BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of Southway Builders, Inc.	)	
	)	
	)	
	)	**Docket No. MSBCA 2557**
	)	
Under MVA Contract # V-WO-04075-C	)	
	)	

APPEARANCE FOR APPELLANT: **Brian S. Jablon, Esq.**
Saltzman & Jablon, LLC
Ellicott City, Maryland

APPEARANCE FOR RESPONDENT: **Jonathan Acton, II**
Leight D. Collins
Assistant Attorneys General
Glen Burnie, Maryland

OPINION BY BOARD MEMBER DEMBROW

In this contract dispute the Maryland State Board of Contract Appeals (Board) is called upon to determine the timeliness of filing of a certain claim protesting the refusal of the Motor Vehicle Administration (MVA) to afford appellant additional compensation claimed to be due for alleged change orders arising during the construction of an MVA branch office. Without reaching the substantive basis of appellant's claim, the Board considers the adequacy of purported e-mail and postal delivery of certain communications to the Board and concludes that the Board is without jurisdiction to recognize a complaint which does not comply with statute and regulation requiring the timely filing of a contract dispute in proper form and fashion as a condition of Board review and relief.

Findings of Fact

1. In May 2004 by Contract No. V-WO-04075-C, the MVA solicited competitive sealed bids for construction of its new White Oak Branch Office, a one-story building of approximately 15,000 square feet located in Montgomery County, Maryland.
2. After bids were opened on or about June 15, 2004, MVA determined to award the contract to appellant Southway Builders, Inc. (Southway), which submitted a conforming low bid of $3,647,863.
3. Appellant performed under the terms of the contract.
4. On or about December 29, 2005, Southway submitted six (6) claims requesting additional compensation totaling $391,357 primarily related to extra site work and other work which appellant claims were change orders.
5. Appellant's claim was rejected by MVA's procurement officer on or about June 13, 2006.
6. On or about June 15, 2006 appellant received the June 13, 2006 denial decision by MVA's procurement officer, which wrongly advised appellant that it had only ten (10) days within which to note an appeal, rather than thirty (30) days, which is the correct deadline.
7. On or about June 28, 2006, appellant directed an e-mail communication to the Board which stated, "I am writing to reserve Southway Builders' right to appeal…"
8. Appellant claims also to have mailed to the Board on or about June 28, 2006 a written notice of intent to appeal.
9. Appellant's e-mail was not opened by the Board because it was routed to an e-mail "trash" bin.
10. The Board's policy and practice is not to accept e-mail filings except as specifically authorized or requested as

a duplicate electronic convenience copy of a formally filed hard-copy original.

11. Included in the rationale for the Board's aforesaid e-mail policy and practice is the desire to protect the State's internal internet and electronic file systems from potential harm which could be caused by virus infiltration carried by unknown senders of unauthorized transmissions.
12. The Board did not receive the mailed written notice of appeal from appellant dated June 28, 2006, and appellant has been unable to produce a copy of that document.
13. On or about July 10, 2006, MVA's procurement officer sent a corrected decision which confirmed the June denial of appellant's claim and advised appellant that it actually had thirty (30) days from the date of the original denial within which to note an appeal, namely, by July 15, 2006.
14. Appellant received the July 10, 2006 corrected decision on that same date.
15. Appellant claims to have sent to the Board by mail another written notice of appeal the following day, on or about July 11, 2006; but, like the notice said to have been mailed on June 28, 2006, the Board did not receive that notice of appeal either.
16. On or about August 24, 2006 the Board did receive a notice of appeal purportedly mailed to the Board by appellant the day prior, namely, on August 23, 2006.
17. The Board docketed the instant appeal on the date that the first written notice of appeal was received by the Board, specifically, on August 24, 2006.
18. Appellant seeks to reverse the MVA's June determination not to allow to Southway payments totaling an additional $391,357 from the MVA for the construction of the MVA's White Oak Branch Office.

Decision

The issue before the Board is whether the instant appeal is timely filed. Arguing against that proposition, the State filed a Motion for Summary Decision and Dismissal of Appeal pursuant to the Code of Maryland Regulations (COMAR) 21.10.05.06D, contending that the appeal is untimely pursuant to *§15-220(b)(2)* of the *State Finance and Procurement Article* of the *Annotated Code of Maryland* as well as COMAR 21.10.04.09A.

The above referenced statute provides as follows:

> "An appeal under this section shall be filed:…(2) for a contract claim, within 30 days after receipt of the notice of a final action."

Similarly, the cited administrative regulation states:

> "An appeal to the Appeals Board shall be mailed or otherwise filed within 30 days of the receipt of notice of the final decision."

COMAR 21.10.04.09D further elaborates:

> "An appeal received by the Appeals Board after the time prescribed…*may not be considered* unless it was sent by registered or certified mail not later than the 5th day before the final date for filing an appeal…[and] [t]he only acceptable evidence to establish the date of mailing shall by the U.S. Postal Service postmark on the wrapper or on the original receipt from the U.S. Postal Service. If the postmark is illegible, the appeal shall be deemed to have been filed when received by the Appeals Board." [Emphasis supplied.]

The deadline for noting appeals before this Board is a hard and fast rule for which this Board has no discretion to deviate from firmly established statute, regulation and decisional precedent. *See* Chesapeake System Solutions, Inc., MSBCA No. 2308 (2002).

In this matter it is undisputed that appellant had actual knowledge at least as early as June 15, 2006 that the MVA denied its claim. That day began the tolling of the thirty (30) day limitations period within which appellant had the opportunity to note an appeal before this Board. However, appellant's notice of appeal was not received by the Board until August 24, 2006, five (5) weeks after the expiration of the filing deadline. It was docketed that same date and the State responded the following month with a Motion for Summary Dismissal based upon the untimely noting of the appeal. An evidentiary hearing on that Motion was conducted before the Board in November 2006 and in February 2007 the parties, through counsel, submitted memoranda of law in support of their respective positions on whether the Board has jurisdiction to adjudicate this contest as the exclusive remedy offering appellant recourse. The Board must grant the State's Motion for the reasons that follow.

While not as unforgiving as the 7-day limitations period for filing a bid protest, both statute and regulation establish a firmly fixed 30-day period within which to note appeals to the Board concerning contract disputes. The relevant statute provides that such an appeal "shall be filed" within that time frame, while administrative regulation provides that an appeal "shall be mailed or otherwise filed within 30 days of the receipt of notice of final decision." (Compare *State Finance and Procurement Article* of the *Annotated Code of Maryland, §15-220(b)(2)* to COMAR 21.10.04.09A.) Hence, though statute trumps regulation when application interpretations may be at variance, here the clarifying administrative regulation permits a late filing sent by mail to relate back to an earlier filing date only under

very specific circumstances of plainly proven delayed mail delivery. In the absence of precise qualifying conditions, the Board may not exercise jurisdiction over a contract dispute that is not timely filed. As referenced above, the Board's authority to recognize an appeal that is filed late is specifically limited to a filing arising from late receipt of a mailing of a notice of appeal only if the mailing is certified or registered and demonstrably proven to have been made at least five (5) days in advance of the filing deadline. This condition is not satisfied by the circumstances at hand. This appeal was mailed by ordinary mail on August 23, 2006 and filed on August 24, 2006.

Appellant makes undisputed factual contention that on June 28, 2006, about two (2) weeks after receipt of the MVA's denial notice, it directed an e-mail communication to the Board seeking to initiate appellate process. (See Appellant's hearing Exhibit No. 2.) It is equally undisputed that that e-mail was never opened by the Board, which has no policy or procedure for receipt of pleadings in electronic format, nor does any specific law, regulation or precedent require the same. With respect to procurements which underlie appeals before the Board, COMAR 21.03.05 provides that electronic means may be employed, but also specifies:

> "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." See COMAR 21.03.04.02A.

A subsequent section of the same 2003 regulation provides:

> "**Unauthorized Transactions Prohibited**.
>
> A. An attempt by a bidder, offeror, or contractor to conduct an electronic

> procurement transaction may not be considered by the procurement officer unless the solicitation or contract specifically authorizes the electronic means for the specified transaction.
>
> B. An attempt by a bidder, offeror, or contractor to conduct a transaction by electronic means, including any acknowledgement, bid, proposal, protest, or claim, does not satisfy the requirement of this title unless the solicitation or contract specifically authorizes the use of electronic means for the specified transation." See COMAR 21.03.05.03.

Plainly the State's regulations reserve to the State sole discretion to determine whether to recognize communications by e-mail when conducting procurement activity. No lesser requirement attaches to post-determination claims appealed to the Board.

In addition, had appellant simply called the Clerk of the Board in follow-up to its e-mail, or inspected its own e-mail transmission records to insure receipt and opening of its e-mail, it could and should have known that its e-mail to the Board was never opened. The Board's practice is not to open e-mail which comes from an unrecognized sender in order to protect the State's internet communications system from the possible introduction of a computer virus or other unauthorized interference with the State's information technology systems. For good cause the Board routinely discards "spam" and in the process of such automatic or manually selected filtering for legitimate e-mail communications occasionally loses some e-mails which are perfectly innocent or appropriate. Moreover, e-mail is not as reliable or verifiable as ordinary, registered or certified mail delivered in person by the U.S. Postal Service. Following evolving progress of some judicial

institutions, someday the Board may be able to accept pleadings and even initial filings in electronic format, but that capability must be deferred until sufficient safeguards are put into place to insure verification of receipt of communications and creation of suitable firewalls to prevent unauthorized e-mail interference with Board records.

The Board has in the recent past requested or permitted briefs or transcripts to be submitted in electronic format, but only when duplicative of filing originals by hard copy with the Clerk of the Board and as instructed to counsel or requested by counsel as a convenience to the Board. The Board has not received and does not receive original filings by e-mail alone.

Furthermore, the Board is simply not authorized to consider an e-mail transmission as sufficient to constitute an original filing for the purpose of initiating an appeal. As set forth above, COMAR 21.10.04.09 provides that "[a]n appeal shall be mailed or otherwise filed…" In this context, "mailing" is adequate to commence an appeal, but only if received and filed prior to the filing deadline, or when certified or registered mail is employed at least five (5) days prior to the filing deadline. The applicable regulation is quite precise in this regard. The use of the word "filing" in the regulation is equally definitive and even more demanding in that it implies the Board's actual receipt of a communication concomitant with that receipt being formally recorded in the Board's official records. Appellant's reliance on Bock v. Insurance Commissioner of the State of Maryland, 84 Md.App. 724 (1990) is misplaced in that the issue in that determination is whether the mailing of a protest of an insurance company's nonrenewal

of a policy satisfied a statutory requirement of "sending" the protest to the Office of the Insurance Commissioner. By contrast, the operative verb in the question at hand is not whether mailing satisfies a requirement of "sending" but instead, a statutory directive of "filing." In comparison to "sending," "filing" requires both transmission and receipt, as well as the formal notation of such receipt in official agency or judicial records.

In addition, COMAR 21.10.04.09C expressly requires that "[a] copy of the notice of appeal shall be furnished to the procurement officer." Appellant's June 28, 2006 e-mail contains no indication that it was directed to the MVA, as required by regulation. Indeed, it appears to substantiate the position that no copy was sent to the MVA by e-mail or otherwise. Appellant's e-mail implies also Southway's own knowledge or suspicion that its communication was or at least could be deficient, concluding:

> "If this is not an acceptable format to state Southway's intent to appeal this ruling, please reply back to this email. Not hearing otherwise, our formal appeal will follow, in accordance with the process described by your office."

Appellant apparently suspected from the outset that its mere e-mailing of a prospective reservation of its right to appeal was insufficient to constitute an actual filed appeal. It nonetheless proceeded in that fashion and in doing so proceeded at its peril. Appellant's e-mail statement recited above evidences an intent to transfer to the Board all obligations borne by Southway to learn and understand the accepted prerequisites for exercising its legal rights. This assumption was ill-advised. Like most judicial and quasi-judicial entities, the Board does

not render legal advice to litigants who come before it. Appellant seeks to assert a claim against the State of nearly $400,000, more than 10% of the contract price that it bid on the underlying construction job. It initially elected to do so without the apparent benefit of legal advice or other review of controlling statutes or regulations. As frequently may occur, when parties attempt to assert technical procedural rights without the benefit of trained, experienced counsel, sometimes those rights may be accidentally forfeited, as occurred here.

Counsel for appellant argues that current state statute provides that an e-mail communication is sufficient to commence an appeal before the Board pursuant to the Maryland Uniform Electronic Transaction Act (MUETA). (Commercial Law Article §21-101 *et seq.* of the Maryland Annotated Code.) However, the central premise of that statute expressly provides:

> "This title applies only to transactions between parties, each of which has agreed to conduct transactions by electronic means." See MUETA §21-104(b)(1).

Contrary to appellant's argument, the mere fact that the Board maintains a website like every other state agency is not an agreement to conduct transactions by electronic means nor authorization for appellants to initiate claims by e-mail.

Indeed, COMAR Chapter 21.10.06 entitled, "Maryland State Board of Contract Appeals – Procedures for Appealing Contract Disputes," states specifically:

> "**Appeals**.
>
> A. How Taken. Notice of an appeal shall be in writing, and the original, together with two copies, shall be mailed to or filed with the Appeals Board within the time specified in the contract or otherwise allowed by law or

> regulation. A Copy shall be furnished to the procurement officer from whose decision the appeal is taken."

In the instant contract dispute appellant's attempted communication by e-mail on June 28, 2006 simply did not conform to the applicable requirements for noting an appeal before the Board.

To sum, e-mail is not yet acceptable to commence an appeal of a contract dispute before the Board. What is required is not onerous. *See* COMAR 21.10.04.09A. It is merely a piece of paper that identifies the contract and the decision from which the appeal is being taken and contains an assertion that can be expressed in merely two (2) words: "We appeal." That paper may be mailed to the Board at the current postal rate of $.39 or for a higher rate, confirmation of receipt will be returned by the postal service to the sender of registered or certified mail. Or the paper may be hand-delivered in person or by courier, for which the Board regularly returns a file-stamped copy for the provider's records as proof of receipt and filing. The Board's conveniently located office in downtown Baltimore is staffed and open from 8:00 a.m. until 5:00 p.m. every State working day to assure ease of access for receipt of filings.

Finally, the Board must address appellant's allegation that not only did it attempt to initiate a timely filed appeal by e-mail, it also appealed by ordinary mailing of correspondence on June 28, 2006 and again on July 11, 2006. This contention is troubling, all the more so because appellant's testimony was detailed and credible, even though appellant was unable to produce a copy of either of the claimed mailings.

Since the creation of the Board over 25 years ago this case appears to be the first time an appellant has

alleged that it mailed an appeal which was not received. The Board is without explanation as to how appellant could have mailed a postage prepaid notice of appeal and not have it delivered or returned to the sender. Appellant alleges that this occurred not just once, but on two (2) consecutive occasions. The Board receives mail every day and the Board's experience is that mail is a highly reliable means of communication. Appellant claims to have used the correct address. Occasionally, correctly addressed mail sent to the Schaefer Tower, where the Board's offices are located, is misdirected to another state agency located at the same street address, but that error is routinely and promptly corrected by redelivery within the building. Board records and institutional memory fail to reflect a single prior occurrence of an allegation that a pleading mailed to the Board was not received. The Board is equally unable to understand why appellant apparently did not preserve a copy of its purported appeal notice for a claim over a substantial sum of money. Regrettably therefore, appellant finds itself in a unique and awkward posture, doubly so because appellant alleges that it made two (2) separate mailings, neither of which were received by the Board nor were copies maintained by appellant. Because the burden of proof on this issue falls entirely upon appellant, the Board must conclude that appellant has failed to adduce adequate proof of the mailing of a notice of appeal prior to the one that was finally received on August 24, 2006 and docketed the same date, well after the limitations period had expired.

The precedent that would be created were the Board to rule otherwise could be devastating. If all that was required to initiate an appeal after the expiration of

the limitations period was a mere allegation of an undocumented mailing by an appellant, it is entirely possible that the statutory limitations period would cease to exist, at least for dishonest contractors. Board process cannot tolerate such a deviation from filing requirements that are plainly fixed by statute and regulation. Therefore appellant's sworn verbal assertion of mailings on June 28, 2006 and July 11, 2006 must fail.

Wherefore, it is Ordered this day of March, 2007 that the State's Motion for Summary Decision and Dismissal be and hereby is granted and the above-captioned appeal be and hereby is dismissed.

Dated:

_____
Dana Lee Dembrow
Board Member

I Concur:

_____
Michael W. Burns
Board Chairman

_____
Michael J. Collins
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 2557, appeal of Southway Builders, Inc. under MVA Contract # V-WO-04075-C.

Dated:

_____
Michael L. Carnahan

Deputy Clerk