



Maryland Procurement Law ALERT

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MSBCA Issues Important Ruling Regarding Claim Certification and Timely Filing Requirements

Earlier this month, the Maryland State Board of Contract Appeals (MSBCA) issued an important ruling addressing two jurisdictional requirements—the time for filing a notice of claim, and the required certification accompanying a claim—for contract claims under the Maryland regulations.

The case, *In the Consolidated Appeals of A-Del Construction, Inc.*, Docket Nos. MSBCA 3127 and 3128, related to a road construction contract in Aberdeen, Maryland, that the State Highway Administration (SHA) had awarded in 2015. The statement of work included installation of sound barriers along the roadways, which in turn required drilling subsurface shafts. Shortly after the prime contractor's drilling subcontractor began drilling, however, it reported to the prime contractor that it had hit hard rock, which would be more difficult and more expensive to drill. The prime contractor sent a letter to SHA requesting approval for an alternative drilling method and requested additional

compensation for the alternative method, which SHA denied the following day.

About a month later, the subcontractor submitted to the prime three proposed change orders to its subcontract, which the prime contractor signed and agreed to pay without first receiving any approval from SHA to cover the additional costs. Additionally, after completing the work, the subcontractor submitted letters to the prime informing the prime that the subcontractor's equipment had been damaged during drilling owing to undisclosed buried debris. The prime contractor sent a letter to SHA requesting that SHA compensate the prime for the subcontractor's damaged equipment, which SHA also subsequently denied.

A month after SHA's denial of the prime's request for compensation for the damaged equipment, the subcontractor sent a notice of claim to SHA for the equipment that had been damaged over three and half months earlier. The subcontractor also filed suit against the prime contractor in Harford County Circuit Court for breach of contract, in which the prime counterclaimed; the Circuit Court stayed the lawsuit pending the conclusion of the related administrative proceedings. Over seven months later—nearly a year after it had completed performing the work—the subcontractor submitted a second notice of claim to SHA for the additional costs the subcontractor had incurred for drilling through hard rock.

Nearly a year after the subcontractor had submitted its second notice of claim, the prime contractor filed two separate claims with SHA on behalf of the subcontractor relating to the differing site conditions that caused damage to the subcontractor's equipment and additional costs to drill.

In its ruling, the MSBCA first noted its concern about the delays in filing the notices of claim. While it would base its ruling on other grounds, the Board observed that despite SHA having allowed the parties to engage in an informal

dispute resolution process, “there is no current regulation that provides for such a process or that stays the time requirements for filing a notice of claim under COMAR 21.10.04.02 while this internal process is pursued.” The Board stated: “To the extent there is a conflict as to when and with whom a notice of claim should be filed, the requirements set forth in COMAR will always take precedence over any conflicting directive issued by the agency.”

Second, the MSBCA took notice of a footnote in the subcontractor’s certification accompanying the claims. COMAR 21.10.04.02B(5) requires that a claim be accompanied by “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**” (emphasis added).

However, the footnote in the certifications in the claims in this case stated that the subcontractor took no position regarding who may have been responsible for causing the foreign construction debris that formed the basis of the claim. The Board observed: “Because of this contradictory language in both Certifications, it would have been unclear to the [procurement officer], as it was to this Board, whether [the subcontractor] was asserting that [SHA] was liable for its damages or whether [the subcontractor] believed that someone else was liable (e.g., [the prime]).” Indeed, the Board took note that after it had docketed and consolidated the appeals of SHA’s denials of both claims in this case, the subcontractor had filed a second lawsuit in Harford County Circuit Court seeking a declaratory judgment, in which the subcontractor alleged that the prime contractor was liable for the subcontractor’s damaged equipment because the prime’s “site preparation work generated large amounts of construction debris” and that the prime had “used some of it as backfill

material.” Throughout the MSBCA appeal and the Circuit Court cases, the subcontractor had asserted that it had not authorized the prime to pursue a pass-through claim to SHA on the subcontractor’s behalf because the subcontractor did not believe that SHA was liable for the subcontractor’s damages.

The Board granted SHA’s motion for judgment on several grounds, the first of which was that the certifications in the claims were defective and ruled that it lacked jurisdiction over the appeals. The Board stated: “the language of COMAR 21.10.04.02B(5) is mandatory, not discretionary.” The Board further observed: “A person asserting a claim must be fully willing to stand behind the claim; otherwise, it must be dismissed.” The Board noted that even if it allowed the subcontractor or the prime to comply with the substantive requirements of the certification in other forms, there was no such compliance in this case.

The *A-De/* opinion provides two significant reminders to state contractors regarding the jurisdictional requirements in COMAR for contract claims, for which, in the Board’s words, “contractors ... should be mindful of the risk associated.” The MSBCA does not take lightly the jurisdictional requirements under COMAR 21.10.04.02.

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General Assembly Considering New Legislation Concerning State Procurement

The Maryland General Assembly is currently considering numerous bills that would affect State procurement law. An up-to-date Maryland legislative report can be found [here](#).



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