BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF TRANSPORTATION & PUBLIC FACILITIES

DOUBLE A CONSTRUCTION OF ALASKA, INC.	)	
v.	)	
	)	
DEPARTMENT OF NATURAL RESOURCES	)	OAH No. 14-2329-CON
	)	Agency No. 70822-1

DECISION AND ORDER GRANTING DNR'S MOTION TO DISMISS

I. Introduction

Double A Construction of Alaska, Inc. ("Double A") submitted a claim to the Department of Natural Resources ("DNR") raising issues concerning a construction contract with DNR regarding improvements to the Johnson Lake campground. After the DNR contracting officer denied the claim, Double A filed an appeal to the Commissioner of the Department of Transportation and Public Facilities ("DOTPF"), who has jurisdiction over DNR construction contract appeals. The Commissioner referred the case as a voluntary referral to the Office of Administrative Hearings ("OAH"), pursuant to AS 44.64.030(b).[1] DNR then filed a Motion to Dismiss Double A's appeal, arguing that, among other things, the claim had not been timely filed with the contracting officer. Double A opposed DNR's motion, and the undersigned administrative law judge ("ALJ") took the motion under advisement.

DNR's Motion to Dismiss presents factual matters that go "beyond the pleadings," and therefore it is treated as a motion for summary adjudication. Summary adjudication may be granted in an administrative proceeding where there are no material facts in dispute and one party is entitled to judgment as a matter of law.[2] The moving party has the burden of showing there is no genuine issue of material fact.[3] In opposing summary adjudication, the non-moving party need not show that it will ultimately prevail, only that there are material facts to be litigated.[4] All reasonable inferences of fact are drawn in favor of the party opposing summary adjudication.[5]

---

[1] By e-mail dated 12/22/14, Double A stipulated to the appropriateness of the Commissioner's choice of venue. One year later, after the substance of this decision had been announced, Double A objected to the choice of venue and sought to have the referral rescinded. The Commissioner declined Double A's request by letter dated 12/9/15. At that time, Double A also challenged the propriety of the referral in motions to the ALJ. *See* Double A's motion to stay proceedings for want of OAH jurisdiction, and Double A's motion for reconsideration regarding the motion to stay. Both motions were denied by orders that discuss OAH's authority to hear this case and issue a proposed decision for the Commissioner of DOTPF. Those discussions are incorporated herein by reference.

[2] *Smith v. State*, 790 P.2d 1352, 1353 (Alaska 1990).

[3] *Alaska Rent-A-Car, Inc. v. Ford Motor Company*, 526 P.2d 1136, 1138 (Alaska 1974).

[4] *Alaska Rent-A-Car*, 526 P.2d at 1139.

[5] *Id.*

As discussed during a status conference on December 1, 2015, and as further discussed and elaborated below, Double A did not timely present its claims to DNR's contracting officer. A proposed decision making that finding was issued on December 29, 2015. Double A submitted a Proposal for Action ("PFA") that raised new equitable arguments, and the PFA was submitted to the Commissioner of DOTPF. The Commissioner then remanded the case to the ALJ "for the purpose of allowing DNR to respond to the new arguments, and for the further purpose of allowing the ALJ to consider the new arguments and responses in the preparation of the decision."[6] Double A's newly-raised equitable arguments are addressed in detail below, in the body of this decision.

Double A's claims were not timely presented to DNR's contracting officer, and there are no equitable considerations that might excuse Double A's delays in presenting its claims. Therefore, DNR's Motion to Dismiss is granted, and Double A's appeal is hereby dismissed.

II. Facts

After a competitive bidding process, in May 2013 Double A and DNR entered into the contract in question for improvements to the existing campground facility at Johnson Lake State Recreation Area, denoted as project no. 70822-1. Double A commenced work on the project in mid-July 2013. The project involved work such as clearing brush and topsoil, and excavating, filling and grading campground roadways and campsites.

Difficulties arose in connection with Double A's work on the project almost immediately.[7] A series of communications between Double A and DNR, and in latter stages between their respective attorneys, ensued. A timeline of the relevant communications[8] follows.

1. **8/13/13**: Double A email to DNR stating it would be claiming for additional compensation for DNR's alleged "decision to use poor materials for sub base" and "errors in plans."[9]

---

[6] Notice of Remand, 2/11/16, at p. 2.

[7] *See, e.g.*, 7/30/13, 8/7/13 and 8/12/13 emails and letters between Double A and DNR, exhibits 8, 15, and 16 to Double A's Motion for Summary Judgment Wrongful Termination for Default. Because DNR's Motion to Dismiss is predicated on timeliness issues, this decision does not address the merits of Double A's claims regarding these operational difficulties.

[8] The timeline presents relevant selections from correspondence relating to the timeliness issues raised by DNR's Motion to Dismiss, and it is not intended to represent a complete listing of the voluminous series of written communications between the parties during the relevant period. References to exhibits herein are either cited as "DNR" followed by page numbers, when citing to DNR's administrative record, or as "exhibit X to Double A's [or DNR's] motion ..." when citing to exhibits attached to the parties' various motions filed in this matter.

[9] DNR 000145.

2. **8/18/13**: Double A letter providing formal notice of its intent to claim under contract section 105-1.17, paragraph two, alleging "elevations and point schedule bust," "poor subgrade being left in place," and "over run of borrow," stating that "additional compensation and time is warranted," and indicating that Double A "will submit our written claim to the contracting officer within the 90 day period provided."[10]

3. **8/20/13**: DNR letter responding to allegations regarding "survey errors," "poor subgrade" and "borrow overruns,"[11] and stating "[w]e are eager to resolve any outstanding costs or time extensions due to you as a result of these three items."[12]

4. **8/28/13**: Double A letter to DNR further elaborating Double A's position regarding the three areas of problems encountered on the project.[13]

5. **8/22/13** through **9/3/13**: emails exchanged between DNR and Double A addressing project adjustments as work continues.[14]

6. **9/7/13**: DNR letter discussing excavation and borrow overrun issue. [15]

7. **9/7/13**: Double A letter to DNR regarding borrow overrun issues.[16]

8. **10/7/13**: Double A attorney Stepovich letter indicating he has been retained by Double A regarding the project and that Double A "is willing to negotiate short of filing its claim," and offering a resolution of issues in dispute.[17]

9. **10/21/13**: DNR letter to Double A, declaring Double A to be "in default of the contract," discussing "incomplete tasks" and Double A's alleged 'intimidation tactics" and other "disrespectful" behavior towards DNR project staff, and requiring "timely corrective measures or [DNR] will terminate the contract."[18]

10. **10/28/13**: Double A attorney Brady letter to DNR, indicating he has been retained by Double A regarding the project, noting that DNR has threatened termination of contract, raising additional issues regarding change orders, additional work required, additional time needed, and DNR's withholding of liquidated damages, and requesting "to review all project files pursuant to AS 40.25.110"[19] (the Alaska Public Records Act).

11. **11/7/13**: Double A attorney Brady email to DNR attorney Gray, thanking her for phone call, stating the hope that they "will be able to resolve this deteriorating situation," and stating "Double A is also agreeable to delaying its

---

[10] DNR 000148.

[11] The term "borrow" is used in the construction industry to refer to fill material such as sand or gravel that is excavated off-site and brought to the location to be filled.

[12] Double A exhibit 21 to Motion for Summary Judgment Wrongful Termination for Default ("MSJ").

[13] Double A exhibit 24 to MSJ.

[14] DNR 000151-153.

[15] DNR 000170.

[16] Double A exhibit 29 to MSJ.

[17] DNR 000179-180.

[18] Double A exhibit 42 to Opp. to DNR Motion to Dismiss.

[19] DNR 000181-182.

Alaska Records Act request at this time and **will advise you when and if the necessity arises to review the project records**."[20]

12. **11/19/13**: DNR letter to Double A regarding "winter shutdown" commencing on 11/19/13.[21]

13. **11/20/13**: Gray letter to Brady providing detailed responses regarding borrow overrun, project delays, change orders, and payments authorized for various requests.[22]

14. **12/18/13**: Brady letter to Gray, discussing borrow overrun and conveying "final progress billing for 2013."[23]

15. **12/31/13**: Gray letter to Brady (delivered via email on 1/2/14[24]), responding to his 12/18/13 letter and progress billings, providing six pages of detailed response, requesting additional information regarding certain specified issues, and stating if "Double A believes additional compensation for borrow or time is warranted, it should submit a claim pursuant to section 105-1.17."[25]

16. **1/13/14**: Gray email to Brady, following up on 12/31/13 letter regarding earthwork data discrepancies and suggesting that a meeting with Double A and surveyors be scheduled.[26]

17. **2/28/14**: Gray letter to Brady following up on details regarding areas of disagreement and stating if Double A "believes additional compensation is warranted, please see my letter dated 12/31/13, wherein Double A was directed to submit a claim pursuant to Subsection 105-1.17."[27]

18. **3/14/14**: Gray letter to Brady following up regarding areas of disagreement, and providing the following reminder: "I notified you on December 31, 2013 of your client's right to file a claim. Pursuant to that letter, Double A's time to file a claim runs on March 31, 2014."[28]

19. **3/16/14**: Brady email to Gray briefly discussing areas of disagreement and stating "[t]his is not going to end well for DNR."[29]

20. **3/24/14**: Gray email to Brady briefly discussing areas of disagreement, noting that prior offer to meet with Double A and surveyors has been declined by Double A, and stating that DNR "will look to receive Double A's claim shortly."[30]

---

20 DNR 000184 (emphasis added).
21 DNR 000185.
22 DNR 001573-1578.
23 Double A exhibit 35 to MSJ.
24 *See* DNR exhibit B to Motion to Dismiss, at p. 1.
25 DNR 000192-197.
26 DNR 000206.
27 DNR 000207-209.
28 DNR 000214-216. Ms. Gray calculated the 90-day claim filing deadline based on a start date of 12/31/13, the date of her letter, rather than the date the letter was actually delivered via email, 1/2/14; the latter date would result in a deadline of 4/2/14.
29 DNR 000218.
30 DNR 000217.

21. **3/24/14**: Brady email to Gray briefly discussing areas of disagreement and stating: "I can see that this falling *[sic]* on deaf ears. Please advise as to when I can review DNR's project records."[31]

22. **3/25/14**: Gray letter to Brady, conveying an "electronic copy of the requested files on a CD."[32]

23. **3/28/14**: Brady email to Gray, stating "I don't recall receiving a date and time to review the DNR project record from you," and asking her to "advise when DNR personnel are available for me to review the records."[33]

24. **4/2/14**: The last day of the 90-day period for filing the claim, based on the period commencing on 1/2/14.[34]

25. **4/9/14**: Brady letter to Gray, stating "[y]ou and DNR appear to be of the mistaken impression that Double A's claim is late ... I assure you that is not the case based upon DNR's failure to produce its project records until March 25, 2014, some five months after they were originally requested."[35]

26. **4/10/14**: Gray letter to Brady, confirming that the project records were produced on 3/25/14, one day after Brady renewed Double A's request.[36]

27. **4/14/14**: Double A submits its claim to the contracting officer.[37]

28. **4/30/14**: DNR letter to Double A noting that "[c]onditions onsite are suitable for commencement of work," requesting a "schedule detailing start of work onsite" and stating that "failure to resume or continue work will place the Contractor in violation of the Contract."[38]

29. **4/30/14**: DNR contracting officer Hagen letter to Brady setting forth 61 requests for additional information concerning various specified points raised in Double A's 4/14/14 claim.[39]

30. **5/14/14**: DNR letter to Double A noting that "[c]onditions onsite are suitable for commencement of work," requesting a "schedule detailing start of work onsite" and stating that DNR expects work to resume "immediately" and that "[f]ailure to do so will result in defaulting of the Contract."[40]

31. **5/19/14**: DNR letter to Double A noting that "[s]ite conditions have been suitable for construction since April 24" and Double A's "lack of progress is unacceptable," and setting a May 27, 2014 deadline for resuming work, "otherwise [DNR] will terminate the contract ... ."[41]

---

31 *Id*.
32 DNR 000219.
33 Double A Exhibit 58 to 12/2/14 Supplement to the Record, at p. 11.
34 AS 36.30.620(a); Double A/DNR contract sec. 105-1.17, at DNR 000260-261.
35 Double A Exhibit 58 to 12/2/14 Supplement to the Record, at p. 12.
36 Double A Exhibit 44 to Opp. to Motion to Dismiss.
37 DNR 000001-000044.
38 DNR 000223.
39 DNR 000232-236.
40 DNR 000237.
41 DNR 000238-239.

32. **5/20/14**: Brady letter to DNR contracting officer Hagen, responding to her letter of 4/30/14: "[E]very single answer to every single question posed by you is within DNR's own project record, which you apparently have not reviewed. ... [N]othing in the contract nor in the state procurement code requires any general contractor to respond to such an inquiry ... . Thus, we will not be providing point-by-point answers to questions that never would have been asked had you bothered to review your own project record." The letter goes on to offer access to Double A's project files, by "arrangement through [his] office for a mutually convenient time."[42]

33. **5/30/14**: Gray letter to Brady, following up on offer to review Double A's project records and asking for a convenient time to arrange for them to be picked up for copying.[43]

34. **6/2/14**: DNR contracting officer Hagen letter to Double A, stating among other things that conditions onsite have been suitable for commencement of work and setting a June 6, 2014 deadline for commencing work "with sufficient workers, equipment and material to complete the project."[44]

35. **6/6/14**: DNR contracting officer Hagen letter to Double A, providing formal Notice of Termination of the contract for "failure and/or refusal to work."[45]

36. **6/19/14**: Gray letter to Brady, following up on 5/30/14 request to have Double A's project records made available for copying, and noting Brady's lack of response.[46]

37. **6/30/14**: Gray email to Brady, following up on prior requests to have Double A's project records made available for copying, and asking again that they be made available.[47]

38. **7/18/14**: Gray letter to Brady, following up on three prior requests to have Double A's project records made available for copying, asking again that they be made available, and stating that if he does not respond by 8/4/14, DNR will assume Double A "has no other information to provide in connection with its claim," and the contracting officer will go ahead and issue DNR's decision on the claim.[48]

39. **11/3/14**: Double A receives DNR's Contracting Officer's Decision ("COD"), issued on 10/31/14 with cover sheet labeled "Engineer's Decision."[49]

40. **11/17/14**: Double A letter to DNR contracting officer, stating "Double A ... hereby submits its claim," referencing the April 14, 2014 claim, listing additional issues regarding "wrongful termination of the contract" and "business impact/business destruction," mentioning "the same pattern of misconduct for the

---

42 DNR 000240.
43 DNR 000241.
44 DNR 000242-243.
45 DNR 000244-245.
46 DNR 000246.
47 DNR 000247-248.
48 DNR 000247-248.
49 DNR 000604-630.

Hatcher Pass Assay Building Project," and stating the hope that a review of the COD will result in an equitable resolution. [50]

41. **11/18/14**: DNR contracting officer Hagen letter to Double A, stating the intent of Double A's 11/17/14 letter "is unclear," asking whether it is intended as a new claim, and noting that if intended as an appeal of the COD, it should be directed to the Commissioner of DOTPF.[51]

42. **11/19/14**: Brady and Gray exchange emails regarding the "Engineer's Decision" label on the COD.[52]

43. **11/19/14**: Double A submits appeal of the COD, raising additional issues regarding "wrongful termination of the contract," "business impact/business destruction," and claims having to do with the apparently unrelated Hatcher Pass Assay Building project. [53] DNR receives the appeal papers on 11/21/14.[54]

III. Discussion

Based essentially on the above timeline of events, DNR moved for dismissal of Double A's appeal, arguing that both the underlying claims and the appeal were untimely on a number of different theories.[55] This Decision focuses primarily on DNR's argument that Double A's claims were not filed within the 90-day period required under both the relevant section of the Alaska Procurement Code and pertinent provisions of the parties' contract.

The relevant Procurement Code provision, AS 36.30.620, requires that construction contract claims "**must** be filed within 90 days after the contractor becomes aware of the basis of the claim or should have known the basis of the claim, whichever is earlier."[56] In addition, the contract between the parties in this case also sets a 90-day deadline for submission of the claim: "The Contractor shall submit a written claim to the contracting officer within 90 days after the date the Contractor became aware of the basis of the claim or should have known of the basis of the claim, whichever is earlier. ... The Contractor waives any right to claim ... if the claim is not filed on the date required."[57]

Double A and DNR devote the bulk of their arguments regarding AS 36.30.620(a) to the question of whether the statutory deadline is "mandatory" or "directory," citing Alaska decisions

---

50 DNR 000505-508.

51 DNR Exhibit D to Motion to Dismiss.

52 DNR Exhibit C to Motion to Dismiss.

53 DNR 000553-630.

54 Exhibit A to DNR's Motion to Dismiss.

55 While DNR's Motion to Dismiss was pending, Double A filed a "Motion for Summary Judgment Wrongful Termination for Default," a "Motion for Summary Judgment Wrongful Assessment of Liquidated Damages," and a "Motion for Summary Judgment Failure to Pay for Change Order 4 Work." Some of the exhibits referenced herein were submitted by Double A with these motions. The issues raised in the motions, however, are rendered moot by this Decision and Order.

56 AS 36.30.620(a) (emphasis added).

57 Double A/DNR contract sec. 105-1.17, at DNR 000260-261.

that examine this distinction in cases involving governmental obligations in a variety of administrative contexts.[58] More on point, however, is the Alaska Supreme Court's decision in *Armco Steel Corp. v. Isaacson Structural Steel Co.*,[59] where the Court indicated that statutory notice requirements governing non-consumer contracts should be strictly construed, regardless of prejudice or lack of prejudice to the other party. Double A has articulated no basis to disregard this principle.

In any event, in this case we need not reach the question of whether the statutory 90-day deadline for filing a claim must be enforced as written, because the contract between Double A and DNR independently sets a 90-day deadline for submission of the claim. The contractual deadline clearly is mandatory, in that it results in a waiver of the claim if the deadline is not met: "The Contractor waives any right to claim ... if the claim is not filed on the date required."[60]

This was an arms-length contract between Double A and DNR, and Alaska courts consistently hold that the parties to a contract are bound by its terms.[61] It is a basic tenet of law "that competent parties are free to make contracts and that they should be bound by their agreement," and that "[a]s a matter of judicial policy the court should maintain and enforce contracts, rather than enable parties to escape from the obligations they have chosen to incur."[62]

The ALJ cannot ignore those terms of the contract, no matter how harsh the results may be. Double A waived its right to claim under this contract if it submitted its claim more than 90 days after it knew, or should have known, of the basis for its claim. This was a clear, unambiguous contractual provision that Double A agreed to, and it is bound by it. The key question then becomes, when did the 90-day period start to run? In analyzing this question, it is useful to separate Double A's various requests for relief into two categories: (1) "operational" issues regarding the survey errors, poor subgrade and borrow overrun issues (first formally raised by Double A in its August 18, 2013 letter), as well as related issues regarding change orders, additional work required, additional time needed, and DNR's withholding of liquidated damages (first formally raised by attorney Brady's October 28, 2013 letter); and (2) issues related to DNR's June 6, 2014 termination of the contract.

---

[58] *See, e.g., City of Yakutat v Ryman,* 654 P.2d 785, 789-790 (Alaska 1982); *State, Dep't of Commerce & Econ. Dev., Div. of Ins. v Schnell,* 8 P.3d 351, 357 (Alaska 2000).

[59] 611 P.2d 507, 511-512 (Alaska 1980). *Armco* was recently cited with approval in *Carr-Gottstein Foods Co. v. Wasilla, LLC,* 182 P.3d 1131, 1139 n.34 (Alaska 2008).

[60] Double A/DNR contract sec. 105-1.17, at DNR 000260-261

[61] *See, e.g., Kazan v. Dough Boys, Inc.*, 201 P.3d 508, 514 (Alaska 2009); *Commercial Recycling Center, Ltd. v. Hobbs Inds., Inc.*, 228 P.3d 93, 98-99 (Alaska 2010).

[62] *Commercial Recycling Center, Ltd.*, 228 P.3d at 98-99.

A. Operational Claims

In its Motion to Dismiss, DNR argues that at the latest, Double A knew of the basis of its claim by January 2, 2014. DNR points out that all of the various aspects of Double A's dispute with DNR (other than the June 6, 2014 contract termination) had been raised, discussed and argued well before that date. DNR then argues that the 90-day clock started to run with attorney Gray's December 31, 2013 letter to attorney Brady (delivered via email on January 2, 2014). That lengthy letter essentially denied Double A's request for additional compensation and concluded with the statement that if "Double A believes additional compensation for borrow or time is warranted, it should submit a claim pursuant to section 105-1.17." This was a clear signal to Double A that DNR considered the dispute to have reached the point where the period for filing of a formal claim had started to run.

DNR subsequently reminded Double A of the running of the clock in another letter from Ms. Gray to Mr. Brady, dated March 14, 2014. In that letter, Ms. Gray reminds Brady that she had notified him on December 31, 2013 of Double A's right to file a claim, concluding that "Double A's time to file a claim runs on March 31, 2014."[63] As noted above, at that time Ms. Gray calculated March 31 to be the 90-day deadline based on the period commencing on December 31. DNR later amended its calculation based on the actual, undisputed delivery date of the letter, January 2, 2014, with the deadline thus falling on April 2, 2014. This resulted in Double A actually having two extra days to file its claim.

In response to DNR's Motion to Dismiss, Double A offered no alternative theory regarding the date on which the 90-day filing period started to run. Rather, Double A focused primarily on two arguments: (1) that DNR had practical notice of Double A's claims long before Double A filed its formal claim on April 14, 2014; and (2) that Double A's delays in filing its April 14 claim were caused by DNR wrongfully withholding records requested by Double A in October 2013.[64] The first argument, however, entirely misses the point. DNR does not dispute the fact that it knew of Double A's position regarding the various disputes between the parties. The contract does not require that mere notice be provided to the contracting officer, however; it requires that a claim be formally filed by the 90-day deadline or it will be waived.

---

[63] DNR 000214-216.

[64] *See, e.g.*, Double A's Opp. to Motion to Dismiss at 4-5, 9-11; *see also* Double A Exh. 58 to 12/2/14 Supp. to the Record, at p. 12. Double A devotes most of its arguments in its opposition brief (and a sur-reply) to the question of whether AS 36.30.620(a) should be strictly construed, without squarely addressing the waiver language in the contract.

More problematic is Double A's argument that its late filing was caused by DNR's withholding of project records. The argument is problematic because it flies in the face of the factual record presented to the ALJ. Double A's attorney, Kevin Brady, made a request on October 28, 2013 for an opportunity "to review all project files pursuant to [the Alaska Public Records Act]."[65] Less than two weeks later, Mr. Brady wrote to DNR's attorney Sara Gray, agreeing to delay the "Alaska Records Act request" and stating that Double A would "advise you when and if the necessity arises to review the project records." [66] The record contains no reference to any further request by Double A or Mr. Brady to review the project records until March 24, 2014; Ms. Gray then provided the records to Double A the next day.[67] Based on the record presented by both parties, DNR did not wrongfully withhold documents from Double A.

At the latest, Double A knew of the basis of its claim by January 2, 2014. It is undisputed that is the date on which Double A received a letter from DNR's counsel, denying Double A's request for more compensation for borrow or time, and notifying it that it should file a claim pursuant to Subsection 105-1.17 if it believed additional compensation was warranted. It is noteworthy that Double A was subsequently reminded three times (February 28, March 14, and March 24) of the need to file a claim promptly it if wished to pursue the matter. Based on a start date of January 2, 2014, Double A's filing of its claim on April 14, 2014 was not timely, and in accordance with the contract, the requests raised in the claim were waived.

B. Wrongful Termination and Related Issues

DNR terminated Double A's contract regarding the Johnson Lake campground on June 6, 2014, while Double A's April 14, 2014 claim was pending. The COD on the April 14 claim was issued on November 3, 2014. Double A then wrote a letter to DNR's contracting officer Marlys Hagen on November 17, 2014, which included a reference to the wrongful termination issue. Subsequently, after Ms. Hagen sought clarification as to the intent of the November 17 letter, on November 19, 2014 Double A submitted its formal appeal of the COD to the Commissioner. Double A included in the appeal its arguments regarding issues that go beyond those addressed in the COD, i.e., "wrongful termination of the contract," "business impact/business destruction," and problems with the apparently unrelated Hatcher Pass Assay Building project (asserting that these problems were emblematic of a pattern of DNR maltreatment of Double A).

---

65 DNR 000181-182.
66 DNR 000184.
67 DNR 000217, 000219.

Double A never submitted a formal claim regarding its argument that DNR wrongfully terminated the contract or the other new issues raised in the November 19, 2014 appeal. Double A's attorney raised arguments about these issues in correspondence with DNR and Ms. Gray, but the closest Double A came to a formal "claim" was its November 17, 2014 letter to the contracting officer, which was ambiguous at best. In any event, even if one were to treat that letter as a "claim" on the wrongful termination issue, it was submitted approximately 164 days after the termination of the contract, or 74 days after the 90-day clock had run.

Because Double A never properly raised these issues through a formal claim to contracting officer Marlys Hagen, she was never able to evaluate the wrongful termination allegations. Presentation of a timely, formal claim is a fundamental prerequisite to a contractor's ability to pursue a construction contract appeal under the Procurement Code. Double A's contentions as to the termination of the contract, and the other new issues raised in this appeal, were not properly or timely raised in a formal claim. Therefore Double A is foreclosed from arguing these issues in this appeal.

C. Double A's Proposal for Action

As mentioned above, after the issuance of the original proposed decision this matter, Double A submitted a PFA arguing that the proposed decision should not be adopted.[68] The bulk of the PFA reiterated the jurisdictional arguments that Double A had raised in the late stages of this proceeding, after the substance of this decision had been orally announced to the parties at a status conference. Those arguments have already been addressed in orders issued in December 2015.[69] Double A's PFA, however, also raised new equitable arguments, as follows:

> The doctrines of both ***equitable tolling*** and ***equitable estoppel*** apply directly to the situation presented to the ALJ – that being – DNR's refusal to timely comply with an Alaska Records Act request in order to permit Double A access to the very records essential to the preparation and submission of its claim.[70]

The proposed decision and the parties' PFAs were submitted to the Commissioner. The Commissioner noted that, because Double A had not previously raised these equitable arguments, DNR had not had an opportunity to respond to them. Accordingly, the Commissioner remanded the case to the ALJ "for the purpose of allowing DNR to respond to the new [equitable] arguments, and for the further purpose of allowing the ALJ to consider the new

---

68 DNR also submitted a PFA recommending that the Commissioner adopt the proposed decision.

69 *See* footnote 1 above.

70 Double A's Proposal for Action, 1/21/16, at p. 11 (emphasis in original).

arguments and responses in the preparation of the decision."[71] DNR then submitted a written response to Double A's equitable tolling and equitable estoppel arguments.

Double A's equitable arguments are unavailing, for the following reasons. First, it must be noted that the foundation for Double A's arguments is the premise that its delays in filing its April 14 claim were either caused or excused by DNR wrongfully withholding records requested by Double A in October 2013. This contention is mistaken, as discussed in this decision at page 10 above. Double A continues to assert this position, making it the centerpiece of its equitable arguments in the PFA, notwithstanding the fact that it is contradicted by the undisputed documentary record.

The parties' correspondence clearly shows that Double A's counsel informed DNR on November 7, 2013 that "Double A is agreeable to delaying its Alaska Records Act request at this time and will advise you when and if the necessity arises to review the project records;"[72] and subsequently, when Double A renewed its request for the records on March 24, 2014, DNR produced them the next day.[73] There simply was no "wrongful withholding" of documents. It is this faulty premise that is the cornerstone of Double A's equitable arguments in its PFA.

Apart from the mistaken factual premise underlying these equitable arguments, Double A has not established that it can meet the essential elements of either of the equitable theories raised in its PFA. As to equitable tolling, Double A's PFA cites a variety of federal cases discussing the doctrine in the context of federal claims, but the PFA overlooks that this case is governed by state law, and that the Alaska Supreme Court has issued numerous decisions discussing the conditions under which equitable tolling will be applied to toll a limitations period. Double A fails to cite even one of these Alaska cases.

A recent Alaska decision discussed the required elements of an equitable tolling claim, emphasizing that the doctrine "applies to relieve a plaintiff from the bar of the statute of limitations when he has more than one legal remedy available to him," and further that "the statute is tolled only when the initial remedy is pursued in a judicial or quasi-judicial forum."[74] Double A does not assert, however, that it delayed submitting its claim in this matter while it was pursuing a legal remedy regarding its dispute with DNR in another judicial or quasi-judicial forum. On the contrary, the factual record is clear that the only forum in which Double A sought

---

71 Notice of Remand, 2/11/16, at p. 2.

72 DNR 000184.

73 DNR 000217, 000219.

74 *Krause v. Matanuska-Susitna Borough*, 229 P.3d 168, 177 (Alaska 2010), *citing Smith v. Thompson*, 923 P.2d 101, 105 (Alaska 1996) and *Dayhoff v. Temsco Helicopters, Inc.*, 772 P.2d 1085, 1087 (Alaska 1989).

a remedy was in its administrative claim to DNR's contracting officer. Equitable tolling, therefore, has no application here.

Double A's PFA also argues that equitable estoppel should be applied to excuse its delay in submitting its claim to DNR. Again, the underlying premise to Double A's argument is the mistaken premise that DNR wrongfully withheld records, causing Double A's claim to be untimely filed. Although this issue alone is a sufficient ground for denying equitable relief, there are other problems with Double A's equitable estoppel argument. First, Double A's assumes that the disclosure of DNR's records was a necessary prerequisite to the filing of its claim. Double A cites to no legal authority or factual basis for that proposition.

In addition, Alaska cases clearly establish that Double A, in seeking application of estoppel, must establish that DNR asserted a position by conduct or word, that Double A reasonably relied upon that assertion and suffered prejudice as a result, and that "estoppel will be enforced only to the extent that justice so requires."[75] There is no evidence in the record of this matter that DNR asserted a position on which Double A might have reasonably relied, resulting in prejudice to Double A in connection with its efforts to timely submit its claim. Based on the record presented, Double A has not established that "justice requires" the application of equitable estoppel in this case to excuse its untimely filing or to toll the deadline for that filing.

IV. Conclusion and Order

Double A did not timely present its claims to DNR's contracting officer regarding the issues raised in this appeal, pursuant to section 105-1.17 of the contract and AS 36.30.620. There are no equitable considerations that might excuse Double A's delays in presenting its claims. Double A's claims, therefore, were waived, and DNR's Motion to Dismiss is granted.

Double A's appeal in this matter is HEREBY DISMISSED. Double A's motions for summary judgment regarding "Wrongful Termination for Default," "Wrongful Assessment of Liquidated Damages," and "Failure to Pay for Change Order 4 Work" are denied as moot.

Dated this 11th day of March, 2016.

Signed
Andrew M. Lebo
Administrative Law Judge

[75] *Ogar v. City of Haines*, 51 P.3d 333, 335 (Alaska 2002).

Adoption

The undersigned, in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 15th day of March, 2016.

By: *Signed*
Signature
Marc A. Luiken
Name
Commissioner, DOT&PF
Title

[This document has been modified to conform to the technical standards for publication.]