

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of HANKS CONTRACTING,)
INC.)
) Docket No. MSBCA 1212
Under DGS Contract No.)
N-000-796-011)

December 11, 1984

Timeliness - Where there is no dispute that a notice of appeal of a contract dispute was actually mailed within the required 30 day appeal period, and Appellant demonstrated its intent to appeal by timely sending a copy of the notice to the agency procurement officer, Appellant's failure to address the notice of appeal correctly was not fatal to its right to proceed on the substantive issues.

APPEARANCES FOR APPELLANT:

Robert L. Flanagan, Esq.
Siskind, Burch, Grady & Rosen
Baltimore, MD

Robert F. Dashiell, Esq.
Singleton, Dashiell & Robinson, P.A.
Baltimore, MD

APPEARANCES FOR RESPONDENT:

Allan B. Blumberg
Edward S. Harris
Assistant Attorneys General
Baltimore, MD

MEMORANDUM OPINION AND ORDER
BY MR. LEVY ON DGS' MOTION TO DISMISS

Findings of Fact

Appellant entered into the captioned contract with the Maryland Department of General Services (DGS) in February 1982 for the renovation of two dormitories at Morgan State University in Baltimore. Appellant also entered into a subcontract with Hague Electric Corporation (Hague) to perform certain electrical work called for in its prime contract. During the later part of 1982, a dispute developed between Appellant and Hague over certain work which Appellant contended was included in the subcontract. On February 15, 1983, Appellant filed an action in the Circuit Court for Baltimore City seeking a declaration of the rights of the parties under the contract. In August 1983, Appellant and Hague agreed to stay the lawsuit and to submit their dispute to this Board for resolution under the disputes

clause of the prime contract with DGS. Based on that agreement, Hague filed a notice of appeal with this Board on February 24, 1984. A telephone conference was conducted by the Chairman of the Board, Lewis J. Baker, on February 28, 1984 with Hague's attorney, Robert F. Dashiell, Esq., and DGS' attorney, Edward S. Harris, Esq. It was determined during that conference that Appellant, as the prime contractor, had not presented the dispute to DGS and that there had been no final decision issued by the procurement officer. Mr. Dashiell was advised to pursue the claim with the DGS procurement officer in the prime contractor's name. The appeal, having been determined to be premature, was not docketed with this Board.

Appellant formally filed a claim with the DGS procurement officer on April 5, 1984. The procurement officer issued his final decision denying the claim on July 16, 1984 and it is undisputed that Appellant received its copy of the decision two days later. On August 15, 1984, Mr. Dashiell 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 Robert F. Flanagan, Esq., Appellant's attorney, with a copy to the DGS procurement officer. The notice of appeal was received at Mr. Flanagan's office on August 17, 1984 while he was away from his office on vacation. The DGS procurement officer also received his copy on August 17, 1984. The Board never received the notice of appeal as mailed on August 15, 1984 by Mr. Dashiell.

After learning that the Board had not received or docketed the appeal, Mr. Dashiell hand delivered the original transmittal letter and notice of appeal to the Board on September 4, 1984 where it was stamped and docketed. DGS thereafter filed a motion to dismiss alleging that Appellant failed to note a timely appeal as required by Md. Ann. Code, Article 21, §7-201(d)(2),¹ and that the Board, therefore, lacks jurisdiction over this matter.

Decision

This Board previously has ruled that the 30 day appeal period established by Md. Ann. Code, Art. 21, §7-201(d)(2) is a mandatory requirement which must be satisfied to perfect jurisdiction and that it has no authority to waive a failure to take an appeal within that period. Jorge Company, Inc., MSBCA 1047 (July 7, 1982). However, in McLean Contracting Co., MSBCA 1108 (December 21, 1982), the Board stated the following, at p. 3, with regard to taking an appeal within the 30 day period:

In establishing this time requirement, however, the Legislature did not specify just how an appeal was to be taken. This was left to the discretion of those authorized to promulgate procedural regulations. With regard to contract disputes, procedural regulations ultimately were

¹This provision states that:

Within 30 days of receipt of notice of a final action disapproving a settlement or approving a decision not to settle a dispute relating to a contract entered into by the State, the contractor may appeal to the Maryland State Board of Contract Appeals.

adopted which permit an appeal to be taken either by hand delivering a notice of the appeal to the Board's offices or by depositing the notice in the U.S. mail. See COMAR 21.10.04.02A².

Since there is no dispute that Mr. Dashiell mailed the notice of appeal within the required appeal period, the only issue to be resolved by the Board is whether the failure to address the appeal correctly was fatal to Appellant's right to proceed further on the substantive issues in dispute.

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.³ The facts here demonstrate that the intent to appeal sufficiently was demonstrated in the manner contemplated by Maryland law and regulation.

If the facts had demonstrated that Mr. Flanagan alone had received the original and two copies of the notice of appeal, we reasonably may have doubted whether Mr. Dashiell had intended the appeal to go directly to the Board. Under such circumstances, one could have assumed that Mr. Dashiell had forwarded the notice of appeal to Mr. Flanagan for filing by the prime contractor. Here, however, Mr. Dashiell mailed the copy of the notice of appeal to the DGS procurement officer on the very day he inadvertently forwarded the original to Mr. Flanagan. Notice to the procurement officer presumably was given pursuant to COMAR 21.10.04.01(C) which states that:

²COMAR 21.10.04.02 provides:

A. Any subsequent appeal to the Appeals Board shall be mailed or otherwise filed within 30 days of the receipt of notice of the final action by the procurement officer.

B. If a question arises concerning the mailing date of an appeal, the actual mailing date may be established by the U. S. Postal Service postmark on the envelope, an original receipt from the U. S. Postal Service, or the automatic date indication appearing on a mailgram. A date affixed by postage meter will not be considered as evidence of the actual mailing date. If the postmark in the case of mail or automatic date indication in the case of a mailgram is illegible, and the appeal is received by the Board later than the 33rd day following the receipt of a notice of final action, the appeal shall be deemed untimely.

³Compare to language of COMAR 21.10.02.09A which requires the appeal of a bid protest to be filed within the prescribed period. In a contract dispute, it is sufficient to mail the appeal within the 30 day period.

A copy of the notice of appeal shall be furnished to the procurement officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference the decision from which the appeal is being taken, and identify the contract involved. (emphasis supplied).

We conclude from the foregoing that an appeal to the Board therefore was intended and properly was taken on August 15, 1984, despite the clerical error made.

In view of the foregoing, we need not address Appellant's alternative argument that the February 24, 1984 notice of appeal as filed by Hague vested this Board with jurisdiction immediately upon issuance of the DGS procurement officer's July 16, 1984 final decision.

For the foregoing reasons, DGS' Motion To Dismiss is denied. Appellant shall have 30 days from the date of receipt of this decision within which to file its complaint.