Circuit Court for Anne Arundel County
Case No. C-02-CV-19-000414

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1334

September Term, 2019

MARYLAND STATE HIGHWAY ADMINISTRATION, ET AL.

v.

MILANI CONSTRUCTION, LLC

Fader, C.J.,
Nazarian,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: September 29, 2020

This appeal arises in the context of bid protests that were filed in connection with an invitation for bids issued by appellant Maryland State Highway Administration ("SHA"). The apparent lowest bidder was Milani Construction, LLC, the appellee. The apparent second-lowest bidder was appellant Total Civil Construction & Engineering, LLC. Seven days after bids were opened, Total Civil filed a bid protest in which it argued that Milani's bid was defective and that Milani should be disqualified as a nonresponsive bidder. Milani did not challenge Total Civil's protest, which SHA subsequently upheld, and that proceeding is now closed.

Three days after receiving notice of Total Civil's protest, Milani filed a bid protest of its own. Milani alleged that SHA's invitation for bids had misrepresented a critical fact related to the timing of the project and asked SHA to cancel all bids and issue a new solicitation. SHA rejected Milani's protest, but the Maryland State Board of Contract Appeals (the "Board") reversed the SHA decision, and the Circuit Court for Anne Arundel County affirmed the Board. In this appeal from the circuit court's ruling, neither SHA nor Total Civil disputes the merits of Milani's protest. Instead, they contend that the Board's ruling must be reversed because (1) the protest was untimely and, (2) in light of Milani's disqualification, it lacked standing to file the protest. We conclude that Milani's protest was untimely and, therefore, will reverse.

BACKGROUND

Relevant Regulatory Background

As relevant to this procurement, bid protests are governed by Title 21, Subtitle 10, Chapter 02 of the Code of Maryland Regulations ("COMAR"). Under COMAR

21.10.02.02, "[a]n interested party may protest to the appropriate procurement officer against the award or the proposed award of a contract subject to this title[.]" An "interested party" is "an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest." COMAR 21.10.02.01B(1).

If a protest is "based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals," it must "be filed before bid opening or the closing date for receipt of initial proposals." COMAR 21.10.02.03A. Any other protest "shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." COMAR 21.10.02.03B. "A protest received by the procurement officer after [these] time limits . . . may not be considered." COMAR 21.10.02.03C.

The Bid Solicitation

On October 24, 2017, SHA issued a public bid solicitation for a highway reconstruction contract in Calvert County, the second phase of a five-phase project. The purpose of the solicitation was to widen MD 2/4 between Fox Run Boulevard and MD 231 to add highway lanes, sidewalks, bike lines, and "signal upgrades at major intersections." SHA emphasized in the solicitation that because the project was considered high priority, it "desire[d] to expedite construction . . . and to reduce the time of construction." To achieve that goal, SHA would evaluate each bid by adding "the bidder's base bid for the work and . . . proposed schedule duration multiplied by a daily incentive/disincentive amount" of $16,200. Under this formula, "a base bid with a shorter schedule would be

evaluated more favorably than the same base bid with a longer schedule." As further incentive, if the recipient of the award finished the project early, it would receive a bonus of $16,200 for every day by which it beat the schedule, up to 30 days. On the other hand, if the project were not completed on time, the contract recipient would be penalized by $16,200 for every day of delay, with no cap.

One important factor driving the timing for completion of the project was the relocation of certain utility lines. Among the affected utility line owners was Verizon, which would need to "adjust and relocate 3964 ft. of underground cables and two manholes." Bid documents stated that "[t]he Verizon relocation and adjustment would be concurrent to construction work," and identified David Metcalfe as the point of contact at Verizon for prospective bidders.

SHA issued several addenda to the initial invitation for bids. As relevant to this appeal, on January 2, 2018, SHA issued "Addendum No. 5" to answer questions from prospective bidders. In response to one question about the timing of utility owners' relocation of utility lines, Addendum No. 5 stated:

> [T]he utility relocations should be accounted for in the contractor's time proposal. Utility relocations are scheduled to be completed by October 2018. The contractor shall coordinate directly with utility companies for a detailed schedule.

(Emphasis removed).

Eight bidders ultimately submitted bids, which SHA opened on January 18, 2018. Milani's bid contained the lowest total price—$27,711,900—and the shortest construction schedule—256 days. Total Civil was the apparent second-lowest bidder, with a price of

$29,614,481 and a construction schedule of 463 days, which was approximately 80% longer than Milani's.

Events Following the Bid Opening

On January 18, 2018, the day of bid opening, Milani's Project Manager, Silvanna R. Mendez, sent a letter by email to Mr. Metcalfe of Verizon in which she: (1) stated that Milani was the "apparent low bidder" on the project; (2) noted that the contract documents stated that "Verizon will relocate 3,964 feet of cable and 2 manholes by October 2018"; and (3) stated that Milani "would like to meet with Verizon to discuss this work[.]"[1] The letter identified copies sent to two SHA employees, who were identified by position as "ADE Construction" and "Utility Engineer." SHA's procurement officer was not copied on the letter.

Mr. Metcalfe responded the next morning, January 19, by email, stating, in full:

> I've read the attached letter and I believe the letter expresses some information and assumptions that may not be accurate.
>
> I do not believe Verizon will have our utility relocation efforts completed by the October of 2018 timeframe mentioned in your letter.
>
> I estimate our relocation work duration will take approx. 10-13[ ]months and some work can only begin AFTER grading is complete along Commerce Drive.
>
> Please call me to discuss in more detail.

Mr. Metcalfe's email copied the same two SHA employees as had Milani's letter.

[1] Milani had previously reached out to Mr. Metcalfe on January 4, 2018, but Mr. Metcalfe had not responded.

Later in the morning of January 19, a Milani Vice President, Ira Kaplan—who was not listed as a cc on either Milani's January 18 letter or Mr. Metcalfe's response—called Mr. Metcalfe. Mr. Kaplan later testified that he called Mr. Metcalfe that morning because he "wanted to know more about [ ] what [Mr. Metcalfe] said since we already had kind of a definitive end date in the contract[.]" The two men "briefly discussed Verizon's proposed work locations and estimated work durations," and Mr. Metcalfe reiterated that he was "concerned that Verizon could not meet the October completion schedule." The two scheduled an in-person "coordination meeting" to take place on January 24, which Mr. Kaplan promptly sought to confirm in a follow-up email. In the email, Mr. Kaplan professed optimism that "a good portion of the Verizon relocations do not interfere with our work, and, thus, will not hinder our ability to meet our project delivery date."

Mr. Metcalfe later testified that "the whole reason for the meeting" on January 24 was because Milani "had concerns" about the utility relocation completion schedule. Mr. Kaplan testified as well that after seeing the email, Mr. Metcalfe's statements "needed to be explored" to see "what that meant to us." Mr. Kaplan explained that because Addendum No. 5 "said October of '18" as the utility completion date, the email "was something that was worth exploring," and so Milani and Mr. Metcalfe "just really had to sit down . . . and go over the [Verizon] documents and [Milani's] documents, and proceed from that point." They "agreed to discuss this at a meeting," to "see what [Mr. Metcalfe] was talking about."

During the January 24 meeting, Mr. Metcalfe presented Milani representatives with Verizon's "most up-to-date [] relocation plans," and the parties discussed, among other things, "known conflicts with existing communication lines." Mr. Metcalfe explained during this meeting "that the earliest [Verizon] could relocate the [utility] lines was between February and April 2019." No SHA representatives were present at the meeting.

On January 25, seven days after bid opening, Total Civil filed a timely bid protest with SHA in which it alleged, among other grounds, that "Milani's Bid was non-responsive because Milani neither achieved the [Minority Business Enterprise ("MBE")] participation goal of 12%, nor requested a waiver thereof." According to the protest, in presenting its bid, Milani had improperly counted toward meeting the MBE goal a contractor who was "not certified to perform work as a 'regular dealer,' and therefore may not be counted" toward the goal. (Emphasis removed). Total Civil asked SHA to reject Milani's bid and award the contract to Total Civil as the resulting lowest responsive bidder. Milani, which received notice of Total Civil's bid protest a day later, never contested Total Civil's protest or its allegation that Milani's bid was nonresponsive.

On January 29, 2018, three days after Milani received notice of Total Civil's protest and ten days after it received Mr. Metcalfe's email, Milani filed its own bid protest. Milani alleged that the entire solicitation process was "materially defective," because "Addendum No. 5 informed bidders that utility relocations are scheduled to be completed by October 2018." This was a material misrepresentation, Milani contended, because it had learned that utility relocations "will not be complete until at least sometime between February and

April 2019." Milani claimed that because the inaccurate completion date "was relied upon by all bidders," SHA should reject all bids, cancel the solicitation, and solicit new bids.

In its bid protest, Milani neither mentioned nor provided a copy of Mr. Metcalfe's January 19 email. Instead, Milani addressed the timeliness of its protest as follows:

> Although this protest challenges the propriety of the [Invitation for Bids ("IFB")], it is timely because the defect did not become apparent until January 24, 2018. This protest is timely filed within seven (7) days after the basis for this protest was known or should have been known. On January 24, 2018, Milani had a meeting with Verizon to coordinate the relocation of Verizon's lines. In that meeting, Verizon explained that the earliest it could relocate the lines was between February and April, 2019. This directly contradicts the information provided in the IFB that the utility relocations would be completed by October 2018. Because this defect was not known until January 24, 2018, this protest is timely under COMAR 21.10.02.03(B).

Having failed to disclose the January 19 email, Milani did not address the information provided in it.

On February 15, 2018, SHA decided both Total Civil's and Milani's bid protests. First, SHA sustained Total Civil's protest, thus rejecting Milani's bid as nonresponsive. Milani did not appeal that decision, as a result of which SHA awarded the contract to Total Civil. Total Civil received the notice to proceed with the contract on April 24, 2018, and began work shortly thereafter.

Second, SHA denied Milani's bid protest on two grounds. SHA found that because Milani's bid had been rejected as nonresponsive, it lacked "standing to protest the award or request re-solicitation of this contract." Additionally, SHA determined that the protest was untimely. SHA stated that the utility relocation timeframe included in Addendum No.

5 had been based on communications with the various utilities and that SHA lacked "any indication from utilities that the October 2018 date was not feasible." (As noted, Milani had not provided a copy of the January 19 email as part of its bid protest.) SHA interpreted Milani's protest as an attempt to shift the risk of a post-bid-opening scheduling change from the contractor to SHA. That, SHA determined, was "a protest based upon alleged improprieties in a solicitation that [we]re apparent before bid opening," and so was required to be filed before bid opening pursuant to COMAR 21.10.02.03A.

The Board of Contract Appeals Hearing

Milani appealed SHA's decision to the Board. Milani contended that it had standing to file the bid protest as "a prospective bidder on a resolicitation." Regarding timeliness, Milani asserted that because the basis for its protest was not revealed until after bids were opened, its protest was governed by COMAR 21.10.02.03B, which provides that "bid protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." Milani contended that it neither knew nor should have known of the basis for its bid protest until January 24, 2018 at the earliest and, therefore, that its protest was timely.

The Board conducted a two-day hearing in November 2018, during which it received into evidence, among other things, Mr. Metcalfe's January 19 email and communications preceding and following it. In addition, the Board heard testimony from Mr. Metcalfe; two witnesses employed by Milani, including Mr. Kaplan; and three witnesses employed by SHA. As relevant to the Board's decision regarding timeliness, in

addition to hearing testimony from Messrs. Metcalfe and Kaplan about their communications on January 19 and 24, the Board considered testimony from the SHA employees to the effect that: (1) the engineer who had been copied on Mr. Metcalfe's January 19 email neither informed Milani that the utility completion date contained in the contract documents was incorrect nor circulated the email to anyone else at SHA; (2) the October 2018 completion date contained within Addendum No. 5 was never discussed or confirmed by SHA before the addendum was issued; and (3) SHA had no reason to believe the completion date was incorrect until September 2018, when "unforeseen" problems and delays gave notice that the date would not be met.

In February 2019, the Board issued a written decision sustaining Milani's appeal. The Board found that the solicitation was defective because "Addendum [No. 5] . . . contained erroneous, unverified scheduling information," upon which bidders relied. Regarding timeliness, the Board made the following findings:

- Upon receiving the January 18 letter from Milani, Mr. Metcalfe "was 'shocked' to see that Verizon's completion date was listed as October 2018" because he had stated repeatedly at meetings attended by SHA representatives "that this was not a reasonable expectation. Prior to receiving this email, Mr. Metcalfe had never committed to a start date because Verizon had not yet finalized its utility relocation plans."

- After receiving the January 19 email from Mr. Metcalfe, and then speaking with Mr. Metcalfe (as discussed above), Mr. Kaplan sent a follow-up email stating that "[w]e believe a good portion of the Verizon relocations do not interfere with our work, and, thus, will not hinder our ability to meet our project delivery date. We also believe we will be able to work concurrently in other areas of the project, and we would like to plan and coordinate this work with you."

- At the time Mr. Kaplan sent that follow-up email, Milani "reasonably believed that it could take steps to facilitate the conduit pathway installation for Verizon and thereby expedite the completion of Verizon's work by October 2018."

- At the January 24 meeting, Mr. Metcalfe provided Verizon's utility relocation plans, which was the first time Milani had seen them. Milani and Mr. Metcalfe discussed possible workarounds, but "Mr. Metcalfe informed Mr. Kaplan that Verizon's utility relocation work would take 60 days for procurement, 60 days for conduit installation, and eight (8) to ten (10) months for cable splicing and cutover, for a total of between 12 and 14 months." Although they discussed possible alternative scenarios in which Milani might be able to assist Verizon, "Mr. Metcalfe responded that Verizon would need to do all of its own work."

- "At this meeting [on January 24, Milani] obtained sufficient information to put [it] on inquiry notice that it needed to investigate whether [SHA]'s representation in the IFB regarding the utility completion date was correct. Therefore, as of January 24, 2018, [Milani] should have known that it had the basis for a potential bid protest regarding [SHA]'s misrepresentation of the utility relocation completion date in the IFB."

- On January 25, Mr. Kaplan sent Mr. Metcalfe an email summarizing the meeting "and stating that 'we are confident that we will be able to coordinate our work with yours and meet our construction goals.'"

- On January 27, after further study of the Verizon plans, Milani sent a letter to Mr. Metcalfe in which it stated that it "agreed that the Verizon lines conflicted with new work and would have to be relocated."

- Two days later, on January 29, in a meeting with SHA, Milani stated "that Mr. Metcalfe had informed them that Verizon's work would not be completed until early 2019," and "suggested that the Project should be re-solicited because of the erroneous information contained in the IFB. The Procurement Officer ("PO") responded that they would 'look into it' and advised [SHA] to file a bid protest."

- Meanwhile, two bid protests had been filed to contest Milani's bid. First, on January 23, bidder Rustler Construction, Inc. filed a protest in which it contended that Milani's "proposed completion timeframe of 256 calendar

days could not possibly be met." Second, on January 25, Total Civil filed its protest, which we have already described.[2]

- Milani filed its protest on January 29, 2018.

In addressing whether Milani's bid protest was timely pursuant to COMAR 21.10.02.03B, the Board identified the relevant question as

> whether [Milani's] Protest was filed within seven (7) days of when [Milani] knew, or should have known, the basis for its Protest, namely, that [SHA's] representation in the IFB, that Verizon's work would be completed by October 2018, was a false representation of a material fact that rendered the IFB and evaluation of bids submitted in response thereto defective.

In analyzing that question, the Board applied the discovery rule, as set forth in *Poffenberger v. Risser*, which "contemplates actual knowledge that is express cognition, or awareness implied from 'knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry (thus, charging the individual) with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued.'" 290 Md. 631, 637 (1981) (quoting *Feritta v. Bay Shore Dev. Corp.*, 252 Md. 393, 402 (1969)). Under that rule, the Board concluded, its charge was "to determine when actual knowledge of the basis of [Milani's] Protest *should be imputed or implied* thereby putting Appellant on inquiry notice requiring an investigation."

The Board ultimately determined that Milani was not on inquiry notice of the basis for its protest until its meeting with Mr. Metcalfe on January 24 and, therefore, that its

[2] The Rustler bid protest, which also alleged that Total Civil was a nonresponsive bidder, was subsequently denied. Two other protests were later filed by other bidders who contended that the October 2018 completion date was unrealistic and false. None of those protests is at issue in this appeal.

protest was timely filed on January 29. The Board began its analysis with what it called the "undisputed fact . . . that both [SHA] and [Milani] continued to believe that Verizon's work could be completed by October 2018, even after they received Mr. Metcalfe's email stating that he believed it could not." (Emphasis removed). In other words, the Board determined that because SHA continued to believe that the work could be completed by October 2018 until well after Milani filed its protest, SHA was "estopped from charging [Milani] with knowledge of facts that [SHA] itself did not believe."

The Board then "conclude[d] that it was not until the meeting on January 24, 2018, that [Milani] learned sufficient facts from Mr. Metcalfe that put [it] on inquiry notice that it needed to investigate further." The Board found that Milani began its investigation on that date, and that "as of January 19, 2018, [Milani] reasonably believed that it could work in conjunction with Verizon and thereby assist Verizon in completing its work by October 2018." As a result, the Board determined that Milani had timely filed its protest.

Turning to the merits,[3] the Board concluded that SHA had "willfully ignored information available to it that clearly contradicted the scheduling information it provided to bidders in Addendum No. 5," and that the procurement officer's "refusal to reject all bids and reissue the solicitation with correct and reliable scheduling information that was within [SHA's] custody, control, and possession was arbitrary, capricious, and an abuse of his discretion."

[3] After resolving the timeliness issue, the Board addressed—and rejected—Milani's contention that SHA lacked authority to award the contract to Total Civil pending resolution of these proceedings. That ruling is not at issue in this appeal, so we do not address it further.

Only after resolving the merits of Milani's protest did the Board turn to whether Milani had standing to bring the protest in the first place. SHA and Total Civil had argued that Milani lacked standing because it was a nonresponsive bidder and, therefore, would not be in position to be awarded the contract even if its protest succeeded. Milani argued that cases standing for that proposition were inapposite because it was asking for the entire bid to be canceled and resolicited, not just for the disqualification of another bidder. The Board ultimately concluded that it was

> unwilling to turn a blind eye to the fact that the solicitation here was defective due to [SHA's] misrepresentation of a material fact that directly affected all bidders and made it impossible to conduct a fair and meaningful evaluation of the bids. . . . Therefore, in order to protect the integrity of the procurement process and to ensure fair and equitable treatment of all competitors, we believe it is necessary to create a narrow exception to the general rule of standing: where an IFB is found, after bid opening but before contract award, to contain a misrepresentation of material fact that an agency knows, or should know, due to information within its possession, is not correct and is likely to be relied upon by bidders in preparing their bids, any bidder that submitted a bid in response to the defective IFB is deemed to be an interested party under COMAR 21.10.02.01B(1) and has standing to protest the material misrepresentation in the IFB and request that all bids be rejected and the IFB reissued with correct information.

Based on that "exception to the general rule of standing," the Board concluded that Milani was an interested party and upheld its bid protest.

SHA and Total Civil petitioned for judicial review of the Board's decision in the Circuit Court for Anne Arundel County. Following a hearing, the circuit court issued an order and opinion affirming the decision of the Board. This timely appeal followed.

DISCUSSION

"In reviewing the decision of an administrative agency, this Court 'look[s] through' the decision of the circuit court and directly evaluates the decision of the agency." *Motor Vehicle Admin. v. Medvedeff*, 466 Md. 455, 464 (2019) (quoting *Brutus 630, LLC v. Town of Bel Air*, 448 Md. 355, 367 (2016)). Our "role . . . is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Donlon v. Montgomery County Pub. Schs.*, 460 Md. 62, 74 (2018) (quoting *Motor Vehicle Admin. v. Shea*, 415 Md. 1, 14 (2010)). "[T]he agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence and to draw inferences from that evidence." *Id.* Nonetheless, "it is always within our prerogative to determine whether an agency's conclusions of law are correct." *Bd. of Liquor License Comm'rs v. Kougl*, 451 Md. 507, 513-14 (2017) (quoting *Adventist Health Care v. Md. Health Care Comm'n*, 392 Md. 103, 120-21 (2006)). "If an agency's conclusion is based on an error of law, it will not be upheld." *Kougl*, 451 Md. at 514.

In reviewing an agency's decision under the substantial evidence test, we consider "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Md. Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005) (quoting *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 512 (1978)). We "review the agency's decision in the light most favorable to it," *Noland*, 386 Md. at 571 (quoting *CBS v.*

Comptroller, 319 Md. 687, 698 (1990)), and "defer to the agency's fact-finding and drawing of inferences if they are supported by the record," *Noland*, 386 Md. at 571.

MILANI'S BID PROTEST WAS UNTIMELY.

The Board properly framed the timeliness question before it as when Milani was on inquiry notice of the basis for its bid protest: on January 19, as SHA and Total Civil contend, or on January 24, as Milani now contends, and as the Board found. Based on undisputed facts in the record, we conclude that Milani was on inquiry notice of the basis for its protest as of January 19, 2018 and, therefore, its protest was untimely. Accordingly, we will reverse the judgment of the circuit court and remand for that court to issue an order reversing the Board's decision.

A. The Seven-Day Limitations Period for Filing a Bid Protest Is Strictly Enforced.

Under COMAR 21.10.02.03B, "protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." Protests that are not brought within this time period "may not be considered." COMAR 21.10.02.03C. The Court of Appeals has described the limitations period as a "strict timeliness requirement," which is enforced inflexibly because "[a]llowing an extended period for protests to be brought forth would hinder the government's ability to obtain the needed item or service (and would increase costs for developers and contractors interested in government contracts)." *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 551, 606 (2014). Moreover, "comply[ing] strictly with the . . . requirements of the regulation" protects a bidder's "interest in knowing promptly (and within the time limit established by

the regulation) . . . whether he may be called upon to defend his bid." *Kennedy Temporaries v. Comptroller of the Treasury*, 57 Md. App. 22, 40-41 (1984). Indeed, we have found that a procurement officer has "no authority in the law . . . to waive [the timeliness] requirement," because the regulation is "externally imposed pursuant to clear statutory authority,"[4] and such "power would be inconsistent with the whole thrust and scheme of the law." *Id.* at 40.

Past decisions of the Board reflect the "principle firmly established" that the Board also will strictly enforce the seven-day requirement. *See, e.g.*, *Pessoa Constr. Co. v. MAA*, MSBCA No. 2656 at 11 (2009) (citing Board decisions strictly construing the limitations period). Indeed, as the Board has observed, noncompliance with the "hard and fast" limitations period has been "the sole ground for dismissal in innumerable appeals," *Gilford Corp.*, MSBCA Nos. 2871 & 2877 at 9 (2014), and "th[e] Board has strictly enforced this jurisdictional requirement, even if the [bid] protest was only a day late," *Aunt Hattie's Place, Inc.*, MSBCA No. 2852 at 4 (2013); *see also, e.g.*, *Affiliated Computer Servs.*, MSBCA No. 2717 at 3 (2010) ("Board precedent has repeatedly emphasized the strictly construed seven (7) day limitation for noting a bid protest."); *Initial Healthcare*, MSBCA No. 2267 at 4 (2002) (observing that the limitations period is "mandatory" and "cannot be waived by a State agency"). With that background, we turn to the timeliness of Milani's protest.

[4] Section 15-217(b) of the State Finance and Procurement Article (Repl. 2015; Supp. 2019), which requires that "a protest or contract claim shall be submitted within the time required under regulations adopted by the primary procurement unit responsible for the procurement," provides the statutory authority for the regulations at issue in this appeal.

B. Milani Had Inquiry Notice of the Basis for Its Appeal as of January 19, 2018.

To determine when a limitations period begins to run, we typically invoke the discovery rule, which is "applicable in all civil actions." *Hecht v. Resolution Tr. Corp.*, 333 Md. 324, 335 (1994). Under the discovery rule, a claim "accrues when the claimant in fact knew or reasonably should have known of the wrong." *Poffenberger*, 290 Md. at 636. The rule has two prongs. First, "a plaintiff must have notice of the nature and cause of his or her injury" before the cause of action can accrue. *Windesheim v. Larocca*, 443 Md. 312, 327 (2015) (quoting *Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 96 (2000)). Such notice includes both (1) actual notice, which "embraces not only knowledge, but also that which is communicated by direct information, either written or oral, from those who are cognizant of the fact communicated," *Windesheim*, 443 Md. at 327 (quoting *Poffenberger*, 290 Md. at 636-37), and (2) implied or inquiry notice, which is "circumstantial evidence from which notice may be inferred," *Windesheim*, 443 Md. at 327 (quoting *Poffenberger*, 290 Md. at 637). The discovery rule thus "may be satisfied if the plaintiff is on 'inquiry notice.'" *Dual, Inc. v. Lockheed Martin Corp.*, 383 Md. 151, 167-68 (2004) (quoting *Am. Gen. Assur. Co. v. Pappano*, 374 Md. 339, 351 (2003)).

"Inquiry notice is triggered when the plaintiff recognizes, or reasonably should recognize, a harm—not when the plaintiff can successfully craft a legal argument and not when the plaintiff can draft an unassailable and comprehensive complaint." *Fitzgerald v. Bell*, 246 Md. App. 69, 94 (2020) (quoting *Estate of Adams v. Cont'l Ins. Co.*, 233 Md. App. 1, 32 (2017)). In other words, inquiry notice *begins* when a claimant is aware of facts

that would cause a reasonable person to make further investigation, not when the investigation has concluded or the claimant has become convinced of the truth of the factual allegations underlying the claim. *See Pappano*, 374 Md. at 356 ("[T]he limitations period is not tolled until [plaintiff's] investigation bears fruit; it runs from the time she was on inquiry notice."); *Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435, 451 (2000) ("The statute of limitations . . . begins to run when the plaintiff should know that he might have a potential claim against another person, not when the plaintiff develops a full-blown theory of recovery." (quoting *Tanyel v. Osborne*, 441 S.E.2d 329, 330 (S.C. Ct. App. 1994))). "[A] claimant will be charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation, regardless of whether the investigation has been conducted or was successful." *Lumsden*, 358 Md. at 452.

The second prong of the discovery rule implicates "the nature of the knowledge the injured party must possess before the cause of action accrues," *State v. Copes*, 175 Md. App. 351, 375 n.12 (2007), and examines whether "after a reasonable investigation of facts, a reasonably diligent inquiry would have disclosed whether there is a causal connection between the injury and the wrongdoing," *id*. (quoting *Georgia-Pacific Corp. v. Benjamin*, 394 Md. 59, 90 (2006)).

In applying the discovery rule, the determination of when a party has notice may be a question "solely [ ] of law, solely [ ] of fact, or one of law and fact." *Estate of Adams*, 233 Md. App. at 37 (quoting *Poffenberger*, 290 Md. at 634). Where the determination "hinges on the resolution of disputed facts, . . . it is for the fact-finder to decide." *Moreland*

v. Aetna U.S. Healthcare, 152 Md. App. 288, 296 (2003); *see also, e.g.*, *Baysinger v. Schmid Prods.*, 307 Md. 361, 367 (1986) ("Whether a reasonably prudent person should [] have undertaken a further investigation is a matter about which reasonable minds can differ."); *DeGroft v. Lancaster Silo*, 72 Md. App. 154, 173-75 (1987) (declining "to conclude, as a matter of law, that an ordinary, prudent person would have conducted further investigation" of negligent construction, as that was a "matter[] for the trier of fact").

However, "[w]hen a party is on inquiry is not always a question of fact." *Estate of Adams*, 233 Md. App. at 37. Because "an inquiry notice analysis hinges upon what the plaintiffs can know and whether their actions are reasonable," we may determine the date that an appellant was put on notice as a matter of law when there are "no disputed material facts a [trier of fact] could find that would change that the appellants [had] inquiry notice." *Id.* at 39-40; *see also Moreland*, 152 Md. App. at 298 ("[T]he facts material to when the appellants' causes of action . . . accrued were not in dispute. Accordingly, the accrual date of the causes of action was not a factual issue for resolution by a fact-finder; rather, it was a legal issue for the court to decide.").

Here, undisputed facts in the record establish that Milani was on inquiry notice of the basis for its bid protest as of January 19, 2018. The basis for the bid protest, as Milani summarized in the opening paragraph of that protest, was:

> Addendum No. 5 informed bidders that utility relocations are scheduled to be complete by October 2018. Milani, however, has learned that utility relocations will not be complete until at least sometime between February and April 2019.

The two facts that supplied the basis for the protest were thus: (1) the contract said utility relocations would be complete by October 2018; and (2) utility relocations were not scheduled to be complete until early 2019. For purposes of inquiry notice, the question is when Milani was aware of circumstances that should have caused a reasonable person to investigate further.[5]

Two undisputed facts establish Milani's knowledge of such circumstances. First, Addendum No. 5 expressly states that all utility relocations would be completed by October 2018. Milani does not dispute that it was aware of that representation well before January 19. Indeed, Milani's reliance on that representation in creating its aggressive schedule for completion of the project is at the core of its protest. Second, on January 19, Mr. Metcalfe sent and Milani received an email in which Mr. Metcalfe, on behalf of Verizon, stated that he "d[id] not believe Verizon will have our utility relocation efforts completed by the October of 2018 timeframe[.]" In light of the acknowledged importance of the timing of utility relocations to this project, and the fact that the contract shifted to the contractor all risk of delay in the schedule, any reasonably prudent person receiving that information would have understood the need to investigate, as Milani in fact did.

We do not find persuasive the reasons the Board provided for its contrary decision. Notably, the Board's decision never directly explains why the January 19 email would not

[5] The second prong of the discovery rule, which examines whether "after a reasonable investigation of facts, a reasonably diligent inquiry would have disclosed whether there is a causal connection between the injury and the wrongdoing," *Copes*, 175 Md. App. at 375 n.12 (quoting *Georgia-Pacific Corp.*, 394 Md. at 89), is not at issue. It is undisputed that Milani's investigation uncovered the facts to support its claim.

have put a person of ordinary prudence on notice of a need for investigation. Instead, the Board based its decision on its findings that: (1) even after receiving Mr. Metcalfe's January 19, 2018 email, both SHA and Milani believed that Verizon's work would be complete by October 2018; and (2) only as of the meeting of January 24, 2018 did Milani have access to the Verizon documents and plans that proved that its work would not be complete by October 2018.

With respect to the first point, the Board placed great emphasis on SHA's subjective belief—which some agency personnel apparently held until September 2018—that the utility relocations would be complete by October 2018. The Board held that in light of that subjective belief, SHA was "estopped from charging [Milani] with knowledge of facts that [SHA] itself did not believe." There are several problems with that analysis. First, the Board failed to identify any basis for its legal conclusion that SHA was "estopped" from arguing that Milani's protest was untimely. Indeed, the Board's decision does not even reference the elements of equitable estoppel, which "essentially consists of three elements: voluntary conduct or representation, reliance, and detriment." *Steele v. Diamond Farm Homes Corp.*, 464 Md. 364, 381 (2019) (quoting *Lipitz v. Hurwitz*, 435 Md. 273, 291 (2013)). The Board's finding of "estoppel" was based entirely on SHA's subjectively held belief. The Board made no finding that SHA made a representation to Milani between January 19 and 26 (the time period in which a timely bid protest could have been filed) about the content of Mr. Metcalfe's email, much less that Milani relied on any such representation to delay filing its bid protest. Nor have we identified any evidence in the

record that might support such findings. To the contrary, the record reflects that Milani first brought a concern about the utility relocation schedule to SHA's attention on January 29, and that SHA told Milani that day that it should file a bid protest.

Second, SHA's subjective belief is simply irrelevant to whether a person of ordinary prudence in Milani's position would have investigated the assertion in Mr. Metcalfe's email. Even if SHA erroneously chose to believe that Verizon would complete its work by October 2018, that would not entitle Milani to do the same, especially when the law imposed on Milani the duty to act within seven days. Indeed, if the rule really were that SHA cannot challenge the timeliness of any bid protest that is filed prior to SHA itself believing that the allegations on which the protest was founded are meritorious, the timeliness requirement would be rendered meaningless for contested bid protests. Inquiry notice occurs when a prospective bid protester has knowledge of facts that would cause a person of ordinary prudence to investigate and learn the basis for the claim, not when the party asserting the timeliness defense actually believes those facts to be true.[6]

Third, although the Board places importance on Milani's subjective belief that it could have assisted Verizon in accelerating the timetable for its work, that subjective belief is also irrelevant to whether a person of ordinary prudence in its position would have investigated the assertion in Mr. Metcalfe's email. The question for inquiry notice is not

[6] It is also notable that although the Board credits SHA's subjective belief as being meaningful regarding the timeliness of Milani's bid protest, the Board elsewhere concludes that SHA's subjective belief was entirely unfounded. In light of that conclusion, it is especially odd to use SHA's subjective belief as an indicator of what Milani should have known.

whether Milani believed Mr. Metcalfe's statements to be true; the question is whether the fact that Mr. Metcalfe said it gave Milani sufficient information that a reasonably prudent person would have investigated whether it was true, and so should be charged with notice of what such an investigation would have uncovered. We conclude, as a matter of law, that it did.

In addition to its reliance on SHA's and Milani's subjective beliefs as of January 19, 2018, the Board also concluded that Milani was not on inquiry notice of the basis for its bid protest until January 24, 2018, because it was only on that date that Milani had access to the Verizon documents and plans that proved that Verizon's work would not be completed by October 2018. We find that analysis to be similarly flawed. As an initial matter, the Board's conclusion that Milani can be held to have been on inquiry notice as of January 24 is logically inconsistent with its conclusion that SHA's subjective belief precludes a finding that Milani was on inquiry notice as of January 19. If SHA's subjective belief did not change between January 19 and 24, it is difficult to understand why the effect of that belief would be different on those dates.

More importantly, the primary support the Board cites for its conclusion that it was only on January 24 that Milani "learned sufficient facts from Mr. Metcalfe that put [Milani] on inquiry notice that it needed to investigate further," is that Milani did not actually start its investigation until January 24. As we have discussed, however, inquiry notice occurs when a person of ordinary prudence would know that an investigation is necessary, not when the claimant in fact began investigating. *See Pappano*, 374 Md. at 351 ("[T]he

commencement of the limitations period is not postponed until the conclusion of the diligent investigation, but continues to run during that period."); *see also Initial Healthcare*, MSBCA No. 2267 at 5 (2002) (rejecting the idea that "the time for filing a protest should start running whenever the protestor decides to make its investigation").

Moreover, the Board's finding that the January 24 meeting was not part of Milani's investigation into Mr. Metcalfe's assertion on January 19 is not supported by substantial evidence. The Board goes to some effort to characterize the January 24 meeting as simply a meeting that Milani had requested before receiving Mr. Metcalfe's January 19 email, which was intended only "to discuss the work on the Project and to obtain Verizon's plans and documents." To the extent that the Board implies that the parties did not intend the meeting to address squarely Milani's concerns resulting from Mr. Metcalfe's email and his subsequent statements to Mr. Kaplan on the morning of January 19,[7] neither the Board nor Milani has pointed to any support in the record for that finding. To the contrary, both Mr. Metcalfe and Mr. Kaplan testified that a discussion of the timeline in light of the assertion in Mr. Metcalfe's email was at the very core of that meeting. To the extent that the Board made a finding of fact that the January 24 meeting was not part of an investigation into the

[7] The significance of the information in Mr. Metcalfe's email to Milani also appears evident from the fact that Mr. Kaplan, who was not listed as a cc on either Milani's January 18 communication or on Mr. Metcalfe's January 19 response, promptly reached out to Mr. Metcalfe by phone later that morning to discuss it. That Mr. Kaplan followed up later that day with an email stating optimism that Verizon's work "will not hinder our ability to meet our project delivery date" does not diminish Milani's prompt attention to the information or, more importantly, whether a reasonably prudent person in Milani's position would have investigated that information.

assertion in Mr. Metcalfe's email, it is not supported by substantial evidence and is clearly erroneous.

Ultimately, the only material change between January 19 and 24, 2018 was that Milani obtained proof that Mr. Metcalfe's assertion on January 19 was actually true. But that is how inquiry notice is supposed to work: A claimant receives information that would provoke a reasonable person to investigate, the claimant investigates, and through that investigation it learns that it has a claim. Here, neither the fact that Milani did not ultimately conclude that Mr. Metcalfe's statements were true until sometime after January 24, nor the fact that Milani received notice of Total Civil's protest of Milani's bid only on January 26, alter the fact that Milani was on inquiry notice of the basis for its protest on January 19, and was therefore required to submit its bid protest by January 26.

Prior Board decisions appear uniformly to support this conclusion. In *Appeal of Initial Healthcare, Inc.*, MSBCA No. 2267 (2002), the claimant came in as the higher of two bids received for a contract, but then learned that the lower bid had a problem and had been rejected. *Id.* at 2. The claimant was later informed that the State agency was considering allowing the other bidder to fix the problem and so be eligible for the award. *Id.* at 5. More than seven days later, the claimant learned that the lower bidder had an additional problem—it was not qualified to do business in Maryland—and the claimant filed a protest. *Id.* at 3. The Board held that the protest was untimely because as soon as the claimant learned that the contract might be awarded to the other bidder, "it was obligated promptly to make whatever investigation it chose into [the other bidder's]

corporate status." *Id.* at 5. That was so even though it does not appear that the claimant had any warning that the other bidder's corporate status was an issue. The Board expressly rejected the claimant's argument that its time to protest should have run from when it began to investigate the other bidder's corporate status, holding that it was obligated to investigate any and all possible issues it might want to raise as soon as it "ha[d] reason to believe the contract will be awarded to someone else." *Id.*

Appeal of Clean Venture, Inc., MSBCA No. 2198 (2000), is also instructive. There, a State agency received three bids for a project. *Id.* at 2. When the procurement officer opened the bids, the officer did not notice that one of the bidders had failed to comply with instructions regarding pricing and had identified some of its charges in an incorrect place on the document. *Id.* Having failed to notice the additional charges, the procurement officer erroneously identified the other bidder, rather than the claimant, as the low bidder. When the claimant later reviewed the bidding sheets and saw the error, it promptly filed a bid protest. *Id.* at 3. Although the claimant filed the protest within seven days of when it discovered the problem, it was more than seven days from when the bids had been opened. *Id.* at 4. On that basis, the agency denied the protest as untimely. *Id.* On appeal, the Board agreed with the agency's decision on the ground that the claimant could have reviewed the bid documents on the date that the bids were opened, and so was charged with knowledge of what it would have learned had it done so. *Id.* at 6. The Board rejected the claimant's argument that "the failure of the Procurement Officer to notice and read aloud the [additional pricing information] excuses the [claimant] from not requesting to see the bid

at bid opening." *Id.* Although the Board concluded that the agency had clearly erred in the way it scored the bids, and that the procurement officer should have recognized the mistake at the time it opened the bids, it held that it was nonetheless required to deny the protest as untimely. *Id.* at 7-8.

The Board's ruling in *Appeal of Juice Co., Inc.*, MSBCA No. 2387 (2004), was to similar effect. There, the claimant, which submitted the lowest bid for a contract, filed a protest after its bid was rejected as nonresponsive. *Id.* at 1. While that protest was pending, the State agency made an award of the contract to another bidder and provided public notice of the award. *Id.* at 2. After the Board later sustained the claimant's protest, the agency sent the claimant formal notice that it had already awarded the contract to the other bidder, which caused the claimant to file another protest. *Id.* at 3. The agency denied the second protest as untimely, and the Board affirmed on the ground that the protest should have been filed at the time the Board made the award to the other bidder, even though the original protest was still pending. *Id.* at 4. The Board explained that "when a bidder is on actual or constructive notice of facts which *might* constitute grounds for protest the bidder . . . must protest within seven days after the date of receiving notice of those facts." *Id.* at 3 (emphasis added); *see also Appeal of Gilford Corp.*, MSBCA Nos. 2871 & 2877 at 9, 11 (2014) (in rejecting bid protest on timeliness grounds, characterizing the seven-day protest period as "a hard and fast rule that frequently arises in bid protests" and stating that it "is a strict and unforgiving rule").[8]

[8] Milani claims support from the Board's decision in *Eisner Communications*, MSCBA Nos. 2438, 2442 & 2445 (2005), which Milani cites for the proposition that

Here, Mr. Metcalfe's email of January 19, 2018 provided Milani with notice that the schedule for utility relocation identified in Addendum No. 5 might not be accurate, which sufficed to place it on inquiry notice and begin the seven-day period to file a bid protest. In *Initial Healthcare* and *Clean Venture*, the claimants were never directly provided with notice of the basis for their bid protests, but were nonetheless charged with inquiry notice as soon as the information on which they based their protest could have been discovered. Here, by contrast, Mr. Metcalfe told Milani explicitly on January 19 that its utility relocation schedule was different from that included in Addendum No. 5. Moreover, we know that Milani considered that January 19 email to be "substantial evidence that Verizon cannot complete its utility relocations by the stated October 2018 date," because Milani affirmatively claimed as much in the Notice of Appeal it filed with the Board.[9]

In sum, we conclude that Milani's bid protest was not timely and that the Board's decision upholding that protest must be reversed. In so holding, we do not sanction SHA's underlying conduct, but the rules that govern the timeliness of bid protests do not provide for exceptions where the Board would prefer a different result. An untimely protest "may not be considered." COMAR 21.10.02.03C. Because we hold that Milani's protest was untimely, we need not address SHA's and Total Civil's alternative contention that Milani

factual disputes regarding timeliness of a bid protest must be resolved in favor of the claimant. However, as we have explained, the material facts here are undisputed. There are thus no ambiguities to construe in Milani's favor.

[9] Milani made that point in a passage addressing an issue other than timeliness. Nonetheless, Milani's admission makes its failure to reference the January 19 email in its bid protest that much more curious.

lacked standing to file its appeal. We will reverse the judgment of the Circuit Court for Anne Arundel County and remand this case so that court can enter an order reversing the decision of the Board.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. CASE REMANDED FOR ENTRY OF AN ORDER REVERSING THE DECISION OF THE BOARD OF CONTRACT APPEALS. COSTS TO BE PAID BY APPELLEE.