS knew or should have known the basis for its Claim on or before June 6, 2022.

## **2. Delay**

Both parties assert in their cross motions that there are no genuine issues of material fact regarding the merits of this case; however, they each assert that the other is responsible for the pre-construction delay incurred. ERS contends that it was contractually prohibited from beginning construction until seven days after SHA held the ESC Meeting. It then alleges that since SHA did not hold the ESC Meeting until 80 days after the NTP, that SHA is solely responsible for this delay. ERS alternatively argues that there were concurrent delays that, at a minimum, would entitle it to a time extension, but not monetary damages. SHA counters that ERS did not complete the pre-construction conditions in the Contract until after the ESC Meeting, and that ERS is therefore solely responsible for all delay.<sup>7</sup>

Although ERS is correct that SHA did not schedule the ESC Meeting until March 28, 2021, which was 80 days after the NTP, the Board does not find that delay controlling as it did not ultimately impact the construction start date.<sup>8</sup> The Board finds that ERS's failure to submit its ICPM within 20 days of the NOA ultimately controlled the construction start date, as construction could not begin until after the ICPM was approved. ERS did not submit its first

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<sup>7</sup> One of these pre-construction conditions was the approval of a field office. The approval does not ultimately factor into the decision in this Appeal, so it will not be discussed.

<sup>8</sup> ERS did not even submit the name of its ESCM until February 16, 2021, so the ESC Meeting could not have been scheduled before that date.



ICPM for review until April 6, 2021, one week after the ESC Meeting had occurred, and did not get an approved ICPM until May 20, 2021, almost two months after the ESC Meeting.

ERS argues that it did not make fiscal sense to submit a speculative ICPM until after the ESC Meeting because the purpose of the meeting was to approve the erosion and sediment control measures necessary to proceed. However, what ERS thought made good business sense and what the Contract required were at odds. The Contract required submission of the ICPM within 20 days of the NOA. *See* MDOT SHA Specification 109.03.01. The MDOT SHA Specifications regarding the ICPM specifically anticipated certain items being completed pre-construction. They specifically required the ICPM to include 70 days between Bid Opening and NTP. They further required the project duration to be from the **anticipated** NTP date through the Contract Substantial Completion Date in the IFB. (emphasis added) *See* MDOT SHA Specification 109.03.01.02(b). If ERS had fiscal concerns about the timing of events, including the submission of the ICPM, it should have asked questions and, if necessary, it should have raised these concerns in a pre-bid protest.

The Board finds there are no genuine issues of material fact, and that SHA is entitled to summary decision as a matter of law. Ultimately, ERS's failure to timely submit its ICPM is the sole controlling reason for the delay in its ability to start construction. Accordingly, ERS is not entitled to either damages or a non-compensable time extension.

**ORDER**

Based on the foregoing, it is this 2nd day of October 2023 hereby:

ORDERED that Appellant's Motion for Summary Decision is DENIED;

ORDERED that Respondent's Motion for Summary Decision is GRANTED; and it is further



**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 No. 3240, Appeal of E & R Services, Inc. under MD SHA Contract No. MO5935870.

Date: October 2, 2023

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