

**BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In The Appeal of)
KBE Building Corporation)
)
) Docket No. MSBCA 2915
Under MAA Contract)
No. MAA-CO-14-005)

APPEARANCE FOR APPELLANT: Donald J. Walsh, Esq.
Offit Kurman, P.A.
Owings Mills, Maryland

APPEARANCE FOR RESPONDENT: Alice M. Somers
Stanley Turk
Assistant Attorneys General
Baltimore, Maryland

OPINION BY BOARD MEMBER DEMBROW

Because this appeal was not filed within thirty (30) days of the date of receipt of final agency action, it is untimely and must be denied.

Findings of Fact

1. In February, 2014 appellant KBE Building Corporation (KBE) was selected for contract award to construct the International Building Expansion of Baltimore/Washington International Thurgood Marshall Airport (BWI)
2. On July 8, 2014 KBE filed a claim with the Maryland Aviation Administration (MAA) for a 48-day extension and payment of \$146,471 for alleged contract acceleration. (Ex. 1, State's Motion to Dismiss.)
3. By final decision letter from the procurement officer dated and received on October 24, 2014, MAA denied KBE's requests. (Ex. 2, 3, State's Motion; Ex. 1, Respondent's Reply.)

4. MAA's October 24, 2014 denial determination ended as follows: "This decision is the final action of this agency. This decision may be appealed to the Maryland State Board of Contract Appeals ("MSBCA") in accordance with COMAR 21.10.04.09. If you decide to take such an appeal, you must mail or otherwise file a written notice of appeal with the MSBCA within 30 days from the date you receive this decision. The MSBCA address is Maryland State Board of Contract Appeals, William Donald Schaefer Tower, 6 St. Paul St., Suite 601, Baltimore, Maryland 21202-1608." (Ex. 2, State's Motion.)
5. Before sending the final decision letter to KBE, the MAA procurement officer shared a draft of that letter with two Assistant Attorneys General as well as others at MAA, including MAA's Chief Engineer. (Ex. 4, 5, Respondent's Reply.)
6. By letter dated November 6, 2014, KBE attempted to appeal MAA's final determination to the Maryland State Board of Contract Appeals (Board), but said appeal was directed to an incorrect address. (Ex. 3, State's Motion.)
7. On December 10, 2014, the Board received and docketed KBE's appeal dated December 9, 2014.
8. Hearing was conducted April 15, 2015 on the State's Motion to Dismiss filed January 9, 2015.

Decision

Pursuant to the Annotated Code of Maryland, State Finance and Procurement Article (SF&P) § 15-2201(b), appeals to the Board must be filed within 30 days of notice of the State agency's final action. The Code of Maryland Regulations (COMAR) 21.10.04.09A similarly provides, "An appeal to the Appeals Board shall be mailed or otherwise filed within 30 days of the receipt of notice of the final decision." KBE concedes that it received

notice of MAA's final decision on October 24, 2014. Appellant therefore had until November 24, 2014 to note its appeal. The Board is without jurisdiction to hear any appeal filed after that date. The instant appeal was not received by the Board until December 10, 2014, 47 days after KBE received notice of MAA's final action. As a result, the appeal is untimely and the Board is unable to entertain appellant's prayers for relief.

Appellant points out that, pursuant to COMAR 21.10.04.04C, an agency procurement officer acting unilaterally is without authority to make a final determination because that regulatory provision requires the procurement officer first to submit the letter "for review to the reviewing authority and the Office of the Attorney General." As a result, according to KBE, the October 24, 2014 letter from MAA could not have been a final determination, notwithstanding the plain language in the letter concluding, "This decision is the final action of this agency." By implication, appellant appears to argue that a procurement officer cannot issue a final determination; only another reviewing authority may do so. There is no indication that the procurement officer failed to submit the recommended decision in accordance with the requirements of COMAR 21.10.04.04C. The only evidence of record is that the procurement officer did in fact do so, and thereafter sent the agency's denial letter by final determination over the procurement officer's signature. Such protocol is routine.

Indeed, KBE attempted to file a timely appeal on November 6, 2014. It simply mailed its appeal to a nonexistent address even though the address for the Board is set forth in COMAR 21.10.05.01 and was expressly stated in MAA's denial decision. In further explanation, appellant contends that its attempted appeal on November 6, 2014 was not because of the October 24, 2014 denial letter, but instead, because KBE was entitled to consider its petition as "deemed denied" due to the passage of

time after its July 8, 2014 claim. However, COMAR 21.10.04E(2)(b) permits a claim to be "deemed denied" after the passage of 180 days, which in this instance was January 7, 2015. Clearly, the appeal dated November 6, 2014 but not received by the Board until December 10, 2014 was in response to MAA's denial letter dated October 24, 2014. From that date appellant had only 30 days within which to note an appeal. Because appellant failed to note its appeal in timely fashion, this appeal must be denied.

WHEREFORE, it is by the Appeals Board this ____ day of May, 2015,

ORDERED that the instant appeal 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 2915, appeal of KBE Building Corporation Under MAA Contract No. MAA-CO-14-005.

Dated:

Michael L. Carnahan
Deputy Clerk