

**STATE OF MARYLAND
BOARD OF CONTRACT APPEALS
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**SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS**

Docket No. 2574	Date of Decision: 05/11/07
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under Maryland State Lottery Agency Solicitation # E75P6200132	
Appellant/Respondent: Merv Margolis, dba Merjo Advertising & Sales Promotions Maryland State Lottery Agency	

Decision Summary:

Appeal - time for filing of appeal COMAR 21.10.04.09 states that an appeal to the Board shall be filed by a claimant within 30 days of the receipt of notice of the final decision of an agency regarding a claimant's claim.

Appeal - notice of final decision required - A notice of the final decision of an agency regarding a claim is required before a claimant can bring an appeal before the Board.

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

In The Appeal of Merv Margolis,)
dba Merjo Advertising & Sales)
Promotions)
) Docket No. MSBCA 2574
Under Maryland State Lottery)
Agency Solicitation #)
E75P6200132)

APPEARANCE FOR APPELLANT: David Ellin, Esq.
Law Office of David Ellen, P.C.
Baltimore, MD

APPEARANCE FOR RESPONDENT: Romaine N. Williams
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN BURNS

Appellant has filed a Motion to File a Belated Claim regarding the assessment of liquidated damages by the Maryland State Lottery Agency regarding the delivery of T-Shirts to be provided to the Lottery.

For the reasons that follow the Motion will be denied.

Findings of Fact

1. On or about April 25, 2005 Respondent, the Maryland State Lottery Agency (Lottery) issued Blanket Purchase Order (BPO) No. 001B5900779 for the purchase of T-shirts.

2. On or about January 4, 2006 the Lottery followed up the April 25, 2005 BPO with an additional BPO - No. E75P6200132 - which provided additional specificity for the T-Shirts and required a delivery date of January 31, 2006.
3. The BPO utilized the Competitive Sealed Bid procurement method.
4. The purpose of the BPO was to solicit bids for T-Shirts.
5. The BPO stated that "[L]iquidated damages will be charged as indicated in the terms of this contract." April 25, 2005 BPO at p.2.
6. The BPO stated that all bid responses must be submitted through eMaryland Marketplace and that "bids would not be accepted by email, Fax, mail or hand delivery." April 25, 2005 BPO at p.1.
7. Other than the provisions noted in Finding of Fact Number 6, there is no mention of electronic filing in either of the BPO's.
8. Pursuant to COMAR 21.03.05.01 A., primary procurement units may conduct procurements by electronic means as provided in the Maryland Uniform Electronic Transactions Act.
9. When electronic means are permitted or required, a solicitation or a contract shall specifically identify the transactions for which electronic means are authorized as well as the specific means of conducting each authorized electronic transaction. COMAR 21.03.05.02 B.
10. The specific means for conducting authorized electronic transactions pursuant to COMAR 21.03.05 include facsimiles. COMAR 21.03.05.02 B.(2)(a).

11. When specifically authorized by the solicitation, procurement transactions conducted by electronic means may include claims such as the one at issue in this case. COMAR 21.03.05.01 B.(7).
12. If a 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. COMAR 21.03.05.02 A.
13. 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. COMAR 21.03.05.03 A.
14. The solicitation/contract at issue in this case does not specifically authorize the filing of claims by facsimile.
15. An attempt by a bidder, offeror, or contractor to conduct a transaction by electronic means, including a claim, does not satisfy the requirements of COMAR unless the solicitation or contract specifically authorizes the use of electronic means for the specified transaction. COMAR 21.03.05.03 B.
16. On or about January 4, 2006 Appellant Merjo Advertising & Sales Promotions¹ (Merjo) was awarded the contract.
17. On or about March 10, 2006, the Lottery sent Merjo a letter stating that Merjo's performance was not in compliance with the contract due to late delivery of the contracted-for T-shirts and that the Lottery, pursuant to the terms of the contract, intended to

¹ The Contract was awarded to Merjo Advertising and Sales Promotions Co. The Motion to File a Belated Claim has been filed by Merv Margolis, dba Merjo Advertising & Sales Promotions.

- assess Liquidated Damages against Merjo for late delivery of the T-shirts.
18. On or about April 12, 2006, the Lottery sent Merjo a letter that assessed a specific Liquidated Damages amount pursuant to the provisions of the contract.
 19. Both the March 10, 2006 and the April 12, 2006 letters referenced above were signed by Robert W. Howells, Director of Procurement at the Lottery.
 20. On or about May 1, 2006, Merjo claims to have sent the Lottery a claim protesting the assessment of Liquidated Damages.
 21. The alleged May 1, 2006 claim was sent, according to Merjo, to the Lottery by way of facsimile.
 22. The alleged May 1, 2006 claim is addressed to Will Sample.
 23. William Sample is an agency buyer with the Lottery.
 24. Lottery Director of Procurement Howells testified that he did not receive the claim on or about May 1, 2006, did not receive other notification of the claim from Merjo, and that he first saw the claim months later during a hearing regarding a Maryland District Court case filed by Merjo involving this claim on December 14, 2006.
 25. The BPO does not expressly permit or require electronic transactions regarding contract claims to be utilized by potential claimants.
 26. Any claim regarding the assessment of Liquidated Damages was required to be filed within 30 days after the basis for the claim is known or should have been known. COMAR 21.10.04.02 A.
 27. According to Merjo's Motion to File a Belated Claim, Merjo's prior attorney "wrote to the Defendant's [sic]

Procurement Officer a couple of times but did not file a Notice of Claim.”

28. The communications noted in Finding of Fact Number 27 do not appear in the record of this case.
29. By way of letters dated May 16, 2006 and July 14, 2006 the Lottery responded to this correspondence sent by Merjo to the Lottery regarding the Liquidated Damages assessment. In both letters, the Lottery reaffirmed it's assessment of Liquidated Damages.
30. Neither the May 16, 2006 letter nor the July 14, 2006 letter from the Lottery to Merjo complies with the requirements of COMAR regarding the disposition of a claim. COMAR 21.10.04.08.
31. Neither the May 16, 2006 letter nor the July 14, 2006 letter from the Lottery to Merjo constitutes a legally valid "notice" of a "final decision" by the Lottery.
32. Merjo filed a "Statutory Notice of Claim" with the Lottery on or about August 2, 2006.
33. The August 2, 2006 claim by Merjo was directed to the Director of the Lottery, Buddy Roogow, as well as the Treasurer of the State of Maryland, the Honorable Nancy K. Kopp.
34. Merjo has filed claims with the Maryland State Treasurer (apparently under the Maryland Tort Claims Act) and in the District Court of Maryland regarding this dispute over the imposition of Liquidated Damages.
35. Merjo's claim with the Maryland State Treasurer was denied by way of a letter dated August 24, 2006.
36. Merjo's claim in the District Court of Maryland was dismissed by way of a Motion to Dismiss With Prejudice signed by a Baltimore County District Court Judge on December 14, 2006.

37. There is no evidence that the Lottery has ever ruled on the August 2, 2006 claim from Merjo.
38. The first contact from Merjo with the Board of Contract Appeals (Board) regarding this case was by way of a Motion to File a Belated Claim filed with the Board on January 29, 2007.
39. A Hearing was held on Merjo's Motion on March 22, 2007.

Decision

COMAR 21.10.04.09 states that an appeal to the Board shall be mailed or otherwise filed by a claimant within 30 days of the receipt of notice of the final decision of an agency by a claimant.

As the above-listed Findings of Fact indicate, however, no legally valid final decision from the Lottery has, as of this date, been forwarded to Merjo.

To say that this case has been procedurally messy is an understatement. The Board will attempt, therefore, to clean up this situation and point the parties in the correct direction for the proper resolution of this matter.

First, there were clearly communications of some kind sent to the Lottery from Merjo which the Lottery responded to by way of letters dated May 16, 2006 and July 14, 2006. From the record, the Board cannot determine whether or not these letters were in response to a valid claim by Merjo under COMAR regarding this contract. From a reading of the letters sent by the Lottery to Merjo, however, it is clearly possible that the Lottery was attempting to respond to a claim of Merjo disputing the imposition of Liquidated Damages by the Lottery.

Unfortunately, neither letter sent by the Lottery addresses the Lottery's current position that Merjo's claim

was filed too late under COMAR. In addition, neither letter comes close to complying with the regulatory requirements imposed on an agency when responding to a contract claim in a procurement dispute such as the one at issue here. Whatever these two letters may be, they are not legally sufficient responses to a contact claim.

There is not, therefore, a "notice of the final decision" of the Lottery regarding Merjo's claim as per COMAR 21.10.04.09 for Merjo to appeal to this Board regarding the letters of May 16, 2006 and July 14, 2006.

In addition, the Lottery has not, according to the record we have before us, ever responded to Merjo's August 2, 2006 "Statutory Notice of Claim".

Hence, there is not a "notice of the final decision" of the Lottery as per COMAR 21.10.04.09 for Merjo to appeal to this Board regarding its claim of August 2, 2006.

In sum there is not, consequently, anything for Merjo to appeal to this Board at this time. Based on the record before the Board, there exists no legally valid "notice of the final decision" from the Lottery to Merjo regarding Merjo's claim regarding the imposition by the Lottery of Liquidated Damages under the contract herein. Without such notice of a final decision from the Lottery, Merjo cannot file an appeal concerning this dispute with the Board at this time and this Board is, as a result, without current jurisdiction over this dispute. Merjo's Motion to File a Belated Claim must and will, therefore, be denied.

Both the Lottery and Merjo are strongly urged to review the law and COMAR, in particular Title 21, and proceed accordingly. The Board could spell out in detail the steps which both parties can, and perhaps must, take from this point forward. That, however, is not the charge nor function

of this Board and the Board will simply reiterate that both parties should review relevant law and regulations in order to proceed correctly and legally from this point forward.

The proper venue for this dispute is not the Maryland Treasurer's Office, nor is it the District Court of Maryland. It is, as clearly outlined in COMAR, the Maryland State Board of Contract Appeals. As explained, however, there is not, at the present time, any legally valid "final decision" by the Lottery from which Merjo may appeal to the Board. The parties must comply with the requirements of Maryland law and regulations before this dispute can be brought to the Board, if that point is indeed reached after the process is correctly followed and Merjo's claim(s) are dealt with in an appropriate and legal fashion by the Lottery.

Wherefore, it is Ordered this day of May, 2007 that Appellant's Motion to File a Belated Claim in the above-captioned appeal is denied.

Dated:

Michael W. Burns
Chairman

I Concur:

Michael J. Collins
Board Member

Dana Lee Dembrow
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 2574, appeal of Merv Margolis, dba Merjo Advertising & Sales Promotions under Maryland State Lottery Agency Solicitation #E75P6200132.

Dated:

Michael L. Carnahan
Deputy Clerk