



Maryland Procurement ALERT

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MSBCA to contractors: It's your fault for trusting the agency

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In the comedy classic “Animal House,” about a raucous fraternity house, the fraternity’s rush chairman, Otter, admonished a pledge, Flounder, after frat members had totaled a car belonging to Flounder’s brother. As the sagely Otter states: “Flounder, you can’t spend your whole life worrying about your mistakes! You f***ed up. You trusted us!”

The same mistake could be said of contractors who have contract disputes with state agencies and trust the agencies to negotiate a reasonable resolution, only to find that, when negotiations fail, the subsequent contract claim is met with a timeliness defense. According to the Aug. 3 decision of the Maryland State Board of Contract Appeals in [Joseph B. Fay Company](#), the “Animal House” defense is alive and well.

Initiating a contract claim against a Maryland agency is a two-step process: (1) filing ‘notice’ of claim; and (2) submitting a formal claim containing the substantive information, legal

justification, and request for relief. [COMAR](#) and [state law](#) require that a contractor file a written notice of a contract claim within 30 days after the basis for the claim is “known or should have been known, whichever is earlier.”

Once a notice of claim is made, a contractor may contemporaneously, or within 90 days of filing a notice of a claim on a construction contract (only 30 days for nonconstruction contracts), submit a formal claim to the procurement officer.

The time frame for submitting a formal claim may be extended “on conditions the procurement officer considers satisfactory to the unit.” If the contractor fails to meet either deadline, the claim will be rejected, and an appeal is to be dismissed under COMAR.

In *Joseph B. Fay*, the appellant had contracted with the Maryland State Highway Administration to rebuild an interchange between Md. Route 85 and Interstate 270 in Frederick County. During performance of the contract, the appellant claimed to have encountered subsurface rock conditions that were materially different from the boring data reported in the bidding documents for the contract.

Several months of discussions concerning the differing site conditions between the company and the SHA failed to yield a resolution. On April 27, 2018, the company set forth in writing a detailed analysis of rock conditions. The SHA denied that there were differing rock conditions, and on Oct. 23, 2018, it sent Joseph B. Fay a “final decision” letter that alerted the company that it had 30 days to file a written notice of claim.

On Nov. 19, 2018, Joseph B. Fay sent a timely notice of claim. This led to more than two years of back and forth, during which the SHA, on several occasions, extended the deadline for the company to file its contract claim. As negotiations progressed, the contractor, believing agreement was near, allowed the time to pass without filing an official claim.

When it ultimately became clear that negotiations would not result in an agreement, the company, on July 28, 2020, finally submitted a formal contract claim to the SHA

procurement officer. In response, the procurement officer denied the claim in its entirety based on untimeliness. On appeal, the MSBCA agreed and granted SHA's motion for summary decision.

Joseph B. Fay argued to the MSBCA that the negotiations with SHA had extended the time for filing a claim. The board ruled, however, that there are no procurement rules that require informal dispute resolution proceedings. Nor are there statutory or regulatory provisions that toll the time requirement for filing a claim during negotiations.

The board emphasized this point in stating, "both contractors and State agencies should be mindful of the risk associated with pursuing informal internal dispute resolution processes without first filing a timely notice of claim once the basis for a claim is known, or should have been known, whichever is earlier." This is a warning repeated from a prior MSBCA case in 2022, [*A-Del Construction, Inc.*](#)

The board found that, though the SHA had engaged in extensive discussions and negotiations, the SHA never waived the statutory notice requirements of COMAR or the law. The board noted its awareness "of the confusion created by SHA's practice of requiring contractors to engage in internal informal dispute resolution process prior to filing any notices of claims with the PO."

When a state agency later moves to dismiss for timeliness the contract claims that this practice generates, the "Animal House" defense applies. Flounder, and contractors, beware.

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