UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1568

September Term, 2014

DAVID A. BRAMBLE, INC.

v.

MARYLAND STATE HIGHWAY ADMINISTRATION

Meredith,
Berger,
Leahy,

JJ.

Opinion by Meredith, J.

Filed: September 25, 2015

David A. Bramble, Inc. ("Bramble, Inc."), appellant, appeals a judgment of the Circuit Court for Kent County affirming the ruling of the Maryland State Board of Contract Appeals (the Board) denying a claim for additional compensation under a Maryland State Highway Administration ("SHA") contract. SHA awarded Bramble, Inc. a contract to expand U.S. 113 in Worcester County, Maryland. Under the contract, Bramble, Inc. agreed to widen U.S. 113 from one lane in each direction to two, at a total cost to the state of $12,160,868. SHA denied Bramble, Inc.'s claim to be paid additional compensation to cover changes which were made to the type of culvert Bramble, Inc. installed where U.S. 113 crossed a stream known as the Massey Branch. Bramble, Inc. appealed to the Board, and, after discovery, SHA moved for a summary decision. After a hearing, the Board granted a summary decision in favor of SHA, and denied the claim. After Bramble, Inc. filed a Motion for Reconsideration, which was denied, Bramble, Inc. then filed a Petition for Judicial Review in the Circuit Court for Kent County. That court entered a judgment affirming the ruling of the Board, and appellant noted this appeal.

QUESTIONS PRESENTED

Appellant presents the following questions for our consideration:

1. Was the Board legally correct in its determination that Bramble, Inc.'s notice of claim was not timely?

2. Was the Board legally correct in its determination that Bramble, Inc.'s documentation of its claim was not timely?

3. Was the Board legally correct in making a determination of Bramble, Inc.'s intent in bidding the project?

4. Is the regulation imposing dismissal for late filing of claims void for vagueness, unconstitutionally applied, and *ultra vires*?

For the reasons that follow, we affirm the ruling of the Circuit Court for Kent County.

FACTS AND PROCEDURAL HISTORY

The Contract between Bramble, Inc. and SHA

In the summer of 2008, the SHA held an informational meeting regarding the expansion of 2.5 miles of U.S. 113 in Worcester County, from North of Goody Hill Road to South of Massey Branch. The contract contemplated expanding this portion of U.S. 113 from one to two lanes in each direction. The Request for Proposals ("RFP") for the project was conducted as "a low-bid design-build two-step procurement process, first identifying qualified contractors and thereafter receiving proposals, including price, which were evaluated with the objective of selecting the best overall value to the state." (Code of Maryland Regulations (COMAR) 21.05.11.01 defines Design-Build as "a project delivery method in which a single entity is contractually responsible for both design and construction of a project.")

The key dispute in this case concerns General Provision 5.14 of the RFP, which mirrors both Maryland Code (1985, 1988, 2009 Repl. Vol.), State Finance & Procurement Article ("SF&P"), § 15-219, and COMAR 21.10.04.02. In short, these provisions require a contractor to file a written notice of a claim under a procurement contract "within 30 days after the basis for a claim is known or should have been known," and require a contractor to substantiate the claim in writing within 90 days after submitting its notice of claim.

Bramble, Inc. was awarded the contract and agreed to perform the road work for a contract price of $12,160,868. Bramble, Inc. used Johnson, Mirmiran, & Thompson ("JMT")

as its engineers for the design phase of the project. The claim for extra compensation relates to the culvert which had to be constructed where the stream known as Massey Branch runs beneath the stretch of U.S. 113 to be expanded. A culvert is a tunnel carrying water under a roadway. The Board observed that, "at the time of its bid submission, Bramble did not know for certain whether pilings would be needed at Massey Branch, but did know that the use of pilings was a possibility." A pile is "[a] heavy timber, concrete, or steel beam driven into the earth as a structural support." *The American Heritage Dictionary* (*Office Edition*) 639 (4th ed. 2001).

The Board summarized the pertinent facts as follows in the written opinion of Board Member Dana Lee Dembrow:

> 8. SHA issued to Bramble a Notice to Proceed on June 17, 2009, with a contract completion date of September 1, 2011.
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> 9. The partnering agreement inherent in this design build contract expressly required the parties to "resolve issues at the lowest level possible" and RFP section TC-2.06 further stated, "the partnership will be structured to draw on the strengths of each organization through open communication, teamwork and cooperative action. . . . The objective is to create an atmosphere of trust and honest dialogue among all stakeholders . . . ."
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> 10. Special provision § 3.11.03.06 of the RFP prescribed for the road crossing over Massey Branch a structural plate arch culvert, but the contractor was conditionally allowed to deviate from that specification by the following provision:
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> > "If the Design-build Team proposes to eliminate or introduce new structures, the proposed changes shall be submitted in writing to the [State Highway] Administration's Office of Bridge Development for review and development of any site specific requirements . . ." (State's Hearing Ex. 1, pg. 7; State's Motions Ex. 1, pg. 199.)

11. **The subject RFP further provided that the specified structural plate arch culvert was to be constructed using either a deep foundation with pilings or in the alternative, a shallow foundation using only Stone 57 and not pilings; but, unlike another culvert on the project, the option of using a shallow foundation to support the structural plate arch culvert at Massey Branch was contingent upon "improved subgrade as determined by the Design-build team and approved by the [State Highway] Administration."** (Emphasis added.)

12. Bramble understood that SHA had authority to dictate site specific requirements beyond those provided by its design-build team. (State's Motion Ex. 3, deposition pg. 82.)

13. Because the prescribed structural plate arch culvert incorporated the installation of large metal pipes under the roadway, that construction design specification as initially set forth by SHA in the RFP, was determined by Bramble to be unsuitable to the particular location at issue, where the soil was tested and found to be too acidic and corrosive to preserve the metal culvert pipes for the requisite duration of road preservation.

14. The use of a structural plate arch culvert was also determined by appellant to be unsuitable for use at the Massey Branch road crossing because, according to Bramble's review and evaluation of SHA's initial plan, the diameter of the required metal culvert pipes would intrude upon the surface of the roadway.

15. Special provision 2.08.01.05 of the RFP, entitled "Duty to Notify if Errors discovered" states, "If a bidder discovers . . . an error, omission or discrepancy [in the RFP], he shall *immediately* notify the [State Highway] Administration in writing; failure to do so notify [sic] shall constitute a waiver of any claim based upon such error, omission or discrepancy." (State's Hearing Ex. 2. Emphasis supplied.)

16. It was conceded during sworn testimony at the deposition of David C. Bramble on behalf of appellant that Bramble knew at the time it was reviewing the RFP and developing its bid that there was a defect in SHA's initial design of the road crossing at Massey Branch using a structural plate culvert but did not inform SHA of that defect at that time. (State's Hearing Ex. 3, deposition pgs. 37 & 39-40.)

17. David C. Bramble also testified at deposition that he knew at the time of his development of Bramble's bid proposal that pilings might be required for the road crossing at Massey Branch. (State's Motion Ex. 3, deposition pg. 61.)

18. After contract award, on August 24, 2009, Bramble submitted to SHA a detailed plan providing for the substitution of a pre-cast segmented concrete box culvert in place of the structural plate arch culvert originally contemplated by SHA and included in the RFP for installation at Massey Branch.

19. Neither the initial plan to use a structural plate arch culvert or the revised plan proposed by Bramble to use a pre-cast segmented concrete box culvert included the necessity of constructing a deep foundation using pilings to support the culvert, though the original SHA plan contemplated that possibility.

20. Bramble again submitted to SHA on July 2, 2010 a detailed plan for the Massey Branch crossing, relying on a geotechnical engineering analysis based in part upon test borings of subsurface conditions, and concluding that a shallow foundation was sufficient to support the concrete box culvert proposed to be installed at that location.

21. On August 25, 2010, based in part upon its reading and review of the same test borings, SHA differed with that conclusion and notified Bramble "that a pile foundation may be more appropriate for this structure . . ." (Rule 4 file, Tab 28.)

22. Geotechnical engineering experts at JMT on behalf of appellant are prepared to testify at trial in this appeal that a shallow foundation would have been perfectly suitable to support the concrete box culverts at Massey Branch, while experts in bridge and road construction at SHA are prepared to testify that SHA had good cause to demand a deep foundation with pilings at that location in order to prevent differential settlement and the resulting possibility of developing cracks in the concrete boxes.

23. Discussions continued between the parties concerning the propriety of using a shallow instead of a deep foundation to support the concrete box culvert which was proposed to be substituted for the structural plate arch culvert originally contemplated by SHA, including communications that occurred on October 20, 2010 as well as during a partnering meeting on November 3, 2010 and related communications on January 19 and March 3, 2011, during which SHA expressed its concern over the possibility of differential settlement of the concrete box culvert, leading to the potential of cracks in the culvert.

24. David C. Bramble testified at his deposition that appellant knew as early as March 3, as well as on March 9, 2011, that SHA had rejected Bramble's

proposal to use a shallow foundation at the Massey Branch crossing. (State's Motion Ex. 3, deposition pgs. 89-90.)

25. By e-mail communication on March 18, 2011, David C. Bramble wrote to Jack Moeller of JMT, "I am working on a claim letter when I get a draft I will send it for your comments." (State's Hearing Ex. 8.)

26. On May 13, 2011, Bramble requested from SHA additional compensation in the amount of $296,690 as the added cost of installing pilings to construct a deep foundation rather than using crushed stone for a shallow foundation at Massey Branch, exclusive of additional costs attributable to 52 days of claimed delay alleged by Bramble to have been incurred due to SHA's contract changes, though appellant concedes that its delay claim was the result of multiple issues for which no apparent apportionment was provided. (State's Motion Ex. 3, pg. 156; State's Motion Ex. 9; & State's Motion Ex. 14, pgs. 105-106.)

27. On June 10, 2011, SHA responded to Bramble's letter by denying Bramble's request for additional compensation.

28. On Monday, July 11, 2011, thirty-one (31) days after SHA's claim denial, Bramble filed a formal Notice of Claim with SHA's Office of Construction seeking compensation for the extra cost of the deep foundation pilings that SHA insisted upon notwithstanding the recommendations of Bramble and its design engineers at JMT.

29. Less than ninety (90) days later, on October 6, 2011, Bramble requested an extension of time within which to file its substantive claim, advising SHA on October 14, 2011 that it intended to file its claim "by the end of the year."

30. Bramble finally submitted to SHA its substantive claim for additional compensation on February 24, 2012 and after further delay SHA denied that claim on August 23, 2012. (Appellant's Complaint, Ex. 14; Hearing Transcript, pg. 21, line 19.)

31. Bramble filed a timely Notice of Appeal to the Maryland State Board of Appeals (Board) on August 30, 2012, which was docketed by the Board as MSBCA 2823, the instant appeal.

32. Following extensive discovery, on October 2, 2012, SHA filed a Motion for Summary Decision which was heard by the Board on October 23, 2013.

After reciting the facts set forth above, the Board denied Bramble, Inc.'s claim. The Board concluded 1) the *notice of claim* was filed later than April 3, 2011, and was therefore untimely; 2) the *substantive claim* was also untimely; 3) there was no pre-bid reliance on Bramble's part; and 4) that Bramble, Inc.'s failure to notify SHA immediately, as required under the RFP's Special Provision 2.08.01.05, constituted a waiver of its claim. In the Board's October 30, 2013, opinion, Board Member Dembrow explained:

> Unfortunately for Bramble, the Board's analysis of the instant appeal may begin and end with reference to applicable State law requiring that "a contractor shall file a written notice of a claim relating to a procurement contract for construction within 30 days after the basis of the claim is known or should have been known." Md. Code Ann., State Fin. & Proc. § 15-219(a). That 30-day notice requirement is repeated in COMAR 21.10.04.02A and a subsequent COMAR section, 21.10.04.02C, provides further that "A notice of claim or a claim that is not filed within the time prescribed in Regulation .02 of this chapter *shall* be dismissed." (Emphasis supplied.) The Board is without discretion to deviate from this plain requirement of law and regulation which was also repeated *ver batim* [sic] in the RFP and certainly well known to a highway construction contractor that has been in business in Maryland for decades.
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> The State might have contended that the basis of appellant's claim was known as early as October 20, 2010, or for that matter, even before Bramble's bid was submitted, but instead, SHA argues that the operative date for commencement of the running of the statute of limitation was later, on March 3, 2011. That is the day that David C. Bramble admitted under oath at this deposition that he had actual knowledge of SHA's rejection of appellant's proposal to use a shallow foundation without pilings to support a concrete box culvert at the Massey Branch crossing. That sworn testimony remains uncontroverted by any prospective evidence offered or referenced by appellant.
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> * * *
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> Yet Bramble directed no formal notice of claim to SHA until July 11, 2011, over four (4) months following Bramble's admission in deposition that it had actual knowledge of its claim. The 30-day statute of limitations for affording notice to the State of potential claims by contractors is strict and unforgiving.

> The Board is afforded no flexibility to depart from the obligation of statute and regulation. SHA is correct in its contention that any notice of claim filed later than April 3, 2011 was untimely. As a consequence, this appeal must be denied.

The Board further explained:

> The Board is not unsympathetic to Bramble's assertion that both the letter and the spirit of a sound and workable partnering agreement embodied by a design/build contract such as the one at issue here not only encourages but requires cooperation and collaboration among all parties involved, including the contractor and its design engineers along with representatives of the State. But that is not to imply that design/build contracts are exempt from the application of the 30 day statute of limitations for affording the State notice of a prospective claim. If such partnering agreements are to be so exempt, it is up to the legislature and not the Board to establish such an exception which does not currently exist in State law or regulation. State highway contractors may be legitimately frustrated at the short time frame permitted to preserve a claim for additional compensation, but that is what is established in law and SHA may easily defend the reasonable basis of the statutory 30-day notice limitation as appropriate to assure that all parties to a design/build partnering agreement understand at the earliest possible time the potential cost consequences of design alternatives. That permits the State to dictate its requirements with advance knowledge of the possibility of incurring extra costs. In the case of the crossing at Massey Branch, the State was and will remain permitted to assume that no extra costs are incurred by SHA's dictate of constructing a deep foundation with pilings because it received no notice of a claim for costs in a timely fashion.
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> With respect to the 90-day deadline for filing the substantive claim under the contract,

the Board also observed:

> Furthermore, the Board notes that not only was Bramble's Notice of Claim untimely, the actual substantive claim that followed was also filed late. According to Maryland law, "Unless extended by [SHA] within 90 days after submitting a notice of contract claim under a procurement contract for construction, a contractor shall submit to the unit a written explanation that states: (1) the amount of the contract claim; (2) the facts on which the contract claim is based; and (3) all relevant data and correspondence that may substantiate the contract." Md. Code Ann., State Fin. & Proc. § 15-219(b). This provision in law is also repeated by the inclusion of substantially identical

> language in COMAR 21.10.04.02B. But here it is uncontested that appellant filed its Notice of Claim on May 13, 2011 and did not follow up with the required elements of the claim itself until some nine (9) months later, on February 24, 2012.

Bramble, Inc. filed a Motion for Reconsideration, which the Board denied on December 19, 2013. Bramble, Inc. then sought judicial review in the Circuit Court for Kent County, and that court affirmed the decision of the Board. Bramble, Inc. timely filed a notice of appeal to this Court. On appeal, Bramble, Inc. argues that the Circuit Court erred in affirming the Board's grant of SHA's Motion for Summary Decision.

STANDARD OF REVIEW

We discussed this Court's review of the actions of an administrative agency in *Doe v. Allegany County Dept. of Social Services,* 205 Md. App. 47, 54-55 (2012), where we stated:

> Generally, when reviewing the decision of an administrative agency a court must only determine "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." *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 568, 709 A.2d 749, 753 (1998) (citing *United Parcel Serv., Inc. v. People's Counsel*, 336 Md. 569, 577, 650 A.2d 226, 230 (1994)). Therefore, we review the decision of the agency rather than that of the circuit court. *See Owens v. Prince George's County Dep't of Soc. Servs*., 182 Md. App. 31, 51, 957 A.2d 191, 203 (2008).
>
> Our review of the agency's factual findings consists solely of an appraisal and evaluation of the agency's fact finding and not an independent decision on the evidence. *Catonsville Nursing Home*, *supra*, 349 Md. at 570, 709 A.2d at 753 (citing *Anderson v. Dep't of Pub. Safety & Correctional Servs*., 330 Md. 187, 212, 623 A.2d 198, 210 (1993)). This evaluation seeks to find whether the evidence is substantial. Thus, "a reviewing court, be it a circuit court or an appellate court, shall apply the substantial evidence test to the final decisions of an administrative agency. . . ." *Id*. (citing *Baltimore Lutheran High Sch. Ass'n v. Employment Sec. Admin*., 302 Md. 649, 662, 490

A.2d 701, 708 (1985); *Anderson, supra*, 330 Md. at 212, 623 A.2d at 210; *Bulluck v. Pelham Wood Apts*., 283 Md. 505, 511–13, 390 A.2d 1119, 1123 (1978)). In this context, "'substantial evidence,' as the test for reviewing factual findings of administrative agencies, has been defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]'" *Id.* (quoting *Bulluck, supra*, 283 Md. at 512, 390 A.2d at 1123).

It is well established that "reviewing courts are under no constraint to affirm an agency decision premised solely upon an erroneous conclusion of law." *Id*. (citing *Ins. Comm'r v. Engelman*, 345 Md. 402, 411, 692 A.2d 474, 479 (1997)). Accordingly, we may reverse an administrative decision premised on erroneous legal conclusions.

Additionally, we are obligated to "review the agency's decision in the light most favorable to the agency," because their decisions are prima facie correct and carry with them the presumption of validity. *Id.* (citing *Anderson, supra*, 330 Md. at 213, 623 A.2d at 211; *Bulluck, supra*, 283 Md. at 513, 390 A.2d at 1124). The Court of Appeals has consistently stated that an adjudicatory agency's decision can only be reviewed on grounds identical to those relied upon by the agency. *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 112 n. 12, 771 A.2d 1051, 1053 n. 12 (2001). Finally, in an administrative appeal, the appellant bears the burden of establishing an error of law or that the agency's final decision was not supported by substantial evidence. *Taylor v. Harford County Dep't of Soc. Servs*., 384 Md. 213, 222–23, 862 A.2d 1026, 1031 (2004).

DISCUSSION

On appeal, Bramble, Inc. contends that: (1) the Board's decision was contrary to the Board's own regulations and an unlawful procedure; (2) the Board erred in granting SHA's motion for summary decision by resolving a disputed issue of material fact, namely, when the basis for Bramble, Inc.'s claim arose; (3) the Board ignored the partnering provision of the contract; (4) the Board's decision was unsupported by any evidence in the record; and (5) COMAR 21.10.05.06.D is void for vagueness, unconstitutionally applied, and *ultra vires*. The Board cited two reasons for denying Bramble, Inc.'s claim: (1) its notice of claim was

untimely; and (2) the substantive claim was untimely. Even if we assume *arguendo* that the facts were not sufficiently beyond dispute for the Board to conclude, at the summary disposition stage, that the *notice of claim* filed on July 11, 2011, was untimely, we perceive no genuine dispute of material facts with regard to the untimeliness of the *substantive claim* that was not filed until February 24, 2012. There is no genuine dispute that Bramble, Inc. failed to comply with SF&P § 15-219(b), requiring a contractor to substantiate its claim within 90 days of providing notice to SHA. We therefore affirm the Board's denial of the claim on the ground that Bramble, Inc.'s substantiation of its claim was untimely.

Notice of Claim Provisions Under State Procurement Law

Title 15, subtitle 2 of the SF&P, §§ 15-201 through 15-223, sets forth a statutory framework for the resolution of procurement contract disputes. Those statutes deal with two kinds of disputes: (1) "contract claims," which are defined in SF&P § 15-215(b) as claims that relate to a procurement contract, including claims about the performance or breach of the contract; and (2) "protests," which are defined in SF&P § 15-215(c) as complaints relating to the formation of a procurement contract. This case involves a contract claim, not a protest. *See Univ. of Maryland v. MFE*, 345 Md. 86, 92 (1997).

The key statute at issue here, SF&P § 15-219, provides in pertinent part:

> (a) *Notice of claim must be filed within 30 days.* — Except to the extent a shorter period is prescribed by regulation governing differing site conditions, a contractor shall file a written notice of a claim relating to a procurement contract for construction within 30 days after the basis for the claim is known or should have been known.
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> (b) *Explanation of claim.* — **Unless extended by the unit, within 90 days after submitting a notice of a contract claim under a procurement**

contract for construction, a contractor shall submit to the unit a written explanation that states:

(1) the amount of the contract claim;
(2) the facts on which the contract claim is based; and
(3) all relevant data and correspondence that may substantiate the contract claim.

* * *

(e) *Time period to which recovery is limited.* — Recovery under a contract claim is not allowed for any expense incurred:

(1) more than 30 days before the required submission of a notice of a claim under subsection (a) of this section; or
(2) unless the time for submission of a claim is extended under subsection (b) of this section, more than 120 days before the required submission of the claim.

(Emphasis added.)

Similarly, COMAR 21.10.04.02 includes the following language, addressing the filing deadlines established by SF&P § 15-219:

A. Unless a lesser period is prescribed by law or by contract, a Contractor shall file a written notice of a claim relating to a contract with the appropriate procurement officer within thirty days after the basis for the claim is known or should have been known, which ever is earlier.

B. Contemporaneously with or **within 90 days of the filing of a notice of a claim on a construction contract**, or 30 days of this filing on a nonconstruction contract, but no later than the date that final payment is made, **a contractor shall submit the claim to the appropriate procurement officer**. On conditions the procurement officer considers satisfactory to the unit, **the procurement officer may extend the time in which a contractor, after timely submitting a notice of claim, must submit a contract claim under a procurement contract for construction.** An example of when a procurement officer may grant an extension includes situations in which the procurement officer finds that a contemporaneous or timely cost quantification following the filing of the notice of claim is impossible or impractical. **The claim shall be in writing and shall contain:**

> **(1) An explanation of the claim, including reference to all contract provisions upon which it is based;**
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> **(2) The amount of the claim;**
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> **(3) The facts upon which the claim is based;**
>
> **(4) All pertinent data and correspondence that the contractor relies upon to substantiate the claim; and**
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> (5) **A certification** by a senior official, officer, or general partner of the contractor or the subcontractor, as applicable, that, to the best of the person's knowledge and belief, the claim is made in good faith, supporting data are accurate and complete, and the amount requested accurately reflects the contract adjustment for which the person believes the procurement agency is liable.
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> C. A notice of claim or **a claim that is not filed within the time prescribed in Regulation .02 of this chapter *shall be dismissed.***
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> D. Each procurement contract shall provide notice of the time requirements of this regulation.

(Emphasis added.)

Summary Decision Under COMAR

Bramble, Inc. contends that the Board erred when it granted SHA's motion for summary decision. It argues that "[t]he applicable standard of review of this matter is whether the Board was legally correct in granting the administrative Motion for Summary Decision, not the substantial evidence test," and that ". . . the substantial evidence test is typically applied on review of an administrative agency action, where the Court's review is a grant of summary decision the standard of review shifts . . . ."

Appellant argues that *Engineering Management Services v. Md. State Highway Admin.*, 375 Md. 211 (2003), requires reversal of the Board's decision. We reject Bramble,

Inc.'s contention that *Engineering Management Servs.* determines the outcome of this case. The former lack of any regulation authorizing dispositions of claims in a summary proceeding, which was the procedural issue that troubled the Court of Appeals in *Engineering Management Services*, has been remedied to satisfy the requirements of procedural due process.

At the time the Court of Appeals decided *Engineering Management Servs.*, neither the statute nor COMAR expressly authorized summary disposition of claims. In *Engineering Management Servs.,* the Court of Appeals reversed the Board of Contract Appeals's grant of a summary decision and remanded the case to the Board because ". . . the MSBCA violated the procedures set forth in its enabling statute when it proceeded to grant a summary disposition in the present case *in the absence of adopted rules of procedure*." *Id.* at 235 (emphasis added).

The Court of Appeals explained in *Engineering Management Servs.* that ". . . the MSBCA has failed to define what a 'summary disposition' is, or to set forth by what standards and under what conditions it is appropriate that a summary disposition may be sought or granted, or what procedures will be utilized by the Board to make such a determination. Absent such standards, procedures, and definitions, the courts cannot make a determination as to whether, in application, an error of law or procedure otherwise occurred at the administrative level." *Engineering Management Servs., supra*, 375 Md. at 235–36. In other words, the Board could not summarily decide cases in the absence of a written procedure adopted through agency rulemaking.

Bramble, Inc.'s position is that the Board continues to grant summary decisions using an unlawful procedure because its summary decision procedure does not fully mirror Rule 2-501 or the Department of the Environment's procedure for summary decisions, *i.e.*, Maryland Code (1974, 1996 Repl. Vol.), Environment Article, § 1-606, cited in *Engineering Management Services*. We disagree.

The Board has remedied the lack of a written summary decision procedure by promulgating COMAR 21.10.05.06.D. The Court of Appeals published *Engineering Management Servs.* on June 11, 2003. The agency proposed COMAR 21.10.05.06.D six months later, on December 26, 2003 (*Maryland Register*, vol. 30, issue 26). The COMAR regulation took effect on August 30, 2004. We infer that COMAR 21.10.05.06.D was promulgated in response to *Engineering Management Servs*. We are satisfied that in COMAR 21.10.05.06.D, SHA has ". . . set forth by what standards and under what conditions it is appropriate that a summary disposition may be sought or granted, or what procedure will be utilized by the MSBCA to make such a determination." *Engineering Management Servs*., *supra*, 375 Md. at 235–36.

Bramble, Inc. maintains that, despite the Court of Appeals's directive in *Engineering Management Servs.*, the Board still lacks proper procedures for it to grant what is the equivalent of summary judgment to the SHA. Bramble, Inc. observes that the Court of Appeals, in a footnote, stated: "Interestingly, House Bill 877, Chapter 59, Laws 1993 did establish detailed procedural rules for summary disposition for the Department of the Environment . . . ." *Id*. at 236 n.31. (citing Maryland Code (1974, 1996 Repl. Vol.),

Environment Article, § 1-606)). Bramble, Inc. contends that "[t]he MSBCA adopted no such language despite the suggestion by the Court of Appeals that they do so." SHA responds that COMAR 21.10.05.06.D now expressly authorizes summary dispositions, and adopts a standard that is, according to the SHA, "the same as that of a grant of summary judgment under Maryland Rule 2-501."

The regulation authorizing summary disposition by the Board, like Maryland Rule 2-501, permits a summary ruling only when there is no genuine dispute of material facts.

Currently, COMAR 21.10.05.06.D provides:

> (1) A party may move for summary decision on any appropriate issue in the case.
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> (2) The Appeals Board may grant a proposed or final summary decision if the Appeals Board finds that:
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> (a) After resolving all inferences in favor of the party against whom the motion is asserted, there is no genuine issue of material fact; and
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> (b) A Party is entitled to prevail as a matter of law.

We note that the limitations imposed by COMAR 21.10.05.06.D are consistent with those applicable to motions for summary judgment. Maryland Rule 2-501(a) provides:

> "Any party may make a motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. The motion shall be supported by affidavit if it is (1) filed before the day on which the adverse party's initial pleadings or motion is filed or (2) based on facts not contained in the record."

Rule 2-501(f) authorizes the entry of summary judgment as follows:

> The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

We are satisfied that the Board's grant of a summary decision in this case pursuant to COMAR 21.10.05.06.D has not violated Bramble, Inc.'s right to procedural due process. "Procedural due process requires that litigants must receive notice, and an opportunity to be heard." *Pickett v. Sears, Roebuck & Company*, 365 Md. 67, 81 (2001). Bramble, Inc. was on notice that its claim was subject to summary decision, and the Board provided Bramble, Inc. with a hearing. Procedural due process is a flexible concept that "calls for such procedural protection as a particular situation may demand," as "appropriate to the fair determination of the particular issues presented in a given case." *Reese v. Dep't of Health & Mental Hygiene*, 177 Md. App. 102, 150 (2007) (citing *Wagner v. Wagner*, 109 Md. App. 1, 24*, cert. denied*, 343 Md. 334, 681 A.2d 69 (1996); *Morrissey v. Brewer***,** 408 U.S. 471, 481 (1972) (noting that "due process is flexible and calls for such procedural protections as the particular situation demands")). There was no denial of procedural due process in this case because COMAR 21.10.05.06.D puts claimants on notice that the Board may, upon a party's motion, decide a claim using the summary decision procedure set out in the text of COMAR 21.10.05.06.D.

With respect to the opportunity to be heard, the Board held a hearing on SHA's motion for summary decision on October 23, 2013, and Bramble had the opportunity to respond to SHA's motion with evidence and argument. COMAR 21.10.05.06.D provides

adequate notice and guidance to parties appearing before the Board to let them know when a claim might be subject to summary disposition.[1]

We therefore reject appellant's argument that the Board's grant of summary decision was procedurally defective, and conclude that COMAR 21.10.05.06.D remedies the defect

[1] We acknowledge that COMAR 21.10.05.06 does not describe the Board's summary disposition with the same degree of detail found in the regulation applicable to matters pending before the Office of Administrative Hearings. For those cases, COMAR 28.02.01.12D provides:

> (1) Any party may file a motion for summary decision on all or part of an action, at any time, on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. Motions for summary decision shall be supported by affidavits.
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> (2) The response to a motion for summary decision shall identify the material facts that are disputed.
>
> (3) An affidavit supporting or opposing a motion for summary decision shall be made upon personal knowledge, shall set forth the facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.
>
> (4) The judge may issue a proposed or final decision in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

But the fact that the regulation authorizing summary dispositions by the Board is not as sophisticated as the regulation authorizing summary disposition by the Office of Administrative Hearings does not lead us to conclude that the Board's procedure is not legally adequate. Because it provides adequate notice to the claimants and they have the ability to contest requests for summary disposition, including the right to a hearing, as was afforded the claimant in this case, we are satisfied that the Board was legally permitted to make a summary disposition of this claim.

in Board procedures that were held inadequate by the Court of Appeals in *Engineering Management Servs., supra,* 375 Md. at 232–33.

The Substantive Claim Was Untimely

Bramble takes the position that it neither knew nor should have known of the basis of a claim until June 10, 2011, when it had actual knowledge that SHA had denied its claim for additional compensation, whereas SHA countered, and the Board agreed, that the statute of limitations period began earlier, on March 3, 2011. We need not decide whether there was a genuine dispute of material facts that should have prevented the Board from finding that the notice of claim filed on June 10, 2011, was filed too late; even if we assume *arguendo* that the notice filed on June 10, 2011, was timely, we conclude that the Board did not err in ruling that the substantive claim was untimely. Accordingly, it was not error for the Board to deny the claim.

The Board ruled that, regardless of whether Bramble, Inc.'s notice of claim was timely, its claim must be denied on a second, independent basis: Bramble, Inc. failed to file its substantive claim within the 90-day deadline. We agree that there is undisputed evidence in the record that Bramble failed to timely document its claim as required by SF&P § 15-219(b) and COMAR 21.10.04.02. SF&P § 15-219(b) ("Explanation of Claim"), as quoted above, provides:

> Unless extended by the unit, within 90 days after submitting a notice of a contract claim under a procurement contract for construction, a contractor shall submit to the unit a written explanation that states:
>
> (1) the amount of the contract claim;
> (2) the facts on which the contract claim is based; and

> (3) all relevant data and correspondence that may substantiate the contract claim.

It is undisputed that Bramble, Inc. did not submit the information required by § 15-219(b) until February 24, 2012. With respect to the 90 day deadline for providing a written Explanation of Claim, also referred to in the party's submissions as the "documentation of claim" or "substantive claim," Bramble, Inc.'s position is that it received an extension from SHA, and that it complied with the 90-day deadline established in SF&P § 15-219(b) as extended in this case. This contention is based on a series of exchanges between Bramble, Inc. and SHA. Even when we view them in a light most favorable to Bramble, Inc., we find no rational basis to conclude that Bramble, Inc.'s deadline for filing its substantive claim was extended through February 24, 2012.

The 90th day after July 11, 2011, would have been October 9, 2011. On October 6, 2011, Megan Bramble Owings, General Counsel for Bramble, Inc., wrote a letter to Mr. Steve Marciszewski, Acting Director, Office of Construction of the State Highway Administration. Ms. Owings explained in the letter, sent by e-mail on October 6, 2011:

> In follow up to the Notice of Claim filed in the above referenced project on July 11, 2011, due to the ongoing nature of our claim the purpose of this letter is to request a delay in the submission of our formal, substantive claim. We believe that delaying our submission until work is complete would be mutually beneficial to all parties.

The next day, Friday, October 7, 2011, Marciszewski responded by e-mail:

> Ms. Owings,
>
> The State Highway Administration's Office of Construction has received Bramble's letter dated October 6, 2011, informing SHA of the delay in its

> submission of the formal, substantive claim until the completion of the above referenced project.
>
> Please feel free to contact me should you have any questions.

On October 14, 2011, Ms. Owings wrote:

> Thank you for acknowledging our letter. **We will file the substantive claim by the end of the year, when the work is complete.** Thank you.

(Emphasis added.)

SHA never responded to this letter. But, even if we assume that, despite its silence, SHA granted Bramble, Inc. an extension until the end of the year, it is undisputed that Bramble, Inc. failed to file its documentation of claim by December 31, 2011.

The Board concluded:

> Even if the State had agreed to Bramble's request to be allowed to file its claim by the end of the calendar year 2011, appellant failed to file within that time frame and never sought any extension beyond the last day of December 2011. So assuming *arguendo* that the Board were to determine that the failure of SHA to reject Bramble's request for extra time constituted implicit consent to the requested extension, appellant's claim would still be deemed untimely. This is a second basis upon which the instant appeal must be denied.

Bramble, Inc. suggests that, even though its letter dated October 14, 2011, promised to "file the substantive claim by the end of the year, when the work is complete," it should not have been required to file its claim by the end of the year. In support of this argument, Bramble, Inc. suggests that it performed some work on the project after December 31, 2011. Bramble, Inc. concedes, however, that the work it performed after December 31, 2011, had nothing to do with its work on the Massey Branch culvert, and it is undisputed that the project was declared substantially complete on December 20, 2011. Consequently, there is

no genuine dispute that Bramble, Inc. failed to file its substantive claim within the extended deadline set forth in its letter dated October 14, 2011.

The Constitutional Arguments are not Preserved for Appeal

Finally, Bramble, Inc. argues that SF&P § 15-219 is void for vagueness and unconstitutionally applied. These arguments were not presented before the Board; therefore, they have not been preserved for appeal. "It is a settled principle of Maryland administrative law that, in an action for judicial review of an adjudicatory administrative agency decision, the reviewing courts should decline to consider 'an issue not raised before the agency,'" *Motor Vehicle Admin. v. Shepard*, 399 Md. 241, 260 (2007) (citing *Brodie v. Motor Vehicle Administration*, 367 Md. 1, 4 (2001)).

JUDGMENT OF THE CIRCUIT COURT FOR KENT COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.