

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of Acme Market #6762,)
Elkton, MD - Acme Market #6845,)
Salisbury, Md)
) Docket No. MSBCA 1763
Under DHMH Refusal to Award)
Contract Under WIC Vendor RFP)

December 23, 1993

Timeliness: Appeals to this Board must be filed within 10 days of receipt of notice of the final procurement agency action. The Board has no power to waive late filing even if to do so would not be prejudicial to any party.

APPEARANCES FOR APPELLANT: Walter P. Rubel, Esq.
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 Malvern, PA
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APPEARANCES FOR RESPONDENT: Helen E. Bowlus
 Sharon Krevor- Weisbaum
 Assistant Attorneys General
 Matthew A. Lawrence
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OPINION BY MR. MALONE

This is an appeal from a final decision of a Department of Health & Mental Hygiene (DHMH) Procurement Officer denying Appellant's bid protest. Respondent filed a Motion to Dismiss the bid protest appeal based upon COMAR 21.10.02.10A and 21.10.02.10B. The facts were not disputed and after hearing legal argument the Board issues this decision.

Findings of Fact

1. The Procurement Officer issues a final decision in this bid protest by letter dated October 1, 1993. This decision was sent certified mail to Appellant at its normal business address and received by the Appellant's employees, in Appellant's mail room on October 4, 1993.
2. Appellant's legal counsel did not have actual possession of the letter from Appellant's mail room until October 5, 1993.
3. Appellant filed its appeal from the final decision to this

Board, by ordinary mail, on October 15, 1993, eleven (11) calendar days after having received the final decision from the Procurement Officer in the Appellant's mail room.

Decision


COMAR 21.10.02.10A requires that appeal to this Board must be filed within 10 calendar days of receipt of notice of the final procurement agency action. COMAR 21.10.02.10B further provides that appeals filed after that time may not be considered unless sent by certified mail not later than the fifth day, or by mailgram not later than the third day, before the final date for filing an appeal. Since the appeal to this Board was made by ordinary mailing, by the Appellant, it must have been filed with this Board by October 14, 1993 or be found untimely. The appeal is late.

The Board has no power to waive a legislative and regulatory prerequisite to its jurisdiction even if to do so would not be prejudicial to any party. See, Eastern Chemical Waste Systems, MSBCA 1310, 2 MICPEL 139 (1986). COMAR 21.10.02.09D requires the Procurement Officer to furnish a copy of the decision to the protester by certified mail, return receipt requested, or by any other method that provides evidence of its receipt. The Board has previously considered what constitutes receipt. In Nutrition America, Inc., MSBCA 1612, 3 MICPEL 290 (1991), this Board held that the date of receipt by Appellant's attorney of the Procurement Officer's final decision commenced the ten (10) day period to file an appeal. Also see Glenbeigh Incorporated, MSBCA 1699, 4 MICPEL 321 1993. Similarly, the Board found in The Piscataway Company, Inc., MSBCA 1595, 3 MICPEL 281 (1991) that where Appellant had permitted a friend to sign for the Appellant's mail receipt by the friend was sufficient to commence the running of the date for filing an appeal. Here, evidence of receipt clearly reflects October 4, 1993 as the date Appellant received its copy of the decision. The State unit can not be held to the internal mail room procedures of the protestor Appellant. Appellant controlled the manner in which the mail was received and delivered to its employees. Once DHMH demonstra-

ed evidence of receipt of the copy of its final decision it fulfilled its obligation under COMAR 21.10.02.09D.

Wherefore, it is this 23rd day of December, 1993 ORDERED, the appeal be dismissed.

Dated: 12/23/93


Neal E. Malone
Board Member

I concur:


Robert B. Harrison III
Chairman


Sheldon H. Press
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 1763, appeal of Acme Market #6762, Elkton, MD - Acme Market #6845, Salisbury, MD under DHMH Refusal to Award Contract Under WIC Vendor RFP.

Dated: 12/23/93

Mary F. Priscilla
Mary F. Priscilla
Recorder