

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

In the Appeal of	*	
HMR of Maryland, LLC		Docket Nos. MSBCA 3245 & 3252
	*	
Under MDVA Contract		
ID: MDVA-CHVH-15-01	*	
	*	
Appearance for Appellant		John F. Dougherty, Esq.
	*	Kramon & Graham, P.A.
	*	Baltimore, Maryland 21202
	*	
	*	Stuart M.G. Seraina, Esq.
	*	Seraina Law Office
	*	Towson, Maryland 21286
	*	
Appearance for Respondent		Stuart M. Nathan, Esq.
	*	Mary Beth Collins, Esq.
	*	Veronica N. Love, Esq.
	*	Assistant Attorneys General
	*	Department of Public Safety and
	*	Correctional Services
	*	Baltimore, Maryland 21215

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OPINION AND ORDER BY CHAIRMAN CHO

Respondent Maryland Department of Veterans Affairs (“MDVA”) moves to dismiss in part, and for summary decision on, certain claims brought by Appellant HMR of Maryland, LLC (“HMR”) in MSBCA No. 3245.¹ Upon consideration of all written submissions by the parties as well as oral argument on June 13, 2024, Respondent’s motion is granted in part and denied in part.

UNDISPUTED MATERIAL FACTS

On August 16, 2017, the Board of Public Works (“BPW”) approved, and Respondent executed, the contract for Management Services for Charlotte Hall Veterans Home, Contract No.

¹ We consolidated MSBCA Nos. 3245 and 3252 on October 24, 2023. Nothing in this Opinion and Order affects Appellant’s contract termination claim asserted in MSBCA No. 3252.

MDVA-CHVH-15-01 (the “Contract”) awarded to Appellant. The Contract had a base term from October 1, 2017 to September 30, 2021, with a possible two-year option until September 30, 2023.

In March 2020, a state of emergency was declared in Maryland due to the COVID-19 pandemic. On April 29, 2020, the parties executed an emergency modification to the Contract in the amount of \$3,309,598 to account for “additional services beyond the initial scope of work” and “additional expenses due to the pandemic which were not contemplated by the parties at the time of the original Contract.” *See* MDVA 02117-MDVA 02121, Respondent’s Rule 4 File, Exhibit 11 (“An Emergency Modification of the Contractual Agreement Between the Maryland Department of Veterans Affairs and HMR of Maryland, LLC for Management Services of Charlotte Hall Veterans Home Contract No. MDVA-CHVH-15-01”).

On November 10, 2020, the parties entered into a grant agreement under which Respondent agreed to make a grant of \$4,245,000 to Appellant from the State’s Coronavirus Relief Fund. The agreement provided:

The Grant proceeds will be used by the Grantee to pay cash operating expenses at the Charlotte Hall Veterans’ Home (“CHVH”) including payroll, suppliers, rents, fixed debt payments and other cash operating costs directly incurred by the Grantee, and to offset financial losses sustained at the CHVH where such costs and/or losses are incurred between March 27, 2020, and December 30, 2020, as a direct result of the Covid-19 pandemic.

See MDVA 00975-MDVA 00983 (“Emergency Grant – For Profit Grant Agreement” dated November 10, 2020), at p.1 (Recitals ¶ 3). In Section 5.11 (Other Miscellaneous Provisions), the grant agreement provided further:

Nothing in this Agreement shall be deemed to modify the rights or obligations of either party in the current contract between MDVA and HMR for the operation and maintenance of CHVH, MDVA-CHVH-15-01. All obligations of HMR related to that contract remain in full force and effect without modification.

The Grantee agrees that it will not assert any claim for additional relief or compensation, or seek a modification of the current contract for loss, or additional unanticipated expenses, where such expenses or losses are attributable to COVID-19, and have been incurred prior to January 1, 2021.

Grantee acknowledges the State's interest in maintaining employment for Grantee's employees. In consideration of this agreement, Grantee agrees that through December 31, 2020, Grantee shall maintain the employment staffing level at Charlotte Hall Veterans Home at or above the employment staffing level current as of February 20, 2020. Grantee further acknowledges that nothing in this agreement is construed to replace or otherwise modify any separate contractual obligation of the Grantee to the State under Grantee's current contract MDVA-CHVH-15-01.

See MDVA 00981-82.

On September 1, 2021, the BPW approved Respondent's request to exercise the two-year option of the Contract from October 1, 2021 to September 30, 2023.

The parties then executed another grant agreement dated December 16, 2021, pursuant to which Respondent agreed to grant \$2,575,000 to HMR from the American Rescue Plan of 2021 ("ARP"). The funds from this agreement were to be used by HMR for the same purposes as the November 10, 2020 grant, but for costs and/or losses incurred due to the COVID-19 pandemic between July 1, 2021 and June 30, 2022. *See* MDVA 00985-993 ("Emergency Grant – For Profit Entity Grant Agreement" dated December 16, 2021), at p.1 (Recitals ¶ 3). It also contained an equivalent Section 5.11 as the November 2020 Grant Agreement. *See* MDVA 00991-992.

On July 15, 2022, the parties executed a second contract modification under which the total number of beds available to HMR was reduced by four, but which did not change the total contract amount. *See* MDVA 02124-02125 ("Modification Number Two of the Contractual Agreement Between the Maryland Department of Veterans Affairs and HMR of Maryland, LLC for Management Services of Charlotte Hall Veterans Home Contract No. MDVA-CHVH-15-01").

On December 1, 2022, Lori Pinson, Respondent's Procurement Officer ("PO"), sent a letter to HMR, which stated:

The [MDVA] herein provides notice to HMR of Maryland, LLC (HMR) that, in accordance with Sections 32.2 and 31.1.8 of the Contract, MDVA has assessed liquidated damages in the total amount of \$1,987,296.42 due to HMR's serious performance deficiencies from October 1, 2021 through October 31, 2022. Based upon recent OHCQ and VA survey results, and documented failures to provide satisfactory care to and maintain the dignity of residents of CHVH, HMR remains in serious default of its contractual obligations for the management of Charlotte Hall Veterans Home (CHVH). ...

The letter went on to explain how Respondent has, and will continue to, calculate liquidated damages assessed against HMR and that "CHVH will invoice HMR for the total liquidated damages, with full payment due within forty-five (45) days of receipt of the invoice" and "[i]f payment is not received within 45 days, CHVH will deduct any unpaid amount from HMR's next monthly payment."

In a December 19, 2022 letter to the PO, HMR stated, among other things:

This letter ... [s]erves as notice of HMR[']s intent to file a claim for any amount assessed as liquidated damages. This notice is issued now so that the 30-day limit described in COMAR 21.10.04.02 to submit a claim is met. ... Please consider this as notice that HMR of Maryland LLC does not agree with the assessment of liquidated damages. HMR considers the amounts to be incorrect and requests supporting documentation as to the methodology applied to vacant positions in this process. (MDVA 01009)

...

Prior to being served with this notice, HMR is not aware of any discussions regarding the need for the MDVA to assess liquidated damages or processes that were moved into the established escalation procedures. ... (MDVA 01009-10)

...

Notice of Intent to File a Claim per COMAR 21.10.04

This letter constitutes notice that if invoiced for liquidated damages in the amount specified in MDVA letter dated December 1, 2022, HMR intends to file a claim under the provisions of COMAR 21.10.04.02 for that amount. This notice is issued now so that the 30-day limit described in COMAR 21.10.04.02 to submit a claim is met. (MDVA 01013)

On December 27, 2022, Pete Pantzer, MDVA's Director of Finance and Administration, sent an email to HMR, attaching a draft grant agreement that "HMR will need to sign" to have the grant funding released. Under this agreement, Respondent was to grant HMR \$3,945,000 from the ARP for costs and/or losses incurred between July 1, 2022 and June 30, 2023 as a direct result of the COVID-19 pandemic. *See* MDVA 01167-01175 ("Emergency Grant – For Profit Entity Grant Agreement" dated December 27, 2022) (hereinafter "FY2023 Grant Agreement").

On January 24, 2023, Heyward Hilliard, HMR's Vice President and Chief Operating Officer, responded in an email, thanking Mr. Pantzer for "the proposed Grant Agreement," and suggesting revisions to the terms of the draft FY2023 Grant Agreement "in an effort to streamline the delivery and appropriate investment of these needed operational funds."

There is evidence of email exchanges between the parties discussing Appellant's proposed revisions. Ultimately, however, the December 27, 2022 draft of the FY2023 Grant Agreement was never signed by either party.

On February 23, 2023, Respondent issued a Notice of Termination for Default of the Contract, effective March 9, 2023. On March 7, 2023, Respondent issued an Amended Notice of Termination, effective June 5, 2023.²

By letter dated February 28, 2023, Appellant, through its Senior Vice President and Chief Financial Officer, John Twitty, filed a claim with the PO seeking the following relief:

- a) Withdrawal of MDVA's February 23, 2023 contract Termination for Cause declaration under an agreement addressing issues of concern to MDVA and HMR or a change from the Termination for Cause to a Termination for Convenience;
- b) Removal of all liquidated damages assessments and return of the damages deleted from payments by MDVA to HMR;

² Appellant's claim disputing the termination for default is the subject of its appeal in MSBCA No. 3252, but Respondent's Motion under consideration has no bearing on that appeal.

- c) Payment of “appropriated relief funds, withheld monthly funds, and additional support” totaling \$4,290,500, including the \$3,945,000 in ARP grant funding; and
- d) Retraction of communications containing misrepresentations of occurrences cited as support for the State’s decision to terminate for default.

Specifically with respect to liquidated damages, HMR requested that Respondent “refund all liquidated damages currently assessed and cease the assessment of any liquidated damages not already published.” According to HMR’s claim, Appellant had been invoiced for \$1,987,296.42 for liquidated damages for the period from October 1, 2021 to October 31, 2022, and \$355,749.28 for November 1, 2022 through November 30, 2022.³

On March 13, 2023, Mr. Twitty emailed Mr. Pantzer requesting “an update on the status of the \$3.9mm, fiscal 2023, grant.” Mr. Pantzer responded that “[w]hile the \$3.9 million in ARP grant funds were appropriated in MDVA’s budget, there is no final agreement with HMR; and MDVA has determined that during this transition period, it will not disburse the funds to HMR at this time.” Additionally, Mr. Pantzer noted:

You will shortly be receiving a letter informing you of MDVA’s intent not to withhold payments for assessed liquidated damages between now and the end of the contract and to release payments recently so withheld. This decision is made in a spirit of cooperation and does not in any way constitute a waiver of the liquidated damages that have been or may in future be assessed.

By letter dated August 28, 2023, the PO granted in part and denied in part Appellant’s February 28, 2023 claim. HMR noted its appeal from that final decision on August 29, 2023, docketed as MSBCA No. 3245.

In its Complaint filed on September 28, 2023, Appellant seeks “equitable adjustment for increased costs and decreased revenues caused by COVID-19” in the amount of \$6,601,989

³ Respondent issued a second invoice dated April 21, 2023 for liquidated damages assessed for November 2022 in the amount of \$356,628.40, which Appellant also disputes. However, the portion of Appellant’s claim relating to the November 2022 assessment is not subject to Respondent’s Motion.

through the date of contract termination. HMR asserts that, as part of its unreimbursed costs and profit, Respondent “agreed to pay HMR additional \$3,945,000 for FY 2023, but withheld that amount.” Compl. ¶ 36. In addition, Appellant asserts that Respondent is not “entitled to assess or withhold liquidated damages from payments due HMR.” Compl. ¶ 51.

STANDARD OF REVIEW

Upon motion, the Board may dismiss an initial pleading if it appears that the Board cannot grant the relief requested. COMAR 21.10.05.06C. In reviewing a motion to dismiss, we assume the truth of all facts alleged by the appellant. *U.K. Constr. & Mgmt., LLC*, MSBCA 2773 at 2 (2011).

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).” *Browner 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.

“If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2–501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2–501.” MD. RULE 2-322(c). Thus, when matters outside the complaint are

considered in ruling on a motion to dismiss, the motion to dismiss will be treated as one for summary decision. *See, e.g., Lewis v. Baltimore Convention Ctr.*, 231 Md. App. 144, 151 (2016); *Hansen v. City of Laurel*, 193 Md. App. 80, 88 (2010); *North Am. Specialty Ins. Co. v. Boston Med. Group*, 170 Md. App. 128, 135 (2006).

DECISION

1. Claim Relating to Assessment of Liquidated Damages

Respondent argues that HMR's February 28, 2023 claim disputing the assessment of liquidated damages covering the period from October 1, 2021 through October 31, 2022 should be dismissed as untimely. We agree.

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, a claim on a non-construction contract must be filed contemporaneously with or within 30 days of filing the notice of claim. COMAR 21.10.04.02B. These time limits are mandatory. *Brawner 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).

In response to the PO's December 1, 2022 letter notifying Appellant of the assessment of liquidated damages in the amount of \$1,987,296 for Appellant's staffing deficiencies and non-performance issues, HMR wrote back on December 19, 2022 stating that its letter "[s]erves as notice of HMR[']s intent to file a claim for any amount assessed as liquidated damages." The

parties do not dispute that the December 19, 2022 letter constituted Appellant's notice of claim and that it was timely. Consequently, Appellant had 30 days from the date of its notice of claim, or until January 18, 2023, to file its certified claim with the PO. Appellant's claim, filed on February 28, 2023, was untimely because it fell outside the 30-day period.

Section 32.2.1 of the Contract allows Respondent to assess liquidated damages against HMR for "damage sustained by the State in the event of delays or failures on scheduled work and provision of services," and provides Respondent the option of either deducting liquidated damages from money payable to HMR or to bill HMR as a separate item. Here, after the initial notice of assessment of liquidated damages, Respondent sent an invoice to be paid within 45 days.

We are not persuaded by Appellant's argument that its obligation to file a claim within 30 days was "conditional" upon actual deduction of liquidated damages by Respondent from money owed to HMR. Appellant admits that Respondent sent an invoice for liquidated damages on December 14, 2022, requiring payment by January 28, 2023. HMR also admits that it "never separately paid the liquidated damages claimed and invoiced by Respondent." HMR's Opposition ("Opp.") at 9. After Appellant failed to pay the invoice, on January 30, 2023, Respondent deducted some amount of liquidated damages from HMR's December 2022 invoice. Appellant argues that, because Respondent did not withhold any money until January 30, 2023, Appellant had suffered no damages up to that point and, therefore, did not "have the burden of initiating a claim to disprove Respondent's claim of entitlement to liquidated damages." Opp. at 11.

However, the 30-day period for filing a notice of claim or a claim is triggered by HMR's knowledge – *i.e.*, when HMR knew or should have known the basis for its claim. *See* State Fin. & Proc. § 15-219; COMAR 21.10.04.02. The fact that Respondent withheld payment two months later has no bearing on Appellant's knowledge upon receiving Respondent's December 1, 2022

letter that liquidated damages in the amount of \$1.9 million were being assessed against HMR. Appellant's February 28, 2023 claim was late.

2. Claim Concerning Respondent's "Contractual Breach"

Respondent next argues that certain assertions made by Appellant for the first time in Appellant's February 28, 2023 claim letter were untimely.

We agree that, with respect to Appellant's broad assertions of contract breach that relate to RFP and contract provisions that purportedly conflict with state and/or federal law and regulations, any such issues should have been raised prior to the submission of proposals or, at the latest, by August 2017 when Appellant began performance under the Contract. Appellant's claims raising any issues of ambiguity or conflicts in contract language are untimely.⁴ Therefore, this portion of Respondent's Motion is granted.

Respondent further asserts: "to the extent HMR alleges the [Respondent] breached the Contract by somehow contributing to HMR's nonperformance, the specific instances HMR cited in its February 28 claim occurred more than thirty days prior to that date, and thus are untimely." Motion at 7-8. Neither party having identified for the Board what the "specific instances" are that are in dispute, we are unable to determine, as a matter of law, the timeliness of Appellant's claims relating to them. Therefore, this portion of Respondent's Motion is denied.

3. The Unsigned FY2023 Grant Agreement

Appellant alleges that it is entitled to payment of \$3,945,000 under the FY2023 Grant Agreement to offset revenue losses due to COVID-19, and that Respondent breached the Contract by failing to pay. Respondent counters that it has no legal or contractual obligation to provide

⁴ In any event, it appears that Appellant has abandoned that argument, since the Complaint is devoid of allegations challenging any RFP or contract language, and counsel did not address the issue in the brief in Opposition to the Motion, or during oral argument.

supplemental grant funds, even if they are appropriated by the General Assembly in the fiscal year operating budget. The issue for us to decide is whether the FY2023 Grant Agreement is either a modification to the parties' Contract, or a stand-alone procurement contract. We conclude that it is neither.

Under State Government § 12-201(a), the State's sovereign immunity remains intact against a contract claim unless the contract is "a written contract that an official or employee executed for the State or 1 of its units while . . . acting within the scope of [his or her] authority" for the State's limited sovereign immunity waiver to apply. *ARA Health Servs., Inc. v. Dep't of Pub. Safety & Corr. Servs.*, 344 Md. 85, 93-95 (1996) (holding that modification of procurement contract by state official who lacked procurement authority meant that contract did not comply with State Government § 12-201(a) and thus the contract claim "fail[ed] to satisfy" the requirements for waiver of sovereign immunity contained in § 12-201(a)).

A procurement contract must be executed by a "procurement officer," who is "an individual authorized by a unit to: (1) enter into a procurement contract; (2) administer a procurement contract; or (3) make determinations and findings with respect to a procurement contract." State Fin. & Proc. § 11-101(p); COMAR 21.01.02.01B(67).

This Board's jurisdiction, as established in State Finance and Procurement § 15-211(a), is "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). Moreover, when State Government § 12-201(a) is read in conjunction with the exclusive, statutorily prescribed dispute-resolution procedure for state procurement contract claims contained in State Finance and Procurement §§ 15-215 through 15-223 and COMAR 21.10.04, it is evident that the jurisdiction vested in the Board is narrowly limited to considering

issues related to breach, performance, modification, or termination of procurement contracts. *See* State Fin. & Proc. § 15-211.

To appear before the Board, therefore, a contractor must have claims arising from not just any contract, but one that falls within the meaning of a “procurement contract.” While “procurement contract” is defined as “an agreement in any form entered into by a unit for procurement,” State Fin. & Proc. § 11-101(o); COMAR 21.01.02.01B(66-1)(a), this definition must be read within the context of the limited waiver in State Government § 12-201(a), which requires a “written contract” executed by an authorized representative of the State or one of its agencies.

Here, the parties executed the Contract and began performance in 2017. It is undisputed that at least two modifications to the Contract were made. The first one, executed soon after the COVID-19 pandemic began, was titled “An Emergency Modification of the Contractual Agreement Between the Maryland Department of Veterans Affairs and HMR of Maryland, LLC for Management Services of Charlotte Hall Veterans Home Contract No. MDVA-CHVH-15-01,” in the amount of \$3,309,598 to account for “additional services beyond the initial scope of work” and “additional expenses due to the pandemic which were not contemplated by the parties at the time of the original Contract.” The second modification dated July 15, 2022 and titled “Modification Number Two of the Contractual Agreement Between the Maryland Department of Veterans Affairs and HMR of Maryland, LLC for Management Services of Charlotte Hall Veterans Home Contract No. MDVA-CHVH-15-01,” changed the total number of beds available to HMR but did not change the total contract amount.

Separately from these two modifications, the parties executed two other grant agreements under which HMR was paid \$4,245,000 and \$2,575,000, respectively, to “pay cash operating

expenses at [CHVH] including payroll, suppliers, rents, fixed debt payments and other cash operating costs directly incurred by [HMR], and to offset financial losses sustained at the CHVH where such costs and/or losses are incurred ... as a direct result of the Covid-19 pandemic.” Appellant does not allege that these executed grant agreements were modifications to the Contract.

Appellant’s argument that it is entitled to be paid \$3,945,000 under the FY2023 Grant Agreement fails for two reasons. First, the FY2023 Grant Agreement could not be a modification to the Contract because it was never signed by either party. To be a valid and enforceable contract modification, it needed to have been executed by an authorized representative of Respondent acting within the scope of authority. *See ARA Health*, 344 Md. at 93.

Second, the FY2023 Grant Agreement is not a procurement contract because its formation was not a result of the statutorily-prescribed procurement process under Division II, and the final agreement did not contain the mandatory contract provisions under State Finance and Procurement § 13-218(a) and COMAR 21.07.01.01-.31. “Failure to either comply with the statutorily prescribed process for procurement contracting or include mandatory contract terms or provisions results in a contract that is either void or voidable.” *Brawner Builders*, at 34. This is important because the Board may only hear contract claims arising out of procurement contracts. Consequently, even if the FY2023 Grant Agreement had been fully and properly executed, this Board would lack jurisdiction to hear Appellant’s claim for \$3,945,000 arising out of that agreement.

ORDER

Based on the foregoing, it is this 5th day of July 2024, hereby:

ORDERED that Respondent’s Motion to Dismiss in Part and Motion for Summary Decision is GRANTED in part and DENIED in part.

_____/s/
Sonia Cho, Esq.
Chairman

I concur:

_____/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. 3245, Appeal of HMR of Maryland, LLC under Maryland Department of Veterans Affairs Contract No. MDVA-CHVH-15-01.

Date: July 5, 2024

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