

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

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| <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>          |
| <br>                                      |   |                                       |
| <b>Under MDH Contract No. M00B0600439</b> | * |                                       |
| <br>                                      |   |                                       |
| <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>       |
| <br>                                      |   |                                       |
| <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 Appellant’s Motion for Reconsideration (“Motion”) of the Board’s Opinion and Order issued on September 7, 2023, and Respondent’s Opposition thereto, the Motion is denied.

COMAR 21.10.05.06F states that a “motion for reconsideration may only be filed on the grounds that the decision of the Appeals Board was in error as a result of fraud, surprise, mistake, or inadvertence,” and that the Board may “at its own discretion, alter or amend its decision or order if it determines that an error has occurred.” As explained further below, we do not find that our September 7, 2023 Opinion and Order “was in error as a result of fraud, surprise, mistake, or inadvertence” and, consequently, we decline to alter or amend our decision.

First, the basis of our decision was limited to a single issue, *i.e.*, whether Appellant’s claim was timely filed as required under MD. CODE ANN., STATE FIN. & PROC., § 15-217(b) and COMAR 21.10.04.02. Based on the undisputed facts, we found that Appellant’s claim satisfying all

components of COMAR 21.10.04.02B, including a certification, was filed on August 30, 2022, which was, unfortunately, more than 30 days from the date Appellant filed its notice of claim on June 27, 2022. We concluded, therefore, that Appellant's claim was untimely. To that extent, we are baffled by Appellant's characterization of our decision as a *sua sponte* "declaration that a lack of Certification pursuant to COMAR 21.10.04.02B(5) is a matter of subject matter jurisdiction." Upon careful and repeated review, we find nothing in the Opinion and Order that remotely suggests that our decision was based on anything "jurisdictional" in nature.

Second, we take this opportunity to confirm that the Board did not "ignore" *Absolute Environmental Contractors, Inc.*, MSBCA 2266 (2003), since that case, along with several others, was discussed extensively in *A-Del Construction, Inc.*, MSBCA 3127 & 3128 (2022). Rather, we were not persuaded that *Absolute* is apposite to this appeal, as Appellant argued.

The decision in *Absolute* read both "substantial compliance" with the certification requirement and "material prejudice to the State" factors into the Board's analysis of whether the contractor filed a valid and timely claim, although neither factor is specified in the statute or regulation dictating how and when a claim must be filed. The Board in *Absolute* recognized that its decision was "a retreat" from *Cherry Hill Construction, Inc.*, which held that "the Government is not required to show prejudice as a result of the late filing, and the failure of the Contractor to timely file its claim is fatal." MSBCA 2056 at 10 (1999). And, as relevant to this appeal, the Board in *Absolute* stated:

Our retreat, however, is limited to the issue of certification under the particular facts of this appeal. We note that COMAR 21.10.04.02C only requires dismissal of a claim or notice of claim that is not timely filed; failure to certify a claim does not appear to require dismissal.

Further, as the Board noted in *A-Del*, the decision in *Absolute* “left the door open for the dismissal of future claims, under different factual scenarios, when there are missing or defective certifications.” *A-Del*, at 13.<sup>1</sup>

Here, unlike in *Absolute* and *A-Del*, we are not dealing with a missing or defective certification. Appellant submitted a compliant certification on August 30, 2022, with all other required components of a claim. It was just too late. A late claim “shall be dismissed.” COMAR 21.10.04.02C.

In so far as *Absolute* was decided on factors not specified in, and was therefore inconsistent with, the statutory and regulatory law, as well a deviation from other Board precedent, in determining what is required to file a valid claim, *Absolute* is hereby overruled.

Finally, this Board is charged with interpreting the procurement law as it is written. The Board of Public Works (“BPW”), as authorized by the General Assembly, promulgated COMAR 21.10.04.02B(5) requiring a certification to be submitted when filing a claim. It is beyond the authority of this Board to pass judgment on the validity of BPW regulations, and we express no opinion as to Appellant’s contention that the certification regulation is *ultra vires*. Moreover, this issue was not raised previously and, therefore, not part of the record that led to our Opinion and Order.

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<sup>1</sup> The Board’s discussion of prejudice in *A-Del* was dicta, where it noted that the contractor’s defective certification “materially prejudices Respondent by failing to properly put it on notice as to who Appellant claims is responsible for its damages.” *A-Del*, at 15.

**ORDER**

Based on the foregoing, it is this 6th day of October 2023 hereby:

ORDERED that Appellant's Motion for Reconsideration 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/  
Senchal D. Barrolle, Esq., Member

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/s/  
Michael L. Carnahan, Member

