Circuit Court for Prince George's County
Case No. C-16-CV-22-001059

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2436

September Term, 2023

IN THE MATTER OF MILANI CONSTRUCTION, LLC

Graeff,
Berger,
Zic,

JJ.

Opinion by Berger, J.

Filed: February 19, 2025

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms with Rule 1-104(a)(2)(B). Md. Rule 1-104.

In December 2021, Appellant Milani Construction, LLC ("Milani") filed a complaint before the Maryland State Board of Contract Appeals ("the Board") challenging the denial by Appellee, the Maryland Department of Transportation State Highway Administration ("SHA"), of Milani's request for a four percent reduction in the retainage being withheld under their construction contract. Soon before the hearing of the Board on this complaint -- and approximately two years after Milani's initial reduction request -- SHA reduced the retainage from five percent to one percent. Therefore, the only question at issue during the hearing was whether Milani was entitled to interest on the four percent retainage held during the period between its initial request and the date SHA executed the reduction. At the hearing, Milani argued that SHA's stated reason for denying the requestion -- that it may later file an equitable adjustment claim regarding the cost of protection vehicles ("PVs") under the contract -- rendered its denial both unlawful and in violation of a 2019 agreement to pay the full price of the PVs for the duration of the contract.

At the conclusion of the hearing, the Board granted SHA's motion for judgment, holding that Milani failed to prove by a preponderance of the evidence that it was entitled to a reduction in the retainage at the time of its initial request and that SHA did not abuse its discretion or breach the 2019 agreement by denying that request for the specific reasons it stated. On appeal, Milani presents three questions for our review, which we rephrase slightly as follows:[1]

[1] Milani phrased its original questions presented as follows:

I. Whether SHA's denial of Milani's retainage reduction request violated Maryland procurement law and denied Milani Construction due process.

II. Whether SHA's denial of the retainage reduction breached the 2019 written agreement between the parties.

III. Whether the 2019 written agreement between the parties waived SHA's discretion to deny Milani Construction's retainage reduction request for the reason stated by SHA.

For the reasons explained herein, we shall affirm.

FACTS AND PROCEDURAL HISTORY

In 2018, Milani bid on a construction project to reconstruct a traffic bridge over Suitland Parkway in Prince George's County. In June 2019, SHA accepted Milani's bid. The total contract price was $29,880,000 with a completion date of September 17, 2021.

I. Was the Board's decision legally incorrect because SHA's action denying Milani Construction's retainage reduction request violated Maryland's procurement law and denied Milani Construction due process?

II. Was the Board's decision legally incorrect because SHA's denial of Milani Construction's retainage reduction request breached a written agreement between Milani Construction and SHA?

III. Was the Board's decision legally incorrect because in a written agreement between the parties SHA waived any discretion it had to deny Milani Construction's retainage reduction request for the reason stated by SHA?

Three portions of the contract are relevant to this appeal. The first is Pay Item No. 1002 concerning the use of PVs during construction. These vehicles are used to protect construction workers from the impact of collisions at or near their worksite. This item in the contract provides for the use of PVs at an estimated quantity of 200 days at a bid price of $2,100 per day. SHA did not dispute this price when it decided to contract with Milani.

The second relevant portion of the contract is Section TC-7.05(a), concerning progress payments and, specifically, the variable retainage being held by SHA. This provision provides that, on a monthly basis, SHA will pay Milani the "value of the work satisfactorily performed during the preceding calendar month," less the specified variable retainage. The retainage being withheld on this contract was five percent. The terms of the variable retainage are laid out in TC-7.05(a)(3), which provides in relevant part:

> The Contract will be subject to a variable retainage. Any variation in retainage (increase or decrease) will be at the discretion of the Administration and the District Engineer. Those meeting the minimum qualifications may have retainage reduced upon request of the Contractor with consent of surety.
>
> Minimum Qualifications are as follows: After 50 percent project completion and upon request, Contractors with 'A' evaluations for the last two years may be reduced from 5 percent to 1 percent. Project completion percentage will be based upon actual work completed (excluding monies paid for stored materials). An interim evaluation of the current project would need to be completed and would need to be an 'A.'

Work under the contract began in August 2018. Approximately one year later, in September 2019, the final relevant contract provision came into play when SHA's project manager informed Milani that the actual quantity of PVs used during the project had

reached 125% of the estimated quantity. Pursuant to General Provision 4.04 of MDOT's Standard Provisions for Construction Contracts ("GP 4.04"), "[w]here the quantity of a pay item . . . is an estimated quantity and where the actual quantity of such pay item varies more than twenty-five percent above or below the estimated quantity stated . . . an equitable adjustment in the Contract price shall be made upon demand of either party." SHA cited the provision and informed Milani that it was holding payment for the PVs until the matter was resolved. In a subsequent email, SHA's District Engineer repeated the Administration's plan to cease payment for the PVs, demanded "an equitable price adjustment on [the PVs] for additional quantities over 125% of the estimated quantity," and alleged that it was "obvious that Milani's price is significantly higher than the average of numerous other bidders during that time frame." SHA requested that Milani provide to the Administration documentation regarding the price and unit cost of the PVs but did not file an equitable adjustment claim at that time.

Following additional exchanges between Milani and SHA, the two parties entered into a memorandum of agreement on December 2, 2019 ("2019 agreement"). The agreement provided:

> Within two weeks of executing this agreement, Milani shall provide MDOT SHA Office of Construction with any and all documents including, but not limited to quantity takeoffs, Milani owned equipment pricing, subcontractor quotes/invoices, etc. that relate to the following:
>
> - Price breakdowns of Milani's unit bid price for . . . Protection Vehicle.

> - Actual unit cost for those unit days that the Protection Vehicle bid item fell below the 125% estimated quantity threshold.
>
> After receiving the aforementioned information from Milani, MDOT SHA shall pay Milani the Protection Vehicle contract line item bid price for all Protection Vehicle unit days used through the duration of the project. This agreement does not limit or otherwise affect the right of either party to file a demand for an equitable adjustment pursuant to GP 4.04 of the contracts. When the contracts are complete to a point where Protection Vehicles are no longer needed for the performance of contract work and prior to final payment on the contract, Milani shall provide MDOT SHA Office of Construction with any and all documents including, but not limited to quantity takeoffs, Milani owned equipment pricing, subcontractor quotes/invoices, etc. that relate to the following:
>
> - Actual unit cost for those unit days that the Protection Vehicle bid item exceed 125% of the estimated quantity.

In September 2020, Milani contacted SHA with a request that SHA reduce the retainage being held on the contract price from five percent to one percent based on the contention that Milani had completed fifty percent of the project and had received an "A" contractor evaluation in 2018 and 2019. On November 24, 2020, Milani received a response from SHA denying its request for a retainage reduction. The denial letter explained that pursuant to Section TC-7.05(a)(3), "SHA has discretion for any variation in retainage (increase or decrease)." It continued:

> The Protection Vehicle line item quantity is anticipated to significantly overrun the estimated quantity. Milani's protection vehicle line item bid price is approximately seven (7) times the Blue Book cost and nine (9) times the average cost for other jobs bid during the same 6-month time period. This suggests that Milani has shifted expenses from one item

> to another pay item and that Milani is making an excessive profit on protection vehicles based upon its use of creative accounting. In light of this SHA anticipates that at the conclusion of construction it will pursue a GP 4.04 equitable adjustment on this pay item.[2]
>
> MDOT SHA must therefore deny Milani's request for a retainage reduction and may even need to hold additional retainage at some point in the future if the anticipated equitable adjustment becomes higher than the amount of retainage withheld.

This decision was affirmed by SHA Procurement Officer Stephen A. Bucy ("Mr. Bucy") on December 2, 2020. On January 5, 2020, Milani filed a claim for reduction of the retainage pursuant to GP-5.14 and COMAR 21.10.04.02. This claim was denied on June 29, 2021.

Milani appealed the denial of the claim to the Board, arguing that (1) SHA waived any right to deprive Milani of payment of its full contract price for the PVs when it signed the 2019 agreement to pay Milani for the PVs for the duration of the contract; (2) SHA abused its discretion and breached the 2019 Agreement because its decision not to reduce the retainage was unreasonable; and (3) SHA violated Maryland law and Milani's due process rights by withholding retainage for its stated reason without following the administrative dispute resolution process to address the cost of the PVs. Milani requested a retainage reduction of $1,094,309 and pre-decision and post-decision interest on that amount.

[2] SHA never filed an equitable adjustment claim pursuant to GP 4.04.

On September 29, 2022, the project was deemed substantially complete and Milani renewed its request for a retainage reduction. SHA approved the reduction from five percent to one percent and provided Milani with a check for the four percent difference on November 4, 2022. Therefore, at the hearing before the Board, the only amount at issue was $200,861.24 that Milani requested as interest due on the retainage held between the date of its original request and the date the check was ultimately issued.

At the Board hearing, Milani argued that it "was clear that the . . . retainage reduction was being denied to cover . . . the potential subtraction of cost that SHA expected to get at the end . . . of the project." Milani's president, Saeed Milani-nia ("Mr. Milani-nia") testified that following his request for a reduction, he spoke with Michael Brown ("Mr. Brown"), SHA's assistant district engineer, who informed him that SHA was refusing the request as a means of renegotiating the price of the PVs at a later date. Milani also introduced an email from Mr. Bucy to Mr. Brown explaining SHA's denial and a possible calculation for a future equitable adjustment:

> I don't think we can reduce the retainage . . . Could you guys please forecast out the # of days beyond 125% for the PV . . . item for the rest of the job? Then we would multiply that by $1,800 to figure what we might be asking Milani for in [an equitable adjustment claim] settlement back to SHA for this item.

According to Mr. Milani-nia's testimony, his understanding of this email was that Mr. Bucy told Mr. Brown that "for any additional protection vehicles going forward take an additional $1,800 retainage."

Milani argued at the hearing that because Mr. Bucy "signed an agreement promising to pay Milani the full contract price for the protection vehicles throughout the length of the project," SHA's actions were "literally paying with one hand, but then by refusing the retainage taking it back from the other." Therefore, Milani argued, because of the 2019 agreement, "either Mr. Bucy waived his right to deny [the retainage reduction] or . . . this was a breach of the agreement that was made to pay the full price." Milani further argued that in denying the request SHA was taking "money that it thinks it's entitled to," for the protection vehicles without filing a proper claim to dispute the cost of the PVs.

At the close of the hearing, SHA moved for judgment. The Board granted SHA's motion, holding that Milani "failed to meet its burden to prove by a preponderance of the evidence that it was entitled to a reduction of retainage at the time [Milani] made its request on September 30, 2020." In so holding, the Board explained that it found "no merit" to Milani's assertion that SHA violated its due process rights or Maryland procurement law by withholding the retainage without first filing an affirmative claim because the "amount of retainage SHA withheld was not a 'disputed contract claim' or an 'alleged debt' that required [SHA] first to file an affirmative claim." The Board further held that no breach of the 2019 agreement occurred because nothing in that agreement "promised Milani that SHA would reduce retainage at 50% project completion," and Milani "admitted at the hearing that SHA did, in fact, pay Milani the full PV line item bid price. . . ." Finally, the Board held that SHA had not waived its discretion to reduce the retainage because the 2019 agreement contained "no language concerning retainage, let alone an explicit waiver by

SHA giving up its discretion to decrease or increase retainage." Rather, the Board concluded, the agreement settled a dispute regarding the PVs "without affecting the right of either party to make an equitable adjustment claim in the future."

DISCUSSION

Standard of Review

When we review the decision of an administrative agency, such as the MSBCA, "we look through the circuit court's decision, although applying the same standards of review, and evaluate the decision of the agency." *Piney Orchard Cmty. Ass'n v. Maryland Dep't of the Env't*, 231 Md. App. 80, 91 (2016) (cleaned up). "[J]udicial review of an administrative agency action is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Bd. of Liquor License Commissioners for Baltimore City v. Kougl*, 451 Md. 507, 514 (2017) (internal quotation and citation omitted). Judicial review of such findings is "quite narrow," however, "it is always within our prerogative to determine whether an agency's conclusions of law are correct." *Adventist Health Care, Inc. v. Md. Health Care Comm'n*, 392 Md. 103, 120-21 (2006). We will not uphold an agency's conclusion when it is based on an error of law. *Id.*

The Supreme Court of Maryland has explained, however, that even "with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency." *Bd. of Liquor License Commissioners*, 451 Md. at 514 (internal

quotation and citation omitted). As such, this Court ordinarily gives "considerable weight" to "an administrative agency's interpretation and application of the statute which the agency administers," and consider "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Md. Aviation Admin. v. Noland*, 386 Md. 556, 571-72 (2005).

I. By denying Milani's retainage reduction request, SHA did not violate Maryland procurement law or deny Milani due process because Milani was not entitled to the reduction at that time as a matter of law.

Milani argues on appeal that the Board's decision in favor of SHA was legally incorrect because SHA abused its discretion in denying Milani's request for a retainage reduction. A procurement officer's exercise of discretion will not be upheld if it is arbitrary and capricious, unreasonable, or is in violation of the law. *PREAAmerica, LLC,* MSBCA Nos. 3036 & 30340 at 1, 7 (2017). Milani argues that SHA's decision is invalid because it violated Maryland procurement law and Milani's right to due process. Maryland procurement law permits a public entity, such as SHA, to retain a percentage of the total cost due to a contractor throughout the life of the contract. Md. State. Fin & Proc. § 13-225(b)(1). Pursuant to this rule, SHA was permitted to withhold up to five percent of the contract price. *Id.*

Milani's contract with SHA provided an opportunity to potentially lower this retainage from five percent to one percent if certain minimum qualifications were met. These qualifications were fifty percent completion of the contract and an 'A' performance rating in an interim project evaluation. As "minimum qualifications," meeting these

criteria did not contractually guarantee a reduction in the retainage percentage, but simply permitted Milani to request such a reduction. The final decision remained within the discretion of the procurement officer.

In arguing that the procurement officer, Mr. Bucy, abused his discretion in denying a request for a reduction in the retainage once Milani met the minimum qualifications, Milani relies on *Star Computer Supply, LLC*, MSBCA 3002 (2017). There, the Maryland State Board of Election's Department of Information Technology (DoIT) entered into a contract with Star Computer to purchase extended warranties for thirty-one ballot printers. *Star Computer* at 1, 20. In that case, although Star Computer fully performed, DoIT made a series of mistakes: it requested the incorrect type of warranty, it failed to fill out and return the warranty cards to the provider, and it ultimately lost the cards. *Id.* at 5-6. When the government sought to use the warranties, it discovered its numerous mistakes and requested a refund from Star Computer. *Id.* Because this request came far outside the stated return period, Star Computer declined the request. *Id.* at 2, 7.

Eventually, DoIT sent the desired refund amount to its collections service as a debt, imposed a seventeen percent collections fee, and off-set the demanded amount under other contracts it had with Star Computer. *Id.* at 8. In its dispute with DoIT, the Board held in favor of Star Computer, holding that a public entity cannot "unilaterally claim that a debt is owed by a contractor and collect the alleged debt via set-off against unrelated contract accounts without first adjudicating the validity of the disputed debt." *Id.* at 1. The Board held that, although the government can collect a debt, it cannot collect a disputed contract

claim without using proper channels. *Id.* at 18. Because Star Computer "was never adjudicated or legally determined to be a debtor" the amount taken by DoIT through off-sets "was clearly disputed." *Id.* at 19. Therefore, DoIT violated Maryland procurement law and deprived Star Computer of its property without due process of law. *Id.* at 20-21.

Here, Milani contends that by refusing the retainage reduction because it intended to file an equitable adjustment claim to dispute the price of PVs -- like DoIT -- SHA was essentially collecting a disputed debt without first adjudicating the validity of that debt via the proper claim procedure. Nonetheless, this case is distinguishable from *Star Computer*. Milani's argument necessarily assumes that Milani was entitled to the reduction in retainage at the time of its initial request in the same way Star Computer was entitled to payment on its other contracts. That is not the case. On the contrary, even if Milani met the *minimum qualifications* for such a request, it remained in SHA's discretion to grant the reduction at that time. Milani admits as much but argues that the *reason* for withholding the retainage rendered it illegal and stripped SHA of its discretion. This contention, however, rests on circuitous logic. SHA had the contractual discretion to deny the reduction but lost that discretion by offering an illegal purpose for the denial. This purpose, however, can only be illegal if SHA lacked discretion to deny the reduction in the first place.

If Milani was entitled to the retainage reduction by law, failure to reduce it based on an unadjudicated pricing dispute may very well be impermissible under the reasoning in *Star Computer*. Unlike *Star Computer*, however, where DoIT was off-setting the cost of a

disputed debt against money owed to Star Computer on other contracts, here, the retainage was not legally due to Milani at the time of its request. Both the contract language as well as our laws provide that SHA was not required to reduce the retainage at the time Milani made the request. Therefore, SHA was well within its authority to deny the retainage reduction for its stated reasons and doing so did not deprive Milani of due process or violate Maryland procurement law. The Board's determination that Milani failed to prove it was entitled to the reduction was not an error of law and supports the reasonable conclusion that no abuse of discretion occurred.

II. SHA's denial of Milani's retainage reduction request was not a breach of the 2019 written agreement between the parties.

Milani argues on appeal that the Board's decision was legally incorrect because SHA's failure to reduce the retainage violated its 2019 agreement to pay the full price of the PVs for the duration of the contract. Milani concedes that the 2019 agreement was unambiguous: "SHA agreed to pay Milani Construction the contract price for all protection vehicles used through the duration of the project." In the agreement, SHA agreed to pay Milani this price item, while reserving its right to file an equitable adjustment claim pursuant to GP 4.04 at a later date. There is no dispute that SHA complied with this by paying the full price of the PVs as promised. Milani argues, however, that under an objective interpretation of the agreement, "no reasonable person . . . would have interpreted [it] to mean that SHA would pay Milani Construction for the protection vehicles with one hand, but then take the equivalent amount of money back with the other hand by refusing a retainage reduction that the contract was otherwise entitled to." Based on this

interpretation, Milani further argues that by refusing to reduce the retainage as a negotiation tool in a potential price dispute, SHA violated the agreement's implied covenant of good faith and fair dealing. We disagree.

A. The plain meaning of the 2019 agreement does not support Milani's contentions.

Maryland contract law provides that when contract language is unambiguous, "we give effect to its plain meaning and do not contemplate what the parties may have subjectively intended by certain terms at the time of formation." *Cochran v. Norkunas*, 398 Md. 1, 16 (2007). In such circumstances, "a court must presume that the parties meant what they expressed . . . [T]he true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." *Id.* at 17 (internal citation omitted).

In considering how a reasonable person in Milani's shoes would have understood the 2019 agreement in relation to the retainage withholding, we will first look at Maryland law governing retainage. Maryland procurement law permits public procurement units, such as SHA, to withhold retainage for the duration of a construction contract. Maryland State Finance and Procurement Code ("SF&P") § 13-225 places limitations on how much a procurement unit such as SHA may withhold. SF&P § 13-225(b)(1). When "a contractor has furnished 100% payment security and 100% performance security," retainage is limited to five percent of the total contract price. *Id.* A primary procurement unit may also "withhold from payments otherwise due a contractor any amount that the unit reasonable believes necessary to protect the State's interest." SF&P § 13-255(b)(2).

When retainage is withheld, a contractor may elect to have the retainage placed in an interest-bearing escrow account. SF&P § 15-108. Retainage is only required to be returned after "satisfactory completion" of the construction project. SF&P § 17-110(b)(3). If the retainage was placed in escrow, when final payment of the retainage is made, the agency must direct the escrow agent to settle the escrow account by distributing money first "to the agency for any claim it may have against the contractor," next "to the Comptroller for any claim exceeding $50 against the contractor by the State or a State agency," and lastly "to the contractor." SF&P § 15-108. Maryland law also provides that "[i]f there is a dispute or contract claim between the contractor and the public body concerning the satisfactory completion of a contract for construction, the public body shall release the retainage to the contractor within 120 days after the resolution of the dispute or contract claim." SF&P § 17-110(b)(4).

It is reasonable to conclude from these statutory provisions, that public procurement units are permitted to withhold retainage as a means of security against default or as additional financial protection during a dispute with a contractor. *See Ridge Sheet Metal Co., Inc v. Morrell*, 69 Md. App. 364, 376 (1986) (quoting *Construction and Design Law*, Progress Payments § 17.4b.3 (1986)) ("[A]lthough the exact purpose of the retainage is not specified in the contract, is has generally been said that one purpose behind the retainage is for the owner to have a source of funds 'to complete the job if the contractor should default.'"); *see also Hensel Phelps Construction Company*, MSBCA No. 1080 & 1167, 62

(1992) (Despite substantial completion of the contract, "MTA . . . had the right to withhold retainage in light of the outstanding claims and counterclaims.").

Here, the source of the 2019 agreement was a dispute concerning the contract price of the PVs. Following negotiations, the two parties reached an agreement that SHA would pay the full contract price of the PVs provided that Milani first provide SHA with documents related to the pricing and cost of PVs and the "[a]ctual cost for those unit days that the Protection Vehicle bid item fell below the 125% estimated quantity threshold." It also provided that at the conclusion of the project, Milani would provide SHA with the "[a]ctual unit cost for those unit days that the Protection Vehicle bid item exceed 125% of the estimated quantity." The agreement did "not limit or otherwise affect the right of either party to file a demand for an equitable adjustment pursuant to GP 4.04" of the contract. This provision of the contract permitted either party to demand an equitable adjustment in the contract price when the actual price of a pay item "varies more than 25 percent above or below the estimated quantity stated in this Contract." The provision further indicates that the "equitable adjustment shall be based upon any increase or decrease in cost due solely to the variation above 125 percent or below 75 percent of the estimated quantity."

A plain reading of this agreement is that SHA was only willing to pay the full price of the PVs if Milani both agreed that a future equitable adjustment claim related to this price was permitted and if Milani provided SHA with the price and cost documentation necessary for SHA to file such a claim when contract performance was complete. Such a reading indicates that, although SHA agreed to pay -- and did pay -- the full price of the

PVs for the duration of the contract, it remained possible that SHA would renew its dispute of this price by filing a future equitable adjustment claim pursuant to GP 4.04. Had SHA done so and succeeded, the price of PVs would potentially be reduced, and SHA would have been entitled to "take back" some portion of the payments it made pursuant to in the 2019 agreement. Therefore, an objective interpretation of this agreement does not support the notion that a reasonable person in Milani's shoes at the time of signing would believe this agreement guaranteed that Milani would take and keep full payment for the protective vehicles. Rather, a reasonable person reviewing this agreement would recognize the possibility of a further price reduction occurring during or after contract performance.

Beyond this reasonable contractual interpretation, Milani also failed to show that the money being retained by SHA was in any way "equivalent to the amount of money SHA had paid or would pay Milani Construction for the protection vehicles that SHA hoped to get back in a future claim . . . ." First, as explained above, retainage withheld on a contract is designed to serve a specific purpose in securing the procurement unit against future default or unresolved disputes. It is calculated as a percentage of the total contract price and withheld over the life of the contract as each monthly progress payment is made. There is no support for the argument that denial of a retainage reduction because of a potential future claim transforms that retainage into anything other than what it is -- a means of financial security for the procurement unit. SHA was not required to reduce retainage at fifty percent contract completion, and its promise to resume full payment for the PVs did not change that.

Further, there is no support for Milani's argument that the amount withheld was literally equivalent to the amount SHA may have hoped to recover in an equitable adjustment claim. In support of this argument, Milani cites the email in which Mr. Bucy requested that Mr. Brown "forecast out the # of days beyond 125% for the PV . . . item for the rest of the job," and "multiple that by $1,800 to figure what we might be asking Milani for," in an equitable adjustment claim. This email does not suggest, however, that this calculation is connected to the amount of retainage being withheld. Rather, it appears designed to inform a future equitable adjustment claim. Milani did not present data to indicate that SHA was retaining an amount equivalent to this cost or that SHA ever increased the retainage or recalculated the amount of retainage being held in connection with a future claim. Even if it had, Milani was not entitled to the reduction, so nothing was taken from it when the reduction was denied.

Because no reasonable interpretation of the 2019 agreement results in the conclusion that SHA was not permitted to continue withholding five percent retainage for the life of the contract, and because continuing to withhold this contractually established amount was not the equivalent of "taking back" the payments SHA made to Milani for the PVs, the Board did not err in holding that SHA did not breach the 2019 agreement when it denied Milani's retainage reduction request.

B. SHA's reasoning for denying the retainage reduction did not breach the 2019 agreement's covenant of good faith and fair dealing.

Milani next argues that by refusing to reduce the retainage for the stated reason, SHA was in violation of the 2019 agreement's implied covenant of good faith and fair

dealing. Milani argues that this violation occurred when SHA denied "the retainage reduction on the advice of counsel to negotiate a reduction in the price of the protection vehicles." Pursuant to Maryland contract law, "there exists an implied covenant that each of the parties thereto will act in good faith and deal fairly with the others." *Julian v. Christopher*, 320 Md. 1, 9 (1990). Maryland courts have interpreted this covenant to mean that a party is precluded from acting in a way "that will have the effect of injuring or frustrating the right of the other party to receive the fruits of the contract between them." *Clancy v. King*, 405 Md. 541, 571 (2008) (internal citation quotation and citation omitted). When one party to a contact is granted discretion, "the party with discretion is limited to exercising that discretion in good faith." *Id.* at 569 (2008). When a contract does not establish a standard for exercising discretion, "the implied covenant of good faith and fair dealing should imply a reasonableness standard." *Julian*, 320 Md. at 9.

Here, as explained above, the 2019 agreement specifically reserved SHA's right to request an equitable adjustment for the price of PVs if it elected to do so. With this potential price dispute in mind and only half the contract performance complete, SHA reasonably determined that continuing to retain five percent of the contract price was an appropriate means of protecting the State's financial interests moving forward. Indeed, because SF&P § 17-110 permits SHA to continue withholding the full retainage even after completion of the contract if a dispute was outstanding, SHA's discretionary decision was therefore reasonable under the circumstances of the contract and the terms of the 2019 agreement.

Further, this decision by SHA did not injure or frustrate "the right of the other party to receive the fruits of the contract." Milani was not entitled to a reduction of retainage at the time of its request. Instead, SHA was only obligated to return the retainage once it deemed the contract "satisfactorily complete." 17-110(b)(3). Because SHA complied with its agreement to pay the full price of the PVs for the duration of the contract, the decision to continue withholding the full retainage amount as financial security against a future claim did not deprive Milani of any payments due to it at the time of the request. As a result, SHA's reasoning for continuing to withhold the full retainage amount did not violate the 2019 agreement's implied duty of good faith and fair dealing. For these reasons, the Board did not err in holding that SHA did not breach the 2019 agreement by denying Milani's retainage request.

III. The 2019 written agreement between the parties did not waive SHA's discretion to deny Milani Construction's retainage reduction request for the reasons stated by SHA.

Finally, Milani argues that because in the 2019 agreement "SHA agrees to may Milani the full contract price for the protection vehicles for the entire length of the project," it waived SHA's right to deny a retainage reduction for its stated reason. In support of this contention, Milani relies on the same arguments already cited, namely that the agreement would induce a reasonable person in Milani's shoes to believe that it would receive and keep payment for the PVs. Milani also argues that it relied to its detriment on this waiver when it discontinued its claim challenging SHA's refusal to pay for the PVs. We are not persuaded.

As we have previously explained, an objective interpretation of the 2019 agreement does not result in the conclusion that a reasonable person in Milani's shoes would have understood the agreement to preclude SHA from refusing a reduction in retainage. SHA was entitled to continue retaining five percent on this contract until satisfactory completion of the project. Continuing to do so based on the possibility of a disputed claim concerning the price of PVs was a reasonable explanation for doing so. Further, Milani was aware, based on the language of the 2019 agreement, that SHA had reserved the right to file an equitable adjustment claim related to the price of the PVs, an action that could have potentially reduced that price and taken some portion of SHA's promised payments for these vehicles back from Milani at a later date. The 2019 agreement contemplated such a claim, and no explicit language exists in the agreement waiving SHA's right to continue exercising discretion regarding a retainage reduction based on this potential claim. In short, there is no support for the argument that SHA would not be permitted to continue retaining five percent of the contract price.

Further, there is no support for the contention that Milani detrimentally relied on the assumption that SHA would not refuse a retainage reduction based on a future equitable reduction claim when it signed the 2019 agreement and withdrew its claim against SHA for non-payment for the PVs. The agreement made clear that SHA was still within their rights to file an equitable adjustment claim based on the price of the PVs. Despite this fact, Milani agreed to abandon its claim against SHA for payment on the PVs and accept the terms of the agreement -- that in exchange for immediate and continued payment for the

PVs, it would provide SHA with documentation that could later be used in an equitable adjustment claim and permit SHA to file such a claim in the future. Milani was aware at the time of signing that there was no guarantee that the full PV contract price would prevail in such a dispute.

Finally, no portion of the agreement made any mention of the retainage or of SHA waiving its contractual right to continue exercising its discretion in determining whether or not to reduce the retainage from five to one percent when Milani met the minimum qualifications to make that request. SHA's stated reason for denying the request was reasonable, legally sound, and in no way limited by the language of the 2019 agreement. Therefore, the Board did not err in holding that SHA did not waive its right to refuse a retainage reduction based on a potential equitable adjustment claim.

CONCLUSION

For the foregoing reasons we hold that the Board's holding in favor of SHA's decision to deny Milani's request for a reduction in retainage was supported by substantial evidence. The Board, therefore, did not err in making its holdings and we affirm the judgment of the circuit court upholding this decision.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.