

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of COMPGRAPH, INC.)
)
Under Maryland Department of) Docket No. MSBCA 1418
Transportation)
RFP DOTDC 88-026)

December 16, 1988

Timeliness - Appeals not filed within 10 days after receipt of the notice of the final agency action on a protest are untimely. Postal records pertaining to receipt of final agency action by the protester constitute prima facie evidence of the actual date of receipt.

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MEMORANDUM OPINION BY CHAIRMAN HARRISON

The Maryland Department of Transportation (MDOT) has moved to dismiss the captioned appeal on grounds it was not timely filed. For reasons that follow we shall grant the motion and dismiss the appeal with prejudice.

Findings of Fact

1. On January 4, 1988, MDOT issued a Request for Proposals (RFP) for CADD¹ computer equipment which included, inter alia, specifications for a digitizer.² On February 16, 1988, proposals were submitted by Appellant, Premier Design Systems, Inc. (PDS) and American Microcad, Inc. (AMI) and three other offerors.

2. On or about April 20, 1988, MDOT notified offerors of its intention to award the contract to Appellant. Subsequently, protests were received by MDOT from PDS and AMI. A common ground of each protest was that the digitizer offered by Appellant did not meet the mandatory specification of a resolution accuracy of .01 inches.

3. The procurement officer reviewed the two protests and, on September 26, 1988, issued a final decision sustaining the ground of both protests which related to the acceptability of Appellant's proposed digitizer and announced a contract award to PDS, the offeror next in line for award. Appellant was advised this was the final decision and that any appeal must be made to the Maryland State Board of Contract Appeals within 15 days of receipt of the final decision.³

4. The final decision was sent to Appellant by certified mail. The return receipt is hand dated September 28, 1988, and executed by Ms. Newkirk, an employee of Appellant. The post office receipt is also hand dated September 28, 1988, and appears to have been executed by Ms. Newkirk.⁴ (Respondent's Ex. 1). The hand dating on these documents was written in by the postman.

5. At the hearing of this motion Appellant produced the original of the procurement officer's decision mailed to it. (Appellant's Ex. 1). The decision

¹ CADD refers to a "computer aided drafting and design" capability to allow a user to create drawings on a computer and then print them.

² A digitizer is a CADD's equivalent to a computer's keyboard and is the means by which the CADD receives data.

³ Under former Section 17-201(f)(1) of the Md. State Fin. & Proc. Art., Md. Ann. Code (1986 Supp.), a protester was required to note an appeal to the Board from an agency's final decision in a protest within 15 days of receipt of the decision. Under former Section 11-137(f) of the Md. State Fin. & Proc. Art., Md. Ann. Code (1987 Supp.), recently recodified as Section 15-220(b)(1), a protester only has 10 days from receipt of the final decision in which to file an appeal with the Board. However, COMAR 21.10.02.09A still refers to the previous requirement of filing an appeal within 15 days of receipt of the final decision. Amendments to the Procurement Regulations are pending. See, 15:20 Md. R. 3-74 (September 23, 1988). Under these circumstances, MDOT does not assert an appeal period of less than 15 days as set forth in the final decision.

⁴ The person receiving certified mail, return receipt requested, signs both the return receipt and the post office file receipt, which is retained by the post office.

bore Appellant's receipt hand date stamp on the first page of September 29, 1988 which was placed thereon by Ms. Newkirk.

6. Both Ms. Newkirk and Appellant's Mrs. Teresa Kim testified that the procurement officer's decision was received on September 29, 1988, and not on September 28, 1988. Mrs. Kim testified that the original of the procurement officer's decision was handed to her by Ms. Newkirk when she arrived at work. According to Mrs. Kim's testimony, she directed Ms. Newkirk to make a copy of the letter for Mrs. Kim's husband to read and after the copy was made Ms. Newkirk date stamped the original. This according to Mrs. Kim's testimony probably explains why copies of the procurement officer's decision filed with Appellant's appeal to this Board did not bear a date stamp. Mrs. Kim speculated that the copies made for the appeal must have been from the first copy made from the original for Mr. Kim prior to Ms. Newkirk having date stamped the original.⁵ Mrs. Kim specifically recalled receiving the letter on September 29, 1988, because that date was Mrs. Kim's daughter's birthday. Nothing in the record, however, excludes the possibility that the letter was in fact received and signed for by Ms. Newkirk the previous day, i.e., September 28, 1988, as reflected on the official post office documents.

7. Appellant's appeal was hand delivered to this Board at 3:44 p.m. on the afternoon of October 14, 1988.

Decision

The record reflects that Appellant's appeal was filed with this Board on October 14, 1988. Based on such date of receipt of the appeal by the Board the procurement officer's decision must not have been received by Appellant earlier than September 29, 1988 in order for the appeal to have been filed timely.⁶ See Eastern Chemcial Waste Systems, MSBCA 1310, 2 MSBCA ¶139 (1986). If an appeal in a bid protest is not timely filed, the Board lacks jurisdiction to entertain the merits of the protest and the appeal must be dismissed. See Rolm Mid-Atlantic, MSBCA 1161, 1 MICPEL ¶64 (1983); Coopers & Lybrand, MSBCA 1098, 1 MICPEL ¶37 (1983).

⁵ According to Ms. Newkirk she date stamped the original before making any copies. The record does not contain an explanation for this apparent conflict of testimony.

⁶ For purposes of timely filing in this context, "day" means calendar days. See COMAR 21.01.02.25.

Appellant asserts that it received the procurement officer's decision on September 29, 1988. MDOT argues that the date of September 28, 1988 on the post office return receipt and post office file receipt is conclusive evidence that that was the date on which Appellant received the procurement officer's decision. Appellant asserts on the other hand that the date appearing on the postal documents only raises a presumption of delivery on such date which may be rebutted by extrinsic evidence - in this case the testimony of Ms. Newkirk and Mrs. Kim that the procurement officer's decision was actually received on September 29, 1988 as reflected on the Appellant's date stamp on the original of the decision.

We believe that the date that appears on the postal records pertaining to receipt of certified mail is prima facie evidence that the document to which the records relate was received on the date indicated on such postal records. See Guye, Guye Construction Co., ASBCA No. 4756, 59-1 BCA ¶2060; Airports Unlimited, Inc., Comp. Gen. Dec. B-222324.2, July 25, 1986, 86-2 CPD ¶111.⁷ However, we believe that such presumptive evidence of receipt may be rebutted by clear and convincing evidence that the date appearing on the postal return receipt documents is incorrect. Here we find, however, that Appellant's evidence consisting of the somewhat conflicting testimony of Ms. Newkirk and Mrs. Kim and the original of the procurement officer's decision with Appellant's date stamp on it does not sufficiently erode the presumption of regularity that attaches to the postal documents. There is no evidence from postal authorities that the September 28 date on the postal documents may have been in error. Nor is there any other evidence that clearly overcomes the fact that the postal documents reflect that the procurement officer's decision was received on September 28, 1988. We accordingly find that the procurement officer's decision was received on September 28, 1988 and therefore the appeal therefrom was not filed with this Board within the prescribed time. Thus we have no jurisdiction to entertain the appeal and grant MDOT's Motion to Dismiss.

⁷ See also COMAR 21.10.02.09.B relating to evidence of the date of mailing of an appeal to this Board in a bid protest and COMAR 21.10.04.02B relating to evidence of the date of mailing of an appeal to this Board in a contract dispute. Compare Landover Assoc. v Fabricated Steel, 35 Md. App. 673 (1977) at p. 681 in which it is noted that in Maryland there is a presumption that in delivering the mail the postal authorities do what the law requires of them.