

Docket No. 2025/2048	Date of Decision: 2/23/99
Appeal Type: <input type="checkbox"/> Bid Protest	<input checked="" type="checkbox"/> Contract Claim
Procurement Identification: Under MTA Contract No. KB-421-000-005	
Appellant/Respondent: Cherry Hill Construction, Inc. Maryland Transportation Authority	

Decision Summary:

Contract Interpretation - Reliance

Where Appellant failed to establish pre-bid reliance on its proposed interpretation, that failure bars recovery under that interpretation. Thus, where a contractor seeks recovery based upon his interpretation of an allegedly ambiguous contract, he must show that he relied on this interpretation in submitting his bid.

Contract Interpretation - Ambiguity

In order to be ambiguous, a contract must be capable of two reasonable interpretations.

Bridge. In part, the proposed contract called for the demolition of existing bridges and the construction of both embankments and mechanically stabilized earth retaining walls ("MSE walls")¹. Both the construction of the MSE walls and the demolition of existing bridges were lump sum items.

2. Payment for the excavation necessary for the MSE walls is covered under Special Provision (SP) 6-18.05 as follows:

SP 6-18.05 Method of Measurement and Basis of Payment

The cost of constructing and providing all labor, materials, equipment and incidentals necessary to complete the retaining walls including excavation, select aggregate backfill material, precast concrete panels and wall accessories, 4" diameter perforated PVC drain pipe, 42" high traffic barrier with coping, concrete moment slab, Bethlehem Blvd., 34" high traffic barrier with footing, 3" galvanized electrical conduits, junction boxes and accessories, and an impervious membrane liner will not be measured for payment but **shall be included in the contract lump sum price bid for the selected Alternate retaining wall system item.**

The cost associated with the engineering design and retaining wall plan preparation will not be measured for payment but shall be considered incidental to the selected Alternate retaining wall system item. (Emphasis supplied)

3. The specifications for payment of demolition of the bridges (SP 6-12.04) and ownership of the rubble (SP 6-12.03) read as follows:

SP 6-12.03 Construction Methods:

All removed material shall become the property of the Contractor, and shall be removed from the site and disposed of on approved spoil areas.

¹For a description of MSE walls, see finding of fact No. 6.

SP 6-12.04 Measurement and Payment

Removal of all the existing bridges will not be measured for payment but will be paid for at the contract lump sum price bid for "Removal of Existing Bridges" item. The payment will be full compensation for all excavation, backfill, temporary protective shields, explosives, hauling, **disposal, and for all material, labor, equipment, tools, and incidentals necessary to complete the work.** (Emphasis supplied)

4. Prior to bid opening, a pre-bid question was submitted regarding whether the bridge rubble could be incorporated into embankments. The MdTA responded as follows:

Reinforced concrete debris from the removal work can be incorporated into embankments if the size of the debris meets Specification requirements for rock incorporated into embankment.

5. Certain areas of the project required the installation of preload embankments built for the purpose of supplying an additional weight (surcharge) to ensure proper compaction of underlying materials. At four preload embankments, the contract also called for an accompanying retaining wall (MSE wall) to ensure the stability of the embankments.
6. MSE stands for "mechanically stabilized earth" MSE walls serve the purpose of restraining a bank of earth. MSE restraining walls are constructed of a footing supporting thin slabs vertically stacked to create the outer face of the wall. Each independent floating concrete panel has a tie-back or strap which is embedded in a special fill material tied back with restraining steel. The weight of the earth holds the panels in place, and the panels by their structure hold the earth in place. The interaction of the slab, tie-back and special fill material create the lateral stability to keep the wall from collapsing.

7. Some portions of the MSE walls were to be built adjacent to the preload embankment. The construction of the MSE walls necessitated removing some of the preload embankment and cutting into the earth below. Sketch A (attached) illustrates the work to be done. Area 1 is the existing slope of the preload embankment that had to be removed and not replaced. It was there to provide stability to the preload embankment during the settlement period. Area 2 is the portion of the preload embankment removed and replaced by the special fill material. Area 3 is the portion of the preload embankment removed for Cherry Hill's convenience in order that the other work could be performed. This material was put back into the hole as the special fill was installed. No claim is made that this area should be measured. Area 4 is the portion of the existing earth that had to be excavated in order to install the structure.
8. The materials used to build the preload embankments were brought in by Cherry Hill and paid for by MdTA. After approximately six months, the preload period was complete and the embankments would be cut and retaining walls installed. The materials removed from the preload embankments were then placed elsewhere on site.
9. In the course of preparing its bid, Cherry Hill's estimators made a determination as to what work should be done under the lump sum items for the bridge demolition (contract item 4001) and the four MSE walls (contract items 4003, 4005, 4007 and 4011), and prepared worksheets detailing that work.
10. The estimate for Item 4001 (bridge demolition) was \$2,923,464, and the bid price was \$2,924,000. The worksheet for the bridge demolition included the cost of placing the bridge demolition rubble in fill areas. Cherry Hill's estimator testified that he interpreted the contract as requiring the costs of disposal on-site or off-site to be included under the lump sum demolition

item². Further, its pricing sheet includes an item for "Placing in Fill", indicating its understanding that placing the bridge rubble in embankments was to be included as "disposal" under the lump sum item.

11. The worksheets for the MSE walls included the cost of excavating the preload embankments and placing the excavation in either a stockpile or embankment. The evidence also demonstrated that these estimates formed the basis for the bid prices in the final bid proposal submitted by Cherry Hill. The estimates for the MSE walls were \$1,101,285 (Item 4003), \$271,348 (Item 4005), \$460,589 (Item 4007); and \$595,995 (Item 4011). The bid prices for these items were only slightly higher than the estimates. Even though Cherry Hill was the lowest bidder overall, Cherry Hill's prices for these items were some of the highest submitted by any bidder. The Cherry Hill bid prices for these items were \$1,131,693 (item 4003); \$276,081 (item 4005); \$467,746 (item 4007); and \$614,377 (item 4011). By the time that the MSE preload embankment materials were finally placed in on site embankments, they had been dug and placed twice and Cherry Hill had been paid twice.
12. After contract award and the commencement of the job, Cherry Hill sought payment for the cost of placing the bridge demolition rubble in fill under the per unit borrow item (Item 2010) price. Cherry Hill also sought payment for the cost of excavating the preload embankments and placing the excavation in either a stockpile or embankment under the per unit borrow item (Item 2010) price or, alternatively, under the per unit Class I Excavation item (Item 2002) price.

²Cherry Hill's estimator of 16 years testified that he never saw any job where placement of rubble was paid both under a demolition item and a second item.

13. At no time prior to bid did Cherry Hill interpret the borrow item as covering the cost of placing the bridge demolition rubble in fill areas or the cost of excavating the MSE preload embankments and placing the excavation in either a stockpile or embankment.
14. Cherry Hill's Class I excavation bid preparation documents did not include an entry for the material from the MSE walls, although it included a variety of other entries.

Decision

Appellant states that the singular question in this appeal is whether the material placed by Cherry Hill in the embankments should be measured for payment under unit prices. Respondent replies that material placed by Cherry Hill is covered by lump sum prices, and therefore, should not additionally be paid for as unit prices.

Appellant is asking that this Board find 1) that the dirt used in the MSE wall should be paid at the unit price for Class 1 Excavation, or in the alternative that it be paid for as borrow³, and that 2) Cherry Hill's use of "its" bridge rubble as fill should be paid for under the unit price for borrow, since Cherry Hill had no obligation to place the rubble in the embankment, and by doing so, it reduced the need for other borrow, for which MdTA would have had to pay. Cherry Hill argues it is self-evident that each cubic yard of concrete that Cherry Hill placed in the embankment meant one cubic yard less of dirt that Cherry Hill would have to place in the embankment regardless of whether such dirt came from a cut, a borrow pit, or a structure. Even though MdTA admits that one cubic yard of concrete replaces the need for one cubic yard of dirt,

³ "Borrow excavation" means the "furnishing, excavating, hauling, and depositing approved materials for embankments and backfills when sufficient quantities of suitable materials are not available from other excavations. . . ." Standard Specifications for Construction and Materials, 1993, (the Green Book), Standard Spec. 203.01.

Cherry Hill charges that MdTA will not measure and pay for the concrete bridge rubble as borrow even though it would measure and pay for the replaced dirt as borrow.

Respondent argues that Cherry Hill is requesting payment under the common borrow item for work for which it has already been paid under the lump sum items. Cherry Hill cannot recover payment under the unit item, Respondent argues, because Cherry Hill failed to prove that it relied upon its interpretation in preparing its bid or prove that it's (Cherry Hill's) interpretation was the only reasonable interpretation or that the contract was ambiguous, but not patently so.

Appellant argues that borrow excavation is defined in the contract as work which consists of furnishing, excavating, hauling, and depositing approved materials for embankments and backfills when sufficient quantities of suitable materials are not available from other excavations. (Standard Spec. 203.01) and is "measured and paid for at the Contract unit price per cubic yard." (Standard Spec. 203.04). Further, by virtue of the answer to the pre-bid query, concrete debris is an "approved material" for use in the embankments and concrete debris is not "from other excavations" thus, concrete debris must be "measured and paid for."

Respondent agrees that Cherry Hill had no obligation to use the concrete rubble as fill. The concrete rubble could have been hauled off-site for some other use. However, the Appellant chose not to remove the rubble in question, thereby saving the cost of disposal on an outside approved site, although the cost of disposal was nonetheless paid for under the lump sum for bridge demolition.

In fact, the difficulty the Appellant faces is that the bridge rubble work for which it seeks an equitable adjustment is work already covered by two lump sum items, either the lump sum item for bridge demolition which created the rubble, or the lump sum item for creating

the embankments where the appellant placed the rubble it owned after bridge demolition. The Board would be receptive to the Appellant's request for an equitable adjustment had such a claim involved use of the bridge rubble for line item work since the contract documents state that rubble created in the bridge demolition would be the property of the contractor, and pre-bid amendment changed the specifications to show that bridge rubble could be used on site if appropriate and did not have to be removed from the site as originally set forth in the specifications. We find in the instant case, however, there were not line items that could be separated from lump sum items. The argument is persuasive, but, in the end, because the Contract provides for payment for this work under the umbrella of the blanket lump sum payments, this Board must find that the Contractor has already been paid for its work.

Respondent looks at the question as one of interpretation of the bid documents, in the context of whether or not there was an ambiguity in the bid documents, which if latent, would permit the Appellant recovery if its interpretation was a reasonable one, and one on which the Appellant relied pre-bid. If there existed a patent ambiguity, of course, the Respondent argues that the Appellant was under an obligation to notify the State of the ambiguity prior to bidding. David A. Bramble v. State Highway Administration, ___Md.___, No. 8 (Sept. 17, 1998).

A contractor's failure to establish pre-bid reliance on its proposed interpretation bars recovery under that interpretation. Fruin-Colnon v. United States, 912 F. 2d 1426 (Fed. Cir.1990); Maintenance Engineers, Inc., 21 Cl. Ct. 553,563 (1990)(contractor has the burden of proof to establish reliance, even in the face of a latent ambiguity); Astro-Space Labs, Inc., 200 Ct. Cl. 282, 295 (1972); John Cibinic, Jr. & Ralph C. Nash, Jr., Administration of Government Contracts, at 227 (3d ed. 1995)("the nondrafting party seeking to have its interpretation

prevail through application of contra proferentum must demonstrate that it relied on its interpretation during preparation of its offer").

In Fruin-Colnon, supra, the ASBCA denied Appellant's claim, holding that although the contract may have been ambiguous, the contractor failed to show that it relied upon its claimed interpretation in preparing its bid. On appeal, the Federal Circuit in affirming the ASBCA, restated the "well settled" rule of law that "where a contractor seeks recovery based upon his interpretation of an ambiguous contract, he must show that he relied on this interpretation in submitting his bid." Id. (citations omitted). Fruin-Colnon emphasized that an interpretation of a contract developed during performance does not entitle a contractor to relief. Id. at 1431. Without proof of pre-bid reliance, a contractor could base its bid on one interpretation, but perform the work "more cheaply than it had anticipated, thus receiving a windfall from the Government." Id. at 1432.

In this case, Cherry Hill offered no evidence that it relied upon its asserted interpretation prior to bid, except that the only materials considered before and immediately after bid submission were off site materials. MdTA offered testimony of Cherry Hill's own estimators who confirmed that they had interpreted the work as falling under the lump sum items and that those estimates were incorporated in the bid. Thus, as in Fruin-Colnon, Cherry Hill's inability to state that it relied upon its claimed interpretation precludes recovery.

Maryland follows the objective law of contracts. Jackson R. Bell, Inc. MSBCA 1851, 5 MICPEL ¶392 (1996). As said in Dr. Adolph Baer, P.D., and Apothecaries, Inc., MSBCA 1285, 2 MICPEL ¶146 (1987), at page 4,

Perhaps one of the most fundamental rules of construction to be applied in ascertaining the meaning of a contract is that the words used should be given their ordinary everyday meaning.

Even if Cherry Hill had relied upon its asserted interpretation, it has done so unreasonably because the terms of the contract were clear. In

order to be ambiguous, a contract must be capable of two reasonable interpretations. John C. Grimberg, MSBCA 1761, 4 MSBCA ¶371 at p. 6 (1994). If there is only one reasonable interpretation, the clear contract language will be determined to be the intended meaning. General Motors Acceptance Corp. v. Daniels, 303 Md. 254, 261-262 (1985). In the present case, both the MSE wall and the bridge demolition provisions were capable of only one reasonable interpretation.

The contract provision for payment for the MSE walls, SP 6-12.04, stated that the cost of "all labor, materials, equipment and incidentals necessary to complete the retaining walls including excavation, . . . shall be included in the contract lump sum price bid for the . . . retaining wall system." (Emphasis supplied) Thus, all excavation necessary to construct the MSE walls is included in this lump sum item. The terms of the contract clearly include the placement of these materials in embankment in the lump sum payment for excavation. Moreover, the contract requires that excavation be used on-site (Standard Spec. 404).

Throughout the entire contract the building of an embankment is not treated as a separate pay item, instead payment is based upon the method of obtaining the materials. If the materials are off site borrow, the placing of the embankment is paid for under a borrow rate. If the materials are on site excavation, the payments are paid for under the excavation rate. Thus, a contractor is paid once for each shovelful of dirt, which includes the cost of both digging and placing in embankment. SP 6-18.05 directs that the material which was removed from the MSE wall preload embankments was "excavation," but, according to the contract, was to be paid for under the lump sum item for the MSE walls.

Cherry Hill's theory is founded on its belief that when it performed that excavation, the materials became Cherry Hill's possession. The premise that possession is determinative of method of payment, however,

is faulty. When the preload embankments were built, Cherry Hill was paid for each shovelful of material used to build those embankments. Since this was a "borrow job," a reasonable contractor would have known that the materials were to be used on-site and that any payment for that work would be included in the lump sum item. See Williams Constr. Co., MSBCA 1860, 5 MICPEL ¶405 at 2 (1996) (discussing borrow, balanced and waste jobs), rev'd on other grounds, case no. 96304035/CL219391 (Cir. Ct. for Balto. City, Apr. 24, 1997), aff'd, No. 999 (Md. Ct. Spec. App., Mar. 27, 1998) (unreported), cert. denied, 350 Md. 279, 711 A.2d. 870 (1998). In Williams, at issue was how the contractor should be paid for borrow. The Board stated,

Type I Borrow Excavation and Type II Borrow Excavation are only to be paid for at their respective unit prices in the event those items were actually obtained from off-site sources; i.e., the contractor must go off-site to find sufficient quantity of such materials. Stated another way, the contractor only gets paid his bid price for Class 1 Excavation (i.e. his bid price for excavating) where such material excavated is also used to meet Type II Borrow requirements to assure a good support system for the roadway. The contractor does not get paid twice for both digging the dirt within the project limits and then placing it elsewhere on the project.

With respect to the bridge rubble, Cherry Hill seeks payment for placement of the rubble in the embankment in addition to the payment made at the time of demolition for removal, because, it states, the rubble became its possession upon demolition and before placement.

The specifications for Item 4001 are set forth under SP 6-12.04:

SP 6-12.04 Measurement and Payment

Removal of all the existing bridges will not be measured for payment but will be paid for at the contract lump sum price bid for "Removal of Existing Bridges" item. The payment will be full compensation for all excavation, backfill, temporary protective shields, explosives, hauling, **disposal, and for all**

material, labor, equipment, tools, and incidentals necessary to complete the work.(emphasis supplied).

The "disposal" of bridge rubble is included in that provision. Prior to bid opening, a pre-bid question was submitted inquiring as to whether the bridge rubble could be incorporated into embankments. The MdTA responded as follows:

Reinforced concrete debris from the removal work can be incorporated into embankments if the size of the debris meets Specification requirements for rock incorporated into embankment.

The permissive language "can be incorporated" merely increases the contractor's options for disposal. Appellant decided to place the bridge rubble in embankment on site. Because this act of "disposal" was paid for under the demolition item, payment as borrow would mean that Cherry Hill would be paid twice for the same act of disposing the bridge rubble in embankments -- once under the demolition and disposal item, and again under the borrow item. The Appellant is entitled only to one payment for this operation. In short, the mere fact that without any direction from the State to do so, Cherry Hill decided to dispose of the bridge rubble in on-site embankments for its own convenience and savings, does not entitle it to a second payment as "borrow."

Cherry Hill also argues that Standard Specifications 203.01 and 203.04 regarding borrow control in this instance. In fact, they do not. Special Provision 6-12.04 governs pursuant to the Standard Specification, General Provision TC-3.01 "Governing Order of Contract Documents:Special Provisions will govern over Standard Specifications" Thus, controlling is Special Provision 6-12.04, which provides that "disposal" of the bridge rubble is covered under the lump sum payment.

Cherry Hill's estimators understood that the placement of those materials was to be included in the lump sum items. It was the view of

Cherry Hill's estimator for the bridge rubble that the cost of disposing the bridge rubble, whether on or off site, was included in the bridge demolition item. Likewise, Cherry Hill's estimator for the MSE walls included preload excavation materials going to embankment in his estimate for the MSE walls.

Cherry Hill and the Respondent appear to have had the same view of the contract language pre-bid. Insofar as Cherry Hill's interpretation of the contract was different pre-bid, and that ambiguity was patent, Cherry Hill would have been obligated to bring it to the attention of MdTA through a pre-bid question or assertion since a contractor cannot recover unless it brings the asserted ambiguity to the attention of the State prior to bid opening. See, e.g., John C. Grimberg, MSBCA 1761, 4 MSBCA ¶371 at p.12 (1994); Cherry Hill Constr. Inc., MSBCA 1313, 2 MSBCA ¶ 172 at 6-7 (1988). A failure to seek clarification prior to bidding undermines the competitive bidding process and is a total bar to recovery. S.O.G. of Ark. v. United States, 212 Ct. Cl. 125, 131, 546 F.2d 367, 371 (1976). In the present case, instead of seeking clarification, Cherry Hill adopted its estimators' price in its bid and now seeks recovery under a contrary interpretation. Accordingly, Cherry Hill may not recover, and the appeals must be denied.

Wherefore it is Ordered this 23rd day of February, 1999, that Appellant's appeals are denied.

Dated:

Candida S. Steel
Board Member

I concur:

Robert B. Harrison III
Chairman

Randolph B. Rosencrantz
Board Member



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MARYLAND
 JOB NO. _____
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 CALCULATED BY _____ DATE _____
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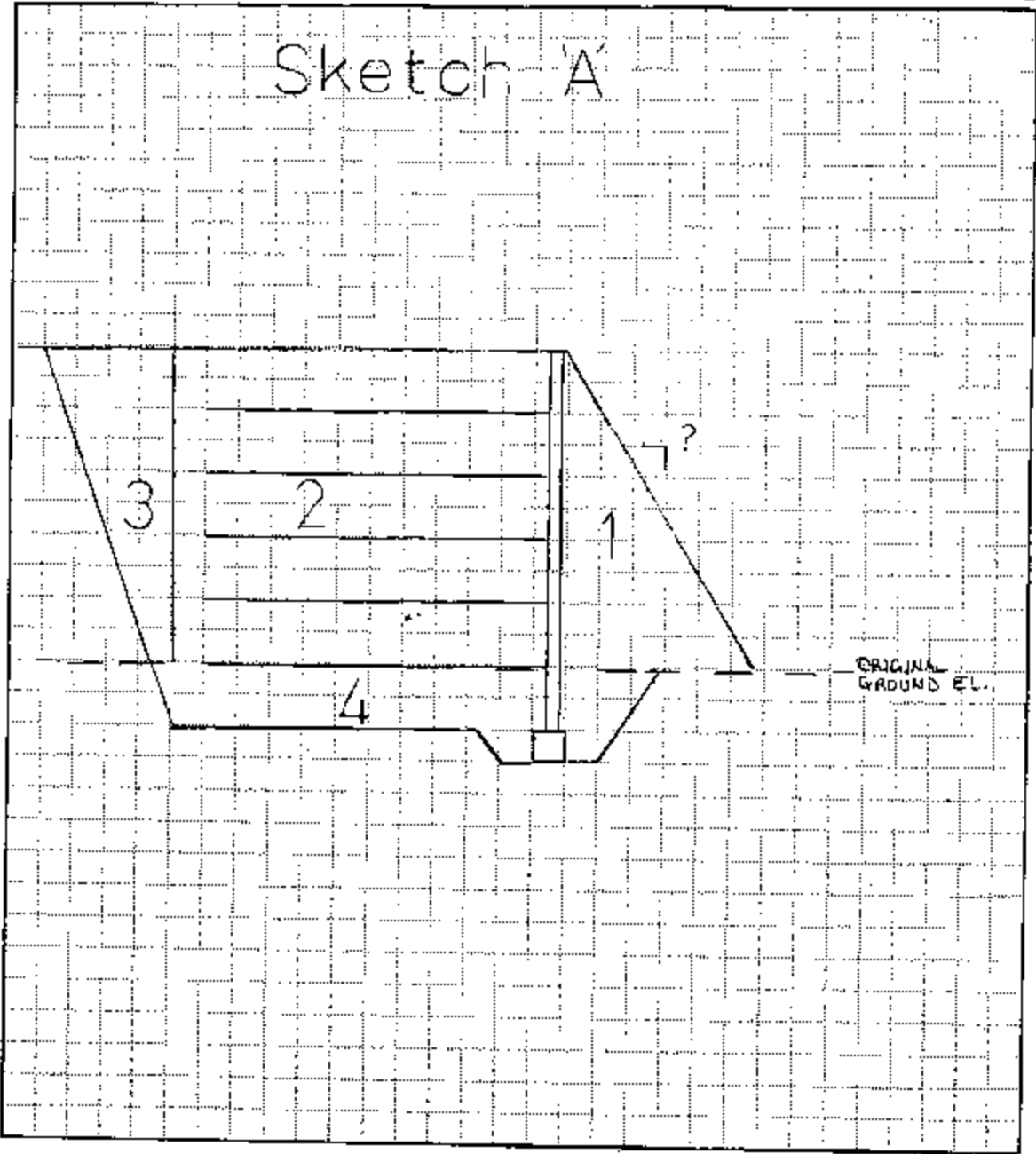


EXHIBIT 2

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 cases.

Annotated Code of 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 10 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 certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2025 and 2048, appeals of Cherry Hill Construction, Inc., under MdTA Contract No. KB-421-000-006

Dated:

Mary F. Priscilla
Recorder