

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of EASTERN CHEMICAL            )  
WASTE SYSTEMS                            )  
  )  
Under MTA Contracts MTA PAINT        )  
and BHT-HAZ 86                            )

Docket No. MSBCA 1310

December 1, 1986

Bid Protest - Timeliness - An appeal from a procurement officer's final decision denying Appellant's bid protest filed with the Board more than 15 calendar days after Appellant received the procurement officer's decision was untimely. This result is not changed by the Appellant's written advice within 15 calendar days of its receipt of the procurement officer's decision to the procurement officer and counsel for all parties that it intended to appeal the procurement officer's decision to the Board.

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MEMORANDUM OPINION AND ORDER BY CHAIRMAN HARRISON  
ON RESPONDENT'S MOTION TO DISMISS

This appeal arises out of two solicitations by the Maryland Transportation Authority (MTA) for the removal of hazardous materials from toll facilities in which Appellant unsuccessfully protested contract award to a competitor, ENPRO, Inc. (ENPRO). MTA has moved to dismiss the appeal on timeliness grounds.

Findings of Fact

1. Contract BHT-HAZ 86 solicited bids for the disposal of hazardous waste material at the Baltimore Harbor Tunnel, consisting of approximately twenty-five, 55-gallon drums of silica debris and approximately 600 gallons of a mixture of oil, gas and water. Bids on BHT-HAZ 86 were opened on July 30,

1986. The MTA PAINT solicitation sought bids for the disposal of low flash paint waste material at the Baltimore Harbor Tunnel, the John F. Kennedy Memorial Highway and the Francis Scott Key Bridge, consisting of approximately 216 barrels of material. Bids on the MTA PAINT contract were opened on August 4, 1986.

2. By letter dated August 22, 1986, Appellant filed a bid protest, objecting to the award of any portion of the MTA PAINT or BHT-HAZ 86 contracts to ENPRO, the apparent low bidder on all or a portion of both contracts.

3. By written decision dated September 24, 1986, the MTA's procurement officer rejected Appellant's protest on its merits.<sup>1</sup> This decision was sent by certified mail, return receipt requested, and was received by Appellant on September 29, 1986. As required by COMAR 21.10.02.08, the procurement officer's decision contained the following paragraph:

"This is the final decision of the Procurement Officer, which has been reviewed by the Executive Secretary of the Maryland Transportation Authority and by legal counsel. This decision may be appealed to the Maryland State Board of Contract Appeals. If you wish to make such an appeal, you must file written Notice of Appeal to the Appeals Board within 15 days from the date you receive this decision."

4. By letter dated October 1, 1986, Appellant's president wrote the procurement officer advising in pertinent part as follows:

I am in receipt of your letter dated September 24, 1986 noting our bid protest does not merit the rejection of the low bidder, ENPRO, Inc. and in turn awarding the contracts to Eastern Chemical Waste Systems (ECWS).

Please receive this letter as notice that we feel not all the facts have been expanded upon fully and not all the recently developed facts have been presented regarding this protest. Further, ECWS will appeal your decision to the Maryland State Board of Contract Appeals. We intend to do so expeditiously so as to allow The Authority to procure the services from the best qualified firm as per the terms of the proposals.

Thank you for delaying the actual award until we present our case to The Contract Appeals Board.

Counsel for MTA and ENPRO were sent copies of this letter.

5. By letter dated October 20, 1986, Appellant appealed the MTA's final decision noting that it received the procurement officer's decision on September 29, 1986. The appeal was received by this Board via Federal Express on October 21, 1986.

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<sup>1</sup>The procurement officer addressed the protest on its merits even though he found the protest was not timely filed.

6. MTA has moved to dismiss the appeal on grounds it was not filed with this Board within the required 15 calendar days of the date (September 29, 1986) that Appellant received the procurement officer's decision.

#### Decision

The State Finance and Procurement Article, Section 17-201(e)(1), Ann. Code of Md., and COMAR 21.10.02.09 deal with the time period for taking appeals to this Board of procurement officers' adverse decisions in bid protests. Section 17-201(e)(1) provides:

Within 15 days of receipt of notice of a final action disapproving a resolution or approving a decision not to resolve a dispute relating to the formation of a State contract, the bidder or offeror or prospective bidder or offeror may appeal the action to the State Board of Contract Appeals. The decision of the Board is final only subject to judicial review.

COMAR 21.10.02.09 provides:

A. Protestors are required to seek resolution of their complaints initially with the procurement agency. If a protest has been timely filed initially with the procurement agency, any subsequent appeal to the Appeals Board shall be filed within 15 days of receipt of notice of the final action.

B. Any appeal received at the Appeal Board's offices after the time prescribed in this regulation may not be considered unless it was sent by registered or 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 as specified in these regulations. The only acceptable evidence to establish the date of mailing shall be the U.S. Postal Service postmark on the wrapper or on the original receipt from the U.S. Postal Service. The only acceptable evidence to establish the date of transmission by mailgram shall be the automatic date indication appearing on the mailgram. If the postmark in the case of mail or automatic date indication in the case of a mailgram is illegible, the appeal shall be deemed to have been filed late.

In interpreting the foregoing, this Board has consistently held that an Appellant has 15 calendar days to file an appeal of a final decision denying a bid protest and that filing within this appeal period is a mandatory requirement which must be satisfied to perfect the jurisdiction of this Board. Coopers & Lybrand, MSBCA 1098, 1 MICPEL 37 (1983); Rolm Mid-Atlantic, MSBCA 1161, 1 MICPEL 64 (1983).

As stated in Appellant's notice of appeal, the procurement officer's decision was received on September 29, 1986. Appellant's notice of appeal is dated October 20, 1986, and was received by this Board via Federal Express on October 21, 1986, after the mandatory 15 calendar days from receipt of the procurement officer's decision had elapsed. Nevertheless, Appellant maintains that its appeal should be considered and asserts the following three arguments: (1) no substantial prejudice has been incurred as a result of the late filing of the appeal since the procurement officer and counsel for MTA

and ENPRO were advised that Appellant would appeal, (2) the 15 calendar day time limit may be treated as a procedural matter that may be waived in the interest of justice, and (3) COMAR 21.10.07 allows 15 working days of the State Government for an appeal to be taken.

Concerning Appellant's first argument, we have previously held that where an Appellant failed "to file its appeal within the 15 day calendar period prescribed by law and regulation, the final decision of the . . . procurement officer became binding and the right to an appeal was lost." (footnote omitted). Coopers & Lybrand, supra, at p. 4. The question of whether a party may be prejudiced does not enter into the determination of whether the right to appeal has been perfected. This Board simply is not empowered to waive a legislative and regulatory prerequisite to its jurisdiction even if to do so would not in the abstract be prejudicial to any party.<sup>2</sup>

In support of its argument that the 15 calendar day time limit may be waived in the interest of justice, Appellant cites, Hanks Contracting, Inc., MSBCA 1212, 1 MICPEL 91 (1984) and Johnson Controls, Inc., MSBCA 1155, 1 MICPEL 60 (1983). Neither case is of aid to Appellant. Johnson Controls, Inc. deals with an Appellant's failure to comply with a procedural regulation of this Board, COMAR 21.10.07.02C, which requires a notice of appeal to contain a statement of the grounds for appeal and specify the ruling requested from the Board. The appeal, however, was timely filed. We said, in pertinent part, at p. 8:

While the Board recognizes the potential problems created when appellants fail to adhere to the requirements of COMAR 21.10.07.02, such an omission is not fatal to an appeal. Obviously the interested parties must be given fair notice of the grounds for appeal and the requested ruling so as to prepare a defense. However, where confusion exists, the proper remedy is to request a more definite statement of the grounds for appeal immediately upon perceiving a problem. In this manner the rights of the parties are protected and the proceedings are not delayed unduly.

Here the basis for Appellant's appeal adequately was stated in its written comments to the Board. Copies of these comments were served on all interested parties prior to hearing and an opportunity to respond was provided under Board rules. Accordingly, [no party] was surprised.

Nothing in this opinion suggests a departure from our rulings concerning mandatory requirements for the filing of an appeal within the times set forth in COMAR 21.10.02.09.

Hanks Contracting, Inc., did involve the question of the timely filing of an appeal, albeit in the context of a contract dispute as distinct from a bid protest. However, in Hanks it was clear that the Appellant was cognizant of

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<sup>2</sup>The Board has observed in the context of the filing of a timely bid protest with the procuring agency that "timeliness requirements . . . must be strictly construed since the rights and interests of so many parties are at stake." David A. Bramble, Inc., MSBCA 1240, 1 MICPEL 103 at p. 3 (1985).

the 30 day time requirement and, as we found, met it. We said in Hanks at p. 3:

The issue, as we see it, may be resolved by asking whether Appellant demonstrated its intent to appeal the adverse decision of the DGS procurement officer within 30 days of its receipt. COMAR 21.10.04 requires that this intent be demonstrated both in writing and by either hand delivering or mailing the appeal to the Board within 30 days. The facts here demonstrate that the intent to appeal sufficiently was demonstrated in the manner contemplated by Maryland law and regulation.<sup>3</sup>

Based on the facts before us in Hanks it was clear that when Appellant placed its appeal in the U.S. mail it intended to file its appeal with this Board within the required 30 day period even though the notice of appeal was inadvertently mailed to another address, rather than to the Board as shown on the cover letter. Additionally, a copy of the notice of appeal was mailed to the procurement officer.

In the instant case, the Appellant wrote the procurement officer on October 1, 1986 and stated it would "expeditiously" appeal to this Board. This was an expression of an intent to file an appeal in the future. Its expressed intention to appeal was not consummated, however, until it actually filed its appeal some three weeks later, approximately a week after the appeal period had run. We find that a general statement that an appeal will be taken, even though communicated to counsel for MTA and ENPRO, does not demonstrate an intent by action to take a timely appeal within the factual setting of the Hanks decision and thus does not comply with the requirement to file a timely appeal.

Finally, we must disagree with Appellant's third argument that 15 working days rather than 15 calendar days are to be used to calculate the appeal period. COMAR 21.10.07 deals with Board practice and procedure after an appeal has been taken. While day is defined in COMAR 21.10.07.01C to mean working days of the State government, all references to the word "day(s)" in COMAR 21.10.07 are in the context of the time frame for an activity after an appeal has been filed. However, the filing of a bid protest appeal is controlled by COMAR 21.10.02.09. Since the word "day" in COMAR 21.10.02.09 is not otherwise defined, the 15 day appeal period set forth

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<sup>3</sup>Appellant, Hanks, on behalf of a subcontractor, formally filed a claim with the procurement officer on April 5, 1984. The procurement officer issued his final decision denying the claim on July 16, 1984 and Appellant received its copy of the decision two days later. On August 15, 1984, the subcontractor's attorney prepared an original cover letter addressed to the Maryland State Board of Contract Appeals together with an original and two copies of a notice of appeal. This package, however, inadvertently was mailed to Appellant's attorney, with a copy to the DGS procurement officer. The notice of appeal was received at the offices of Appellant's attorney on August 17, 1984 while he was away from his office on vacation. The procurement officer also received his copy on August 17, 1984. The Board never received the notice of appeal mailed on August 15, 1984 by the subcontractor's attorney. After learning that the Board had not received the appeal, the subcontractor's attorney hand delivered the original transmittal letter and notice of appeal to the Board on September 4, 1984.

therein is 15 calendar days. Coopers & Lybrand, supra, at p. 4. In this regard, COMAR 21.01.02.25 defines "day" as a calendar day unless otherwise designated.

Appellant's appeal filed some 21 calendar days after receipt of the procurement officer's decision is thus untimely and MTA's motion to dismiss on timeliness grounds is granted.