BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of	)	
MAXIMUS, Inc.	)	
	)	
	)	**Docket No. MSBCA 2891**
Under Maryland State	)	
Department of Education	)	
RFP No. R00R4401397	)	

APPEARANCE FOR APPELLANT: **John F. Dougherty**
Sheila Gibbs
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Baltimore, Maryland

APPEARANCE FOR RESPONDENT: **Lydia B. Hoover**
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APPEARANCE FOR INTERESTED PARTY: **Denise Bowman**
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O R D E R

The State filed a Motion to Dismiss this bid protest on the grounds that it is untimely filed, appellant's Notice of Appeal not having been docketed with the Maryland State Board of Contract Appeals (Board) until March 27, 2014, ten (10) days after appellant's uncontested receipt of the hard copy of the final denial sent by the State to appellant by certified mail received on March 17, 2014, but thirteen (13) days after electronic transmission of that decision, which was e-mailed to appellant on March 14, 2014. Applicable Maryland statute and regulation strictly requires the bid protest to be noted "within ten (10) days of receipt of notice of the final procurement agency action." State Finance and Procurement Article of the Maryland Annotated Code, Section 15-220(b). See also Code of Maryland Regulations (COMAR) 21.10.02.10A.

Simply put, the question before the Board is: When did appellant receive notice of the final procurement agency action:

March 14 or March 17? The State contends that receipt occurred when the final denial determination was e-mailed to counsel for appellant on March 14, 2014. Without conceding it ever received the March 14, 2014 e-mail, appellant contends that unacknowledged e-mail transmission of the decision does not trigger the determination of date of receipt for purpose of starting the running of the 10-day statute of limitations to file a protest with the Board, which, according to appellant, did not commence until actual proven receipt of the formal correspondence that was written on a piece of paper, mailed to appellant by certified mail, and undisputedly received on March 17, 2014, as indicated by the postal return receipt bearing a signature of appellant's authorized agent on that date.

COMAR 21.10.02.10(D) states: "The procurement officer shall furnish a copy of the decision to the protester and all other interested parties, by certified mail, return receipt requested, *or by any other method that provides evidence of its receipt.*" So the issue for the Board's resolution is whether e-mail constitutes a method of communication "that provides evidence of its receipt." If receipt occurred on March 14, 2014, appellant's bid protest would have had to be filed with the Board no later than March 24, 2014.

The Maryland Uniform Electronic Transactions Act (UETA) recognizes the validity of e-mail transactions, but "only to transactions between parties, each of which has agreed to conduct transactions by electronic means," stating further, "whether the parties have agreed to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct" but also that "a provision to conduct a transaction electronically may not be contained in a standard form contract unless that provision is conspicuously displayed and separately consented to." Maryland Annotated Code, Commercial Law §21-104(b).

UETA further provides, "If parties have agreed to conduct a

transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered in an electronic record capable of retention by the recipient at the time of receipt." Maryland Annotated Code, Commercial Law §21-107(a). By revision to UETA enacted in 2005, UETA specifically permits electronic communications to substitute for certified mail if authenticated by an electronic postmark certificate, which is not alleged to have been used in this procurement. Maryland Annotated Code, Commercial Law §21-118.1.

With particular reference to state contracts, COMAR 21.03.05.02(A) requires that "Each solicitation and contract shall state whether electronic transactions are permitted or required for that procurement. *If the solicitation or contract does not specify that electronic transactions are permitted or required, bidders and offerors may not use electronic means for any part of the procurement.*" (Emphasis supplied.)

With respect to express authorization of e-mail communications, this RFP stated only, "This is not applicable to this RFP." (See RFP Sec. 1.36, pg. 18, Hearing Ex. No. 1.) Thus, the solicitation did not expressly specify that electronic transactions were permitted. The State argues that the underlying Request for Proposals (RFP) implicitly allowed e-mail notification of the final decision because the procurement contains repeated references to the procurement officer's e-mail address, and communications between bidders and the controlling procurement officer were routinely conducted by e-mail, including plenty of e-mails between appellant and the procurement officer. (See Hearing Ex. Nos. 2, 3, 4, 5 & 7.) The Board is persuaded that e-mails were certainly acceptable for purposes of discussing this procurement, but that is not to imply that e-mail is therefore an authorized substitute for certified mail of a copy of the final denial of a bid protest.

Evidence introduced at the Motions hearing included affidavits by State employees supporting the unchallenged contention that the subject e-mail was sent to appellant's counsel on March 14, 2014 and was directed to the correct e-mail address; that it was never returned as undeliverable; and furthermore, that it was in fact delivered electronically on Friday March 14, 2014 at 11:18 a.m. to the internet protocol (IP) address presumably attached to appellant's counsel's e-mail account, though that coded computer record is substantially but not completely unintelligible without complex explanation of means of documenting electronic records transmission. (See Motion Ex. Nos. 2, 3, 4, 5 & 6.)

The Board notes *sua sponte* that for some e-mail programs, for example, America On Line (AOL), in the event an e-mail is undeliverable, a message is automatically generated and sent to the sender's inbox with the subject heading, "Undelivered Mail Returned to Sender," which states, " *** ATTENTION *** Your e-mail is being returned to you because there was a problem. . ." Also by judicial notice on the basis of its own observation, the Board knows that Microsoft Outlook has a feature that allows the sender to track delivery of an e-mail and obtain a delivery receipt to confirm delivery to a recipient's mailbox. According to Microsoft's website, this feature to provide delivery confirmation works only if the recipient's e-mail program allows the same and the recipient elects to acknowledge receipt. There is no indication in the case at bar that the State attempted to receive from appellant any such e-mail delivery receipt, but there was also no automatic message generated to show non-delivery of the e-mail in question.

Though it is undisputed that the State sent notification to appellant by e-mail on March 14, 2014, the Board nevertheless declines to accept the proofs posited by the State as sufficient to show that the final decision was received by counsel for appellant prior to the undisputed receipt of the letter sent by

certified mail in the particular form suggested by COMAR. Ordinary e-mail communication is not "a method which evidences receipt" as referenced in COMAR. Except in the event of formal service of process or when the recipient is evading receipt, the source of evidence for receipt implicit in COMAR 21.10.02.10(D) is some form of evidence *from the recipient.* This is what renders a date of receipt undisputable. That is why certified mail, return receipt requested from the recipient, is specifically authorized, with a stated permissible alternative of any other method that provides evidence of receipt. The only evidence of receipt as yet here put forward by the State comes from the State and not the recipient. Receipt of the March 14, 2014 e-mail is not admitted by appellant.

In rendering this decision, the Board does not dispute the accuracy of the State's representations that a courtesy copy of the final decision was e-mailed to appellant's correct e-mail address on March 14, 2014. There simply is no concession or acknowledgement provided by the recipient that appellant actually received that e-mail at all. Hopefully the State is not contending that a person with an e-mail address is obliged to open all of their e-mail each day. Is an unopened e-mail received? Is opened e-mail received when it is opened or when it is electronically parked in the recipient's inbox? Of course, like e-mail, regular mail may also remain unopened by the recipient, but the Board suggests that a different standard of urgency and obligation is attached to a certified letter, return receipt requested, as compared to ordinary e-mail for which the recipient sends no acknowledgement of receipt.

Does the State really seek to assert that in 2014, e-mail is now to be regarded as providing the same level of certification of receipt as certified mail, return receipt requested? In prioritizing communication for timely review, physical receipt of a piece of certified mail hand-delivered by the post office simply does not and should not carry the same weight of

importance and immediacy as ordinary e-mail. It’s not unusual for some people to receive hundreds of e-mails per day, the great bulk of which may never be opened at all. While the Board does not question that the subject e-mail was sent on March 14, 2014, there is no affirmative proof of receipt. The only alleged proof of receipt comes from the sender, and is made not by direct evidence but only circumstantial evidence, to be implied by a specially generated computer transmission record which appears to reflect that the subject e-mail was sent and did not bounce back. This is insufficient evidence of receipt.

There is no indication to the Board whether the March 14, 2014 e-mail was misdirected to the recipient’s electronic spam folder, nor was any other evidence offered to show that appellant opened or otherwise actually received the subject e-mail with certainty on March 14, 2014. Acknowledgement of receipt was requested, but never provided. Without evidence of receipt by the recipient from the recipient, using e-mail to suffice for the prescribed formal communication of an important final determination is insufficient to satisfy the requirement of COMAR to convey such a determination only “by certified mail, return receipt requested, or by any other method that provides evidence of its receipt.”

The Board distinguishes the case precedent relied upon by the State from the circumstances present here. In the Appeal of NewMarket Enterprises, Ltd., MSBCA 2718 (Aug. 2010), no counsel entered an appearance for appellant, a defect for which the Board may dismisses appeals without even addressing the merits. In addition, certified mail sent to appellant at the address provided by appellant in that appeal was returned by the post office marked “insufficient address.” Only then did the State take recourse to e-mail in order to advise appellant of its final decision. Also significantly, NewMarket did not dispute the date alleged by the State to be the date it received actual notice of the final agency action. In that scenario, it is quite easy to

calculate the deadline for noting an appeal to the Board, which is ten (10) days from that date. Similarly, in the Appeal of Mumsey's Residential Care, Inc., MSBCA 2702 (June 2010), no counsel entered an appearance on behalf of appellant and again, the date alleged to be the date of actual receipt of the State's final determination was not disputed. Neither of these cases is helpful to resolving the claim now before the Board.

The Appeal of M&J's Powerwash, Inc., MSBCA 2362 (Sept. 2003) involved a notification by facsimile (fax), not e-mail. In that decision, the Board did determine that notification by fax was sufficient to commence the running of the strict 10-day statute of limitations. But again, in that case, notice by certified mail was unclaimed and the State had plain proof of fax transmission on a date certain when evidence of receipt of notice by fax was not challenged by appellant. Unlike e-mail, in the Board's experience with fax technology, when a document is faxed, the fax machine automatically generates a confirmation following transmission which indicates whether or not the fax was successfully sent. This is quite different than the case at bar, for which an IT specialist was apparently assigned to investigate and prepare a special record like the one afforded here.

Moreover, in none of the aforementioned case precedents did any counsel even enter an appearance to argue the opposite side of any and all positions advanced by the State. All three of the cited appeals were abandoned by appellants and the State moved unilaterally for dismissal, using as the date of receipt of the final denial of the bid protests the only date that constituted accurate, available assumptions, the validity of which were never challenged. These are not appeals for which the Board's prior decisions are determinative or even useful to resolution of the instant contest.

The March 14, 2014 e-mail from the State to Maximus was simply a courtesy copy of the determination that was not actually delivered by the United States Post Office until March 17, 2014,

as proven by the return receipt post card by which appellant acknowledged receipt and admits to delivery. Therefore the 10-day statute of limitations for noting an appeal to the Board was triggered at that time, not on the earlier date for which receipt is placed affirmatively in question. Were the Board to rule otherwise would permit the State to bypass U.S. mail altogether, allowing the use of e-mail alone to communicate vital information to persons who seek to do business with the State and must comply with an already extremely demanding timeframe in order to preserve appellate rights. If e-mail is sufficient even though COMAR specifically prescribes certified mail, return to receipt requested, as the first option in choosing the method of communication, for which COMAR admittedly also allows "any other method that provides evidence of its receipt" as an alternative means of notification, why would a procurement officer ever mail anything again? And if e-mail alone was really adequate here, why did the procurement officer bother to send the final determination also by certified mail, return receipt requested, the same date that the courtesy e-mail was also sent?

What was actually envisioned by the language of COMAR 21.10.02.10(D) when it was placed into COMAR in 1983 may well have been hand-delivery by courier as an alternative to certified mail. In that fashion, delivery with signed acknowledgement of receipt most certainly is an acceptable form of communication of a final decision for which there can be direct indubitable evidence of receipt. The Board understands that methods of acceptable business communication have evolved immeasurably since that time, and the Board is empowered to interpret the antiquated provision of COMAR to include modern business communication forms like e-mail, which are not uncommon today. E-mail is fine and commonplace for ordinary communications; but for extraordinary communications like transmission of a final determination on a bid protest, COMAR requires more. It requires certified mail or other proof of receipt beyond what is offered here.

In the absence of adequate proof of appellant’s receipt of the final denial letter on March 14, 2014, the undisputed date of receipt on March 17, 2014 becomes the operative point in time at which notice to appellant is certain and the 10-day statute of limitations begins to run, permitting this bid protest to be filed on or before March 27, 2014, as was done.

Accordingly, respondent’s Motion to Dismiss must be and hereby is DENIED.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael J. Collins
Chairman

Ann Marie Doory
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2871 and 2877, appeal of Gilford Corporation Under DGS Project No. P-075-080-010.

Dated: ____________________________

Michael L. Carnahan

Deputy Clerk