

Circuit Court for Montgomery County  
Case No. 399804

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1684

September Term, 2017

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FORT MYER CONSTRUCTION  
CORPORATION

v.

MARYLAND NATIONAL CAPITAL PARK  
& PLANNING COMMISSION, *et al.*

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Leahy,  
Beachley,  
Battaglia, Lynne A.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Leahy, J.

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Filed: April 29, 2019

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Two sophisticated parties, Fort Myer Construction Corp. (“Fort Myer”) and the Maryland-National Capital Park and Planning Commission (the “Commission”) entered into a contract in 2008 for the construction of a pedestrian bridge in Montgomery County. The contract set its term from the date of execution until the Commission made final payment. A delay in construction (which Fort Myer alleges to have been caused by the Commission and its design firm, URS, Corp. (“URS”)) left Fort Myer unable to substantially complete its work within the time allowed by the contract. As a result, the Commission assessed deductions and liquidated damages. Fort Myer protested the Commission’s decision, which was deemed denied in April 2012. In October 2012, Fort Myer sued the Commission, seeking \$876,822.03 in damages and a declaration that the Commission wrongfully retained liquidated damages. The Commission answered in February 2013, denying that Fort Myer was entitled to any relief. The circuit court eventually dismissed Fort Myer’s complaint without prejudice. Meanwhile, a motion for sanctions filed against Fort Myer by URS and the Commission proceeded and ultimately reached the Court of Appeals. *URS, Corp. v. Fort Myer Constr. Corp.*, 452 Md. 48, 53 (2017).

In January 2015, nearly three years after its initial complaint, Fort Myer again sued the Commission in the Circuit Court for Montgomery County—this time seeking only \$770,264.11 in damages plus a declaration that Fort Myer would be entitled to an additional \$62,092.90 as “final payment” under the contract after the litigation. URS moved to intervene and, along with the Commission (collectively, “Appellees”), sought to dismiss Fort Myer’s claims as barred by the doctrine of sovereign immunity. They alleged that the

claim was brought more than one year after it arose and/or the contract was complete, as required by Maryland Code (1984, 2014 Repl. Vol.), State Government Article (“SG”) §§ 12-201 and 12-202. Fort Myer countered that the contract was not yet complete because final payment was still outstanding. The circuit court dismissed the case. Fort Myer appealed and presents one question for our review:

“Did the court err in barring Fort Myer’s claims based on the Commission’s sovereign immunity where contract completion still has not occurred based on the definition of contract completion as drafted by the Commission?”

We hold that sovereign immunity barred Fort Myer’s claim regardless of whether the contract required the Commission to issue final payment to complete the contract. The Commission repudiated its obligation to make any further payment in its answer to Fort Myer’s original complaint in February 2013. This repudiation, if wrong, amounted to a breach of the *entire* Contract. Accordingly, SG § 12-202 required Fort Myer to bring its claim against the Commission within one year of that answer. Because it failed to do so, the circuit court was correct to dismiss its complaint.

## **BACKGROUND**

### **A. Invitation for Bids & Contract Execution**

In response to an invitation for bids (“IFB”) by the Commission for sealed bids to construct the Rock Creek Trail Pedestrian Bridge and Trail Approaches (the “Bridge”), Fort Myer submitted a bid on May 5, 2008, offering to perform the work and execute a contract. The Commission awarded the contract to Fort Myer. The Executive Director of the Commission executed the contract (the “Contract”) on November 16, 2008. The

Commission contracted separately with URS to design the Bridge. *URS Corp.*, 452 Md. at 53.

The Contract set its term “from the date of execution by the Executive Director until the Commission makes final payment as provided in Section 6.12 of the General Conditions (or 90 days after the Commission’s acceptance of the work and the Commission makes final payment).” The Contract incorporated the General Conditions, along with the IFB, four addenda to the IFB, and all documents submitted by Fort Myer in response to the IFB. The Contract provided that in case of any conflict, the Contract itself took precedence over all other documents.

The Special Conditions contained within the IFB provided that Fort Myer would perform and complete the work in 640 consecutive calendar days from the date the Commission specified in its Notice to Proceed; in exchange, the Contract provided that the Commission would pay Fort Myer “a maximum amount not to exceed \$6,040,076.32 upon satisfactory completion of the work[.]” The Special Conditions further provided that the Commission could assess liquidated damages of \$2,500 per day “for each calendar day delay after the construction completion date until the final physical completion of the work and its acceptance by the Commission.”

### **B. Fort Myer’s Work Under the Contract**

The Bridge, which is now complete, consists of two curved steel girders on concrete piers. Fort Myer began its assembly of the steel girders on September 29, 2009, and about two weeks later, the Commission approved Fort Myer’s erection plan, allowing Fort Myer to begin placing the girders onto the piers. During construction on October 12, the bridge

experienced “steel-beam uplift” — meaning, the girders would not rest on the piers in a manner consistent with the Contract’s depiction of the completed Bridge. Fort Myer would later complain that the Commission did not provide it notice of potential steel-beam uplift and that the Contract failed to contemplate the issue.

After Fort Myer contacted the Commission about the uplift, the Commission changed the pouring sequences for the concrete deck and issued a new drawing for the Contract. According to Fort Myer, the Commission failed to specify how concrete could continue to be poured despite the uplift. Instead, the Commission ordered that Fort Myer “address th[e] issue and obtain an engineer’s seal on any proposed method[.]” Fort Myer commissioned an engineering firm to complete a constructability report and, after modifying the erection plan, Fort Myer continued construction. Eventually, Fort Myer held down the girders with the weight of temporary sandboxes and completed the pouring sequence on September 3, 2010—only six days before the original date set for substantial completion. Fort Myer would not substantially complete the work under the Contract for several months—not until January 24, 2011—and maintains on appeal that it would have completed the Bridge 191 days sooner if not for the uplift issue.

The Commission assessed liquidated damages against Fort Myer in the amount of \$315,000 based on Fort Myer’s failure to complete the Contract in the time scheduled. Fort Myer protested this decision, as permitted under General Provision § 6.12.B., because it did not accept the Commission’s calculation of liquidated damages. Fort Myer also protested the Commission’s determination that it owed Fort Myer a smaller final payment than Fort Myer believed was due. On January 27, 2012, Fort Myer submitted a formal

claim “to the Program manager responsible for the Contract at the Commission,” alleging that the Commission breached the Contract and that Fort Myer was entitled to additional payment for the work it performed relating to the uplift issues. The claim was deemed denied as of April 2012 when the Commission failed to issue a written opinion within 90 days of Fort Myer’s claim.

### **C. The First Complaint**

Fort Myer sued the Commission on October 12, 2012, in the Circuit Court for Montgomery County, asserting two counts: (1) the Commission breached the Contract by interfering with and preventing Fort Myer’s timely construction of the Bridge, for which Fort Myer sought \$876,822.03 “in lost profits, additional and increased costs and markups” and (2) a declaratory judgment that the Commission wrongfully retained \$315,000 as liquidated damages based on delays in the construction. In its answer, filed February 26, 2013, the Commission denied that it breached the Contract and denied that Fort Myer suffered \$876,822.03 in damages. Further, the Commission “denie[d] that Fort Myer [wa]s entitled to any of the relief it s[ought] and request[ed] that judgment be entered for the Commission and against Fort Myer on all of Fort Myer’s claims.”

The Commission impleaded URS, seeking indemnification and contribution, and alleged that the design contract imposed a duty on URS to defend the Commission against Fort Myer’s claims. *URS Corp.*, 452 Md. at 54. After the parties engaged in discovery, URS moved to dismiss Fort Myer’s claims because Fort Myer failed to file a certificate of a qualified expert along with its complaint, as required by Maryland Code (1957, 2013 Repl. Vol.), Courts and Judicial Proceedings Article (“CJP”), § 3-2C-01 *et seq.* *Id.* at 54-

55. Eventually, Fort Myer withdrew its opposition to the motion and the circuit court dismissed its complaint without prejudice.<sup>1</sup> *Id.* at 56.

#### **D. The Underlying Complaint**

On January 23, 2015, Fort Myer filed the underlying complaint against the Commission. Count I of the complaint alleged that the Commission breached the Contract by interfering with and preventing Fort Myer’s timely completion of the Bridge, mainly through design issues outside of Fort Myer’s control or responsibility. Unlike its 2012 complaint, which sought \$876,822.02 in compensatory damages, Fort Myer claimed that the Commission’s breach caused it to incur only \$770,264.11 in lost profits and in increased costs and markups. In Count II of the complaint, Fort Myer sought a declaratory judgment, declaring that (1) Fort Myer was entitled to \$315,000 that the Commission was wrongfully withholding as liquidated damages and, (2) at the conclusion of the litigation, Fort Myer was entitled to final payment in the amount of \$62,093.90 (the difference between what Fort Myer alleged to be the semi-final payment amount and the final payment amount that “the Commission is withholding . . . under the Contract until the conclusion of this litigation”).

On October 27, 2015, on a motion from the Commission, the circuit court stayed the case pending the resolution of the related litigation that followed Fort Myer’s initial

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<sup>1</sup> Following the dismissal of Fort Myer’s complaint, “URS and the Commission pursued an award of sanctions against Fort Myer with respect to the ill-fated complaint[.]” which the circuit court granted. *URS Corp.*, 452 Md. at 56-57. This Court and, ultimately, the Court of Appeals, determined that the circuit court clearly erred in finding that Fort Myer acted without substantial justification and, therefore, the circuit court abused its discretion in awarding costs and attorneys’ fees to URS and the Commission. *Id.* at 73.

complaint and culminated with the Court of Appeals' decision in *URS Corp.*, 452 Md. at 48, on March 24, 2017.

### **E. Motion to Dismiss**

After moving to intervene on August 4, 2017, URS sought to dismiss Fort Myer's claim on August 25, asserting that "Fort Myer failed to timely sue the Commission and thus failed to satisfy an express statutory condition precedent to the Commission's limited waiver of sovereign immunity."<sup>2</sup> In support of its motion, URS declared that the Contract was complete by January 2011, when Fort Myer completed its work under the Contract, and Fort Myer's complaint, brought over 4 years later, failed to satisfy the provisions of SG §§ 12-201 & 12-202. Specifically, § 12-202 limits the government's waiver of sovereign immunity to claims a plaintiff brings "within 1 year of the later of: (1) a date on which the claim arose; or (2) the completion of the contract that gives rise to the claim." Anticipating that Fort Myer would argue that the Contract was not yet complete because the Commission has not yet made a final payment, URS argued that Fort Myer's reasoning was circular and would lead to an untenable result by which the one-year deadline set by SG § 12-202 "will not even begin to run until the case ends, thereby rewriting and rendering meaningless straightforward statutory language."

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<sup>2</sup> When Fort Myer filed its first complaint against the Commission, the Commission implied URS and prevailed on claims against URS "on the theory that URS was contractually obligated to defend the Commission against Fort Myer's claims and would be liable for any damages." *URS Corp.*, 452 Md. at 51-52. In the underlying action, the Commission filed a motion to dismiss of its own on August 28, 2017, in which it adopted and incorporated by reference the arguments that URS set out in support of its motion to dismiss.



As anticipated, Fort Myer argued in opposition that sovereign immunity did not bar its claims against the Commission because the Contract was not complete based on the Contract’s definition of “Contract Completion.” Fort Myer insisted that the language of the Contract made its completion of the Bridge and the Commission’s acceptance thereof “necessary, but not sufficient, conditions for ‘Contract Completion.’” To complete the Contract, Fort Myer maintained, General Provision § 6.12.E required the Commission to authorize final payment and then make final payment to Fort Myer. Given the temporal allowance granted to the Commission “to tabulate the final quantities and identify delays and charges,” Fort Myer averred that “acceptance of the work and Final Payment may be months apart.” Fort Myer urged that URS’s interpretation of when the Contract was complete defied time—retroactively causing the Contract to be complete at the time of the Commission’s acceptance of the work only if Fort Myer were to later protest the Commission’s tabulation.

Additionally, Fort Myer clarified what its complaint *did not* allege. It enunciated that, because it filed a protest, the Commission was within its right to withhold a retainage up to 5% of the Contract’s total value, and the Commission did not breach the Contract by holding this money. In fact, Fort Myer noted, had the Commission assessed liquidated damages or other back charges in an amount greater than the money Fort Myer earned, there would be no funds remaining in the Commission’s possession to make as a final payment, and the Contract would be complete. Therefore, the Commission’s decision to withhold final payment was not a breach and kept the Contract open because authorizing

and making final payment was an express condition precedent to completion of the Contract.

The circuit court heard argument on the motions to dismiss on October 10, 2017, and considered, among other documents, Fort Myer’s original complaint and the Commission’s answer from the 2012 action. The Commission argued that the filings from the 2012 action were “important here for a number of reasons”:

. . . [T]he reason among others that I wanted to provide you with the answer that was filed in Case No. 369478V was that this answer was filed February 26, 2013. And that answer . . . contains a number of issues[,] which I think will help resolve beyond any question the issue of whether or not a year elapsed from the time not only that they knew about the claim, but [] the point in time that the contract was complete.

\* \* \*

So as to the issue of completion of the contract, the allegations that were contained in the October 12, 2012 complaint – and they are repeated again[] in this new complaint – there’s no doubt that those allegations having been made, the Commission answered each and every one of those. **So as to the issue of an obligation to pay money, the Commission steadfastly and consistently in the answer that I’ve supplied to you, filed in February of 2013, denied obligations to the contractor, Fort Myer, for payment of any money, whether it be in the form of liquidated damages, whether it be in the form of additional claims that had been made.** So there’s no issue that as of the date that this suit was filed . . . – **February 26, 2013 – the project was complete and there had been a rejection of Fort Myer’s claim[.]**

(Emphasis added).

Following the parties’ arguments, the motions judge ruled from the bench. She observed that “the Court is not required to accept all the allegations, only the ones that are well-pleaded. And considering plaintiff[’s] counsel’s argument, the whole argument is the fact that final payment has not been made. But the Court finds that the argument is circular and without merit.” Applying this Court’s analysis in *Daughton v. Maryland Automobile*

*Insurance Fund*, 198 Md. App. 524, 538 (2011), the motions judge reasoned that the argument that “a contract alleged to have been breached is not completed because it was allegedly breached would be circular reasoning[,] and would produce the untenable result that in all actions stating breach of contract claims against state agencies, the one year filing deadline would not have started to run before liability c[ould] be established.” The court then recounted the following timeline before arriving at her ruling:

It’s [] undisputed that in January of 2011, Fort Myer completed work and [the Commission] accepted the bridge. On January 27, 2012, Fort Myer submitted its claim to the program manager. It was deemed denied as of April of 2012. That’s when the statute of limitations or [SG §] 12-202 began [to run, ]not when the final payment that it disputes it owes.

So therefore, based on the complaint itself and the law, the motions to dismiss are granted and the complaint is dismissed with prejudice.

The court entered a written order to this effect on October 12, 2017. Fort Myer then, on October 26, noted its timely appeal to this Court.

## DISCUSSION

### I.

#### Sovereign Immunity

The parties agree that the Commission, as an arm of the State Government, can assert the defense of sovereign immunity, under which “no contract or tort suit can be maintained thereafter against it unless the General Assembly has waived the doctrine.” *Stern v. Bd. of Regents, Univ. Sys. of Md.*, 380 Md. 691, 701 (2004); *see also O & B, Inc. v. Md.-Nat’l Capital Park & Planning Comm’n*, 279 Md. 459, 462 (1977) (holding that the Commission is a State agency for purposes of governmental immunity). The General Assembly, in 1976, enacted such a waiver—albeit a conditional one—in contract actions

brought against the State. *See Daughton*, 198 Md. App. at 538 (citing Laws of 1976, ch. 450). That conditional waiver is set out in Article 12, Subtitle 2 of the State Government Article:

*Subtitle 2. Actions in Contract.*

**§ 12-201. Sovereign immunity defense barred.**

(a) *In general.* — Except as otherwise provided by a law of the State, the State, its officers, and its units may not raise the defense of sovereign immunity in a contract action, in a court of the State, based on a written contract that an official or employee executed for the State or 1 of its units while the official or employee was acting within the scope of the authority of the official or employee.

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**§ 12-202. Limitation on claims.**

A claim under this subtitle is barred unless the claimant files suit within 1 year after the later of:

- (1) The date on which the claim arose; or
- (2) The completion of the contract that gave rise to the claim.

**A. The Parties' Arguments**

This case turns on the application of SG § 12-202(2) to the Contract. As Fort Myer frames the sole issue on appeal, we must resolve “whether the contract reached ‘completion’ more than one year before January 2015, when Fort Myer filed its complaint.” To determine the point of contract completion, Fort Myer says we must look to the Contract’s plain language, which “twice states that completion is conditioned on final payment by the Commission to the contractor.” Fort Myer contends that because the final payment amount of \$63,093.90 will become due after this litigation concludes, the Contract will not be complete until the Commission releases that money. Fort Myer emphasizes that the Commission could have conditioned completion on the occurrence of a different

event, such as when the Commission “accept[ed] the Bridge, deliver[ed] its tabulation of final quantities, ma[de] a semi-final estimate payment, or when the Construction Manager issue[d] a final decision.”

Fort Myer explains that the sovereign immunity waiver remains finite under its reading of the Contract because a duty of good faith and fair dealing requires it, when the litigation ends, to perform the remaining duties imposed by the Contract’s close-out procedures. And, attempting to avoid any conflation of the statute of limitations and waiver of sovereign immunity, Fort Myer also observes that the general statute of limitations on a potential claim by the contractor may run before the waiver of sovereign immunity under SG § 12-202 expires (*e.g.*, if a claim for breach of contract arises more than three years before the completion of the Contract).

Fort Myer concludes by distinguishing the facts of this case from those in *Daughton*, in which this Court reasoned that the contract at issue was not incomplete for purposes of SG § 12-202 even though the defendant was in breach because the defendant had canceled the contract and denied owing further payment thereunder. 198 Md. App. at 550-51. In this case, Fort Myer says, the Commission’s failure to release final payment was not a breach of contract and not the subject of the underlying litigation; instead, “[t]he sole reason that the contract remains open in this case is that the Commission identified final payment as the event that closed the contract.”

Appellees offer three main arguments in response. First, Appellees dispute the point at which the Contract was complete. They offer two dates for contract completion: April 2012, when the Commission, having already accepted the Bridge for use, denied Fort

Myer’s claim for certain delays and site conditions; or February 26, 2013, when “the Commission denied owing Fort Myer any further funds under the contract . . . in its Answer to Fort Myer’s initial lawsuit, and thereby repudiated any obligation to issue final payment.” Appellees maintain that the Commission “has no intention to make any further payment to Fort Myer,” which, according to Appellees, “is precisely why Fort Myer sued the Commission for final payment under the auspices of a prayer for declaratory judgment.”

Second, Appellees refute Fort Myer’s reading of the Contract. Acknowledging that “Fort Myer relies entirely on language in the contract which provides that the contract ends after the Commission makes final payment,” Appellees insist that it’s irrelevant whether “an outstanding final payment prevents the contract from reaching completion[.]” This is because, under Appellees’ interpretation, Fort Myer’s decision to litigate its claims rather than executing a general release—a condition precedent to final payment—relieved the Commission of its obligation to make final payment.

Lastly, Appellees contend that Fort Myer’s claim that the Contract is not complete suffers from the same circular logic as existed in *Daughton*: Fort Myer’s suit alleged “that the Commission breached the Contract by failing to issue final payment,” and at the same time, Fort Myer asserts that it can bring the action because the Contract is not complete since the Commission has not issued final payment. Appellees believe this is “a circular interpretation of SG § 12-202,” which “cannot be reconciled with the decision in *Daughton*” and would prevent the waiver of sovereign immunity from running.

Much like it did in its opening brief, Fort Myer insists in its reply that “[t]he only

material inquiry is whether final payment has been made[.]” Fort Myer argues that Appellees concede in their brief that the *only* event that could constitute completion of the Contract hasn’t occurred. According to Fort Myer, Appellees’ reading of the Contract would produce an illogical result—it would force a contractor (here, Fort Myer) to choose between litigating its claims against the Commission or receiving a final payment, even when the parties agree final payment is owed. Fort Myer also rejects Appellees’ argument that Fort Myer filing suit renders “impossible” the execution of a waiver (which Fort Myer admits is a condition precedent to the Commission releasing final payment), because Fort Myer can still execute a general release that purports to waive all claims after this lawsuit resolves the issues between the parties—regardless of whether waivable claims remain.

### **B. Interpreting the Contract**

In Maryland, we “adhere to the principle of the objective interpretation of contracts,” *Walker v. Dep’t of Human Res.*, 379 Md. 407, 421 (2004) (citation omitted); “that is, ‘if the language of the contract is unambiguous, we give effect to its plain meaning and do not delve into what the parties may have subjectively intended.’” *O’Brien & Gere Eng’rs, Inc. v. City of Salisbury*, 447 Md. 394, 421 (2016) (citation and brackets omitted). Whenever possible, we construe contractual provisions harmoniously, in a manner that gives effect to each. *Walker*, 379 Md. at 421. “[C]ourts are not at liberty to ignore the clear and unambiguous language of a contract.” *Gilbane Bldg. Co. v. Brisk Waterproofing Co., Inc.*, 86 Md. App. 21, 26 (1991).

We begin, then, with the language of the Contract to determine whether the Contract determines unambiguously when it is complete. The Contract itself is brief, only three

pages, but incorporates the IFB (plus addendums thereto) and Fort Myer's bid. **E. 89.** In case of any conflict between these documents, Paragraph 1 of the Contract states explicitly that the documents shall have precedence in the following order: (1) the Contract; (2) the IFB and its addendums; and (3) Fort Myer's bid and its corresponding documents.

### 1. The Contract's Term

The Contract sets its term and the period allotted for Fort Myer to complete its work as follows:

3. **Term.** The term of this Contract is from the date of execution by the Executive Director until the Commission makes final payment as provided in Section 6.12 of the General Conditions (or 90 days after the Commission's acceptance of the work and the Commission makes final payment).

4. **Completion of Work.** The Contractor shall perform and complete the work in 640 calendar days in accordance with Section F, Special Conditions of the IFB. The days for completion of work are consecutive calendar days from the date specified in the Commission's written Notice to Proceed. The failure of the Contractor to complete the work within the specified time may result in the assessment of liquidated damages or termination of the Contract for default.

The unambiguous, plain language of these provisions indicates that the term of the Contract concludes with final payment by the Commission.<sup>3</sup> Under the terms of the

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<sup>3</sup> Appellees' argument most directly related to the Contract relies on Special Condition F, contained in the IFB, which states that the Contract will remain in effect for only 730 days:

1. Time for Completion of Work and Liquidated Damages

This contract shall be in effect for a term of Seven Hundred Thirty (730) calendar days from the start date specified in the Contract Administrator's Notice to Proceed. This accounts for Six Hundred Forty (640) calendar days to complete all work including all punch list items; and a ninety (90) day retention period after all punch list items have been corrected and accepted.



Contract, the Commission could accomplish this through either the process set out in the General Provisions or by making final payment within 90 days of its acceptance of Fort Myer's work. Because no party suggests that the Commission made final payment within 90 days of acceptance, we shall examine the provisions of the General Conditions of the IFB that govern contract completion:

Section 6.12 of the General Conditions governed final payment:

6.12 Substantial Completion, Final Inspection And Acceptance

A. Notice of Substantial Completion. When the Work is substantially complete, the Contractor shall notify the Construction Manager that the Work is ready for inspection and test on a definite date. Sufficient notice shall be given to permit the Construction Manager to schedule the final inspection.

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. . . If the Contractor refuses or fails to complete such work within the Six Hundred Forty (640) calendar day period, subject to the conditions named in the specifications and drawings, the Commission may deduct from the final payment the sum of \$2,500.00 as fixed and agreed liquidated damages, but not as a penalty, for each calendar day delay after the construction completion date until the final physical completion of the work and its acceptance by the Commission.

\* \* \*

Failure to complete the work, or any part of the work, by the specified construction completion date constitutes a breach of contract[,] which may result in termination or assessment of liquidated damages as provided by the contract. . . .

To the extent this Special Condition contemplates the Contract being complete on the 730th day following the Notice to Proceed, it is in conflict with the Paragraph 3 of the Contract, and the Contract takes precedence over the IFB documents.

Further, this Special Condition, which governs liquidated damages, expressly contemplates Fort Myer's work taking longer than the term provided and, consequently, permits the Commission to assess liquidated damages or terminate the contract based on Fort Myer's failure to meet that term. Although, under this provision, Appellee potentially *could* have ended the Contract based on Fort Myer's failure to complete the work within the term, there is no evidence that the Commission did so. We do not agree, therefore, that the Contract was complete—regardless of any delays or ensuing disputes or protests—730 days after the Notice to Proceed.

B. Confirmation of Substantial Completion. On the basis of the inspection, if the Construction Manager determines that the Work is substantially complete and that the Work can be occupied and used for its intended purpose, the Construction Manager shall establish the date of substantial completion, and shall state the responsibilities of the Commission and the Contractor for maintenance, heat, utilities and insurance, and shall fix the time from which any warranties or guaranties will begin.

C. Work Remaining. The Construction Manager shall fix the time within which the Contractor shall complete any remaining items of Work, which will be indicated on a list prepared by the Construction Manager. If the Contractor fails to complete the remaining items so listed in the time stipulated, the Commission shall have the undisputed right to complete that Work and deduct any cost incurred in doing so from any monies retained under the Cont[r]act.

D. Final Payment. Final payment shall not be made until all Contract Work<sup>4</sup> is complete to the satisfaction of the Commission.

E. Contract Completion. **The Contract will be considered to be completed when the Work has been completed in accordance with the terms of the Contract; when final acceptance has occurred; when final payment has been authorized; when all of the obligations of the Contractor and its surety have been complied with; and when final payment has been made.**

(Emphasis added).

By the plain language of Section 6.12, contract completion required five conditions: (1) Fort Myer must complete the work; (2) the Commission must accept the work; (3) the Commission must authorize final payment; (4) Fort Myer and its surety must comply with all their obligations; and (5) the Commission to make final payment. The parties agree that Fort Myer completed its work, which the Commission then accepted. The remaining three steps were governed by Section 7.9 of the General Conditions.

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<sup>4</sup> The portions of the IFB included in the record at the motion to dismiss stage did not include the definition of the term “Contract Work.”

## 2. The Process Governing Final Payment

Section 7.9 provides that, once Fort Myer has completed its work and the Commission has finally accepted that work, the Commission must submit to Fort Myer within 60 days “a tabulation of the proposed final quantities,” accompanied by a statement that sets forth, among other things, “the number of any days of inexcusable delay [that] have been charged against the Contractor for having failed to timely complete the Contract” and “any deductions, charges or liquidated damages” that the Commission has made or imposed on Fort Myer.

Once the Commission determines “the full apparent values of the Contract,” Section 7.9.A. mandates that amount “shall become due and payable to the Contractor ninety (90) days after final acceptance of the project[.]” Section 7.9.A. also set, as a condition precedent to final payment, that Fort Myer “**shall be required to execute a general release** of all claims against the Commission arising out of or in any way connected with performance of the Contract.” (Emphasis added).

Section 7.9.B. then sets out Fort Myer’s right to accept or protest the Commission’s tabulation of the final payment:

B. Contractor’s Right to Accept or Protest Final Payment. The Contractor shall have a period of ten (10) calendar days from upon which it receives the aforementioned tabulation from the Commission, within which to:

1. Decide whether or not to accept final payment upon such a basis.
2. Notify the Commission, in writing, of its decision. The Contractor may request an additional period of up to ten (10) calendar days in which to notify the Commission of its decision. In the event the Contractor notifies the Commission that it protests final payment on such a basis, that notification shall outline the reason(s) for said protest.

If Fort Myer accepted the Commission’s tabulations, Section 7.9.C. set out the process the parties were to follow, including that the Commission was to prepare and execute “the final estimate and final payment forms.” If Fort Myer did not accept, but instead protested the Commission’s tabulations, then Section 7.9.D. provided the Commission’s right to withhold partial payment:

D. Partial Payment if Contractor Protests. **If, under the provisions of subsection B. above, the Contractor notifies the Commission of its protest and non-acceptance of the data submitted to him, the Commission shall pay the Contractor a semi-final estimate, or additional semi-final estimate in the event a semi-final estimate has already been paid upon the data noted in subsection A. above, with deductions for all prior payments. A retainage equal to not more than five percent (5%) of the total value of the Contract shall be withheld by the Commission. The acceptance of such semi-final estimate, or additional semi-final estimate, shall not be considered as a waiver on the part of the Contractor of its right to pursue a protest and an adjusted final payment.**

(Emphasis added).

Then, Section 7.9.E. instructed the parties to “endeavor to reconcile all points of disagreement expeditiously.” If the parties could reconcile, Section 7.9.E. provided that the Commission would then “**promptly proceed with acceptance and final payment on the reconciled basis** and in accordance with the provisions of subsection C. above.” If, however, the parties were unable to reconcile within 30 days, Section 7.9.E. provided that the Commission can make a final decision and “furnish a copy of the final decision to [Fort Myer] by certified mail[.]” The same provision permitted Fort Myer to appeal that decision, and if Fort Myer failed to timely appeal, it waived its rights under the Contract’s

Disputes Clause, in which case, “**final payment may then be made by the Commission[.]**”<sup>5</sup> (Emphasis added).

These provisions plainly establish that Fort Myer’s protest of the Commission’s tabulations and deductions for liquidated damages did not conclude the Contract. Instead, protesting was part of—and explicitly governed by—the Contract. In the event of a protest, the Commission was to pay Fort Myer “a semi-final estimate” and withhold a retainage “equal to not more than five percent (5%) of the total value of the Contract.” Under Section 7.9.D., Fort Myer, by accepting payment of a semi-final estimate, did not waive its right to “pursue a protest *and* an adjusted final payment.” If the parties could reconcile or if Fort Myer failed to timely appeal, Section 7.9.E. mandated that the Commission then make final payment. Put simply, Section 7.9.E directly refutes Appellees’ contention that Fort Myer forfeited its right to final payment by filing a protest; the Contract did not require Fort Myer to choose between protesting the Commission’s tabulations and receiving final payment.

Appellees suggest, however, that the Contract concluded in April 2012, when Fort Myer’s protest was deemed denied. This, too, is inconsistent with the plain language of the Contract. When interpreting contracts, we seek to harmonize the separate provisions. *Walker*, 379 Md. at 421. In the event of a protest by Fort Myer, Section 7.9.D. required the Commission to withhold a retainage of up to 5% of the value of the Contract—not an amount tied to the disputed tabulations. This retainage was not necessarily based on or

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<sup>5</sup> The portions of the Contract contained in the record were attached as exhibits to Fort Myer’s opposition to the motions to dismiss. Among these portions are pages 99-100 of the IFB, which include Section 7.9.A.–F. It is unclear whether Section 7.9 continues to page 101 (which is not part of the record) or includes additional subsections.

equal to the amount in dispute among the parties. In fact, in its complaint and before this Court, Fort Myer has alleged that the Commission withheld a retainage *in excess of* the amount the Commission still owed under the Contract after the deductions and liquidated damages (the amounts that Fort Myer protested). Nor does the plain meaning of the term “retainage” convey an amount to which Fort Myer would forfeit future right. A retainage is “[t]he portion of monies kept aside until a project is completed in all aspects according to the contract.” Retainage, *The Law Dictionary*, <http://thelawdictionary.org/retainage/> (last visited January 15, 2019). *See also* Maryland Code (2001, 2015 Repl. Vol.), State Finance & Procurement Article, § 15-219(h) (“At the time of final payment, the unit shall[] . . . release the retainage due to the contractor[.]”).

### C. Completion Through Repudiation

The Commission did not pay any retainage to Fort Myer, however, nor did the Commission make final payment under the Contract.<sup>6</sup> In fact, the Commission tells us, it has no plans to ever do so. According to the Commission, its explicit repudiation of any further payment owed to Fort Myer as of February 26, 2013, when the Commission filed its answer to Fort Myer’s original complaint rendered the Contract “complete.”

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<sup>6</sup> Because we conclude that the Contract was complete when the Commission formally repudiated any further payment under the Contract, we need not address Appellees’ argument that Fort Myer can no longer issue a general release of claims under the Contract (a condition precedent to final payment) because Fort Myer filed suit against Appellees. We observe, however, that this argument is another iteration of Appellees’ general proposition that Fort Myer forfeited its right to final payment by suing the Commission. Under Appellees’ proposed reading of the Contract, Fort Myer cannot receive final payment because it sued before issuing a general release, but if it issued a general release, it would have been left unable to sue. This is illogical and unsupported by the language of the Contract.

The Commission further elucidated this point at oral argument before this Court, as we probed the Commission on its theory of the case:

THE COMMISSION: It is a matter of record that the answer was filed by the Commission in that case . . . in February of 2013. . . . [T]he Commission denied owing any money, claimed right of setoff, claimed the right of recoupment, and then claimed the general right to deny any payment to Fort Myer. So, if anyone had any question as to what the Commission’s position was as of February of 2013, there’s an answer that’s filed in court and it says, “we do not owe you any money.”

\* \* \*

. . . If you sue me and I tell you, “I do not owe you any money,” the issue of final payment has been resolved, and it has been filed in court, and it is the subject of litigation. . . . It may not have been exactly what the Contract called for but it certainly was unmistakably clear to Fort Myer that . . . the Commission was denying liability to Fort Myer.

We agree with Appellees that, regardless of whether the Contract required the Commission to issue final payment to complete the Contract, the Commission repudiated its obligation to do so in answer to Fort Myer’s original complaint in February 2013. As Appellees point out, Fort Myer’s original complaint in 2012—unlike its underlying complaint—did not differentiate between monies the Commission allegedly owed relating to the uplift issues and monies the Commission retained as a final payment. Rather, Fort Myer’s complaint in 2012 sought compensatory damages, generally, for the full amount it alleged that the Commission still owed under the Contract. When the Commission answered Fort Myer’s complaint in February 2013, the Commission formally denied owing Fort Myer any further money under the Contract—in the form of final payment or otherwise. This formal repudiation of its alleged remaining obligations under the Contract amounted to a breach of the *entire* Contract. *Antigua Condo. Ass’n v. Melba Inv’rs Atl., Inc.*, 307 Md. 700, 715-16 (1986) (reasoning that one way in which a party can breach a

contract is by repudiating its obligation under the contract); *Dugan v. Anderson*, 36 Md. 567, 583 (1872) (concluding that when a party repudiates a contract “such an announcement amounts to a violation of the contract *in omnibus*[.]”). Consequently, even if the Commission had not yet made final payment as required for contract completion, the one-year waiver period under SG § 12-202 began to run in February 2013 when the Commission repudiated any further obligation under the Contract.

#### **D. Daughton**

Fort Myer tries to avoid this conclusion by insisting that the Commission’s explicit refusal to issue final payment did not complete the Contract. At oral argument before this Court, Fort Myer agreed that the Contract would be complete with “some affirmation by the Commission that [the Contract is] finished,” such as sending a letter that the Contract “is over, expired.” But Fort Myer attempted to distinguish between the Commission repudiating its remaining obligations under the Contract, on the one hand, and the Commission terminating the Contract, on the other hand. When pressed, Fort Myer insisted that the Commission’s repudiation of making final payment could not complete the Contract, stating instead that the parties “w[ould] still be stuck in [the wrap-up provisions] in [Section] 7.9” even after the Commission’s repudiation.

Fort Myer’s position runs afoul of this Court’s reasoning in *Daughton*, 198 Md. App. at 548. *Daughton* sued the Maryland Automobile Insurance Fund (“MAIF”) for breach of contract and declaratory judgment based on MAIF’s failure to pay interest on its late payment for *Daughton*’s insurance claim. *Id.* at 527-28. MAIF sought summary judgment because, *inter alia*, based on SG § 12-202, *Daughton* filed suit outside the one-



year waiver period. *Id.* at 528. The argument before the motions court concerned whether MAIF was a State agency or instrumentality that could assert the doctrine of sovereign immunity as a defense. *Id.* at 533. Daughton’s counsel conceded that her claim would be barred by SG § 12-202 if the court found MAIF to be a State agency. *Id.* at 549. The court concluded that MAIF was a State agency or instrumentality and could assert immunity; the court, therefore, granted judgment in favor of MAIF. *Id.* at 536. Daughton moved to alter or amend the judgment, arguing that her automobile insurance policy with MAIF was not “completed” within the meaning of SG § 12-202 because MAIF had failed to pay the statutory interest it owed her on her late-paid insurance benefits. *Id.* at 536-37. The circuit court denied Daughton’s motion and she appealed. *Id.* at 537.

This Court characterized Daughton’s argument on contract completion as follows: “She takes the position that the contract cannot have been completed because MAIF failed to pay statutory interest owed pursuant to [Maryland Code (1995, 2006 Repl. Vol., 2010 Supp.), Insurance Article, § 19-508(c)]. In other words, because MAIF is in breach of the contract, the contract remains incomplete.” *Id.* at 548. We held that Daughton waived her contract-completion argument by conceding before the motions court that SG § 12-202 barred her claim if the court determined, as it did, that MAIF was a State agency. *Id.* at 550. Had she not waived her claim, we reasoned, her argument was meritless anyway. *Id.* at 550-51. MAIF had cancelled Daughton’s automobile policy for non-payment more than four years prior to her lawsuit; five months after it canceled her policy, MAIF denied that it owed any further payment to Daughton under the policy. *Id.* This Court determined that “the canceled insurance policy had to have been a completed contract” as of the point in

time when “MAIF *had denied any further payment* to Daughton on her claim.” *Id.* at 500.

(emphasis added). We concluded by offering the following observation:

To read SG [§] 12-202 as Daughton suggests—to mean that a contract alleged to have been breached is not completed because it allegedly was breached—would be circular reasoning and would produce the untenable result that, in *all* actions stating breach of contract claims against State agencies or instrumentalities, the one-year filing deadline in SG [§] 12-202 would not have started to run before suit was filed and liability was established. The phrase in that section calling for suit to be filed within one year after “the date on which the claim arose” would be meaningless, because that never would happen before “the completion of the contract,” and it is the latter of those two dates that controls.

*Id.* at 151.

As with the contract in *Daughton*, the Contract in this case “had to have been [] completed” once the Commission denied any further payment. *Id.* at 550. To hold that the Contract was otherwise incomplete would be to say “that a contract alleged to have been breached is not completed because it was allegedly breached[.]” *Id.* at 550-51. Faced with the Commission’s repudiation of its remaining obligations under the Contract—including its obligation to make final payment—Fort Myer had its choice of remedies. *See Wash. Homes, Inc. v. Interstate Land Dev. Co.*, 281 Md. 712, 728 (1978) (“Repudiation of a contract by one party gives the other party a choice of remedies.”). But the time limit on its ability to seek those remedies began to run in February 2013, when the Commission denied any further obligation under the Contract in its answer to Fort Myer’s first complaint.

We hold that SG § 12-202 required Fort Myer to bring its claim within one year after the Commission repudiated the Contract—by February 2014—to avoid the sovereign

immunity bar. *See* SG §§ 12-201, 12-202. Accordingly, the circuit court was correct to dismiss the complaint.

**JUDGMENTS OF THE CIRCUIT COURT  
FOR MONTGOMERY COUNTY  
AFFIRMED; APPELLANT TO PAY  
COSTS.**