

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of KENNEDY ELECTRIC)
COMPANY, INC.)
) Docket No. MSBCA 1479
Under DGS Project)
No. F-000-871-001)

December 15, 1989

Jurisdiction of MSBCA - Timeliness - The MSBCA lacks jurisdiction to consider an appeal that is not timely filed. Where filing is attempted by use of certified mail, the Appellant bears the burden to show that its appeal was mailed within the time frames established in COMAR. Such burden may only be met by presentation of the specific evidence mandated by COMAR.

APPEARANCE FOR APPELLANT	None
APPEARANCE FOR RESPONDENT	Michael P. Kenney Assistant Attorney General Baltimore, MD

MEMORANDUM DECISION BY CHAIRMAN HARRISON

Appellant appeals a Department of General Services (DGS) procurement officer's final decision denying Appellant's claim for an equitable adjustment to the referenced contract. Respondent has filed a Motion to Dismiss on grounds that the appeal was untimely.

Findings of Fact

1. The referenced contract was awarded to Appellant on October 27, 1988.
2. On June 20, 1989, Appellant requested a meeting with the procurement officer to discuss its claim for an equitable adjustment. After this meeting, the procurement officer issued a final decision denying Appellant's claim. This decision was received by Appellant, via certified mail, on August 18, 1989. This decision stated that Appellant had 10 days to appeal to this Board, rather than the 30 days set forth in COMAR 21.10.04.06 and Section 15-220 of the State Finance and Procurement Article.¹
3. Appellant claims to have sent a notice of appeal to this Board by

¹ We deem the error in the notice of appeal time to be harmless as Appellant claims to have appealed within the 10 days as directed in the procurement officer's final decision. Had Appellant's appeal been filed within 30 days as required by law, we would have considered it as having been timely filed.

certified mail on August 22, 1989 and a follow-up letter on September 22, 1989. The Board never received these letters. On October 23, 1989, Appellant hand delivered copies of both letters and a second follow-up letter.

4. While Appellant claims that its original letter appealing the procurement officer's final decision was sent by certified mail on August 22, 1989, it has not presented any credible evidence such as the postal receipts to prove this.²

5. On November 28, 1989, DGS filed a Motion to Dismiss on the grounds that the appeal was not timely filed. Appellant has not responded to this motion.

Decision

Section 15-220 of the State Finance and Procurement Article and COMAR 21.10.04.06 require that appeals in contract disputes be filed within thirty days after receipt of notice of a final agency action. This Board did not receive Appellant's appeal until October 23, 1989, more than thirty days after Appellant received the procurement officer's final decision on August 18, 1989. Appellant has not been able to conclusively establish by evidence such as the certified mail postal receipt that its appeal was actually mailed within the time period allowed for filing. The thirty day time period for filing an appeal is a mandatory requirement which must be satisfied to perfect jurisdiction. See Jorge Company, Inc., MSBCA 1047, 1 MSBCA ¶20 (1982). Accordingly, Appellant's untimely appeal may not be considered.

For the foregoing reasons, therefore, Respondent's Motion to Dismiss is granted, and Appellant's appeal is dismissed with prejudice.

² With respect to appeals that are sent to the Board by certified mail, COMAR 21.10.04.06D provides that "An appeal received by the Appeals board after the time prescribed in §A or §B 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 §A or §B. A date affixed by postage meter will not be considered as evidence of the actual mailing date. 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 or automatic date indication is illegible, the appeal shall be deemed to have been filed when received by the Appeals Board."