

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of MFE INCORPORATED/)
NCP ARCHITECTS, INCORPORATED)
) Docket No. MSBCA 1781
Under DGS Contract No. U-502-)
792-002)

March 7, 1994

Timeliness (fax transmission - Where the final written decision of the Procurement Officer is sent by facsimile transmission, evidenced by a transmission result report and confirmed by a follow-up telephone call, the COMAR 21.10.04.04D requirement to furnish the decision by any other method that provides evidence of receipt has been met.

Constructive receipt by placing the appeal in the hands of the U.S. Postal Service is limited to the strict definition given by COMAR 21.10.04.06 for registered or certified mail, within the time periods described and where the acceptable post mark evidence is legible and in the record before the Board.

APPEARANCES FOR APPELLANT: James F. Lee, Jr., Esq.
Mary C. Nevius, Esq.
Carr, Goodson & Lee, P.C.
Washington, D.C.

APPEARANCES FOR RESPONDENT: Jay N. Bernstein
Mark S. Dachille
Asst. Attorneys General
Baltimore, MD

OPINION BY MR. MALONE

Respondent, the State of Maryland, University of Maryland (University), filed an affirmative contract claim against Appellant, MFE Incorporated/NCP Architects, Inc. for alleged costs plus interest incurred as a result of alleged MFE/NCP design errors and omissions. This claim was reviewed by the University's Procurement Officer who concluded the State was entitled to \$2,043,735.00. Appellant has appealed this final decision to this Board. The Respondent has filed a Motion to Dismiss With Prejudice this appeal on grounds it was filed beyond the 30 day filing period for appeals to this Board is late, and therefore, this Board does not have jurisdiction to hear the appeal.

Findings of Fact

1. The facts material to a determination of this Motion are not in dispute.
2. On September 16, 1981, the State of Maryland contracted with MFE/NCP to provide plans and specifications for alterations of, and an addition to, the McKeldin Library located on the College Park campus of the University of Maryland.
3. The plans and specifications formulated by Appellant were issued as Contract No. U-502-792-020, awarded by the State to Centex-Simpson Construction Co., Inc. to construct an addition to the McKeldin Library; and, as Contract No. U-502-792-120, awarded to Chas. H. Tompkins Co. to perform alterations to the existing library.
4. By letter dated May 4, 1993, the State asserted a claim against Appellant for indemnification of the additional costs incurred by the University on Contract Nos. U-502-792-020 and U-502-792-120 as a result of alleged design errors and omissions on the part of Appellant.¹ Appellant responded by letter dated June 4, 1993 which denied any liability.
5. In a final decision dated October 28, 1993, the Procurement Officer concluded that the State was entitled to indemnification totaling \$2,043,735.00 plus interest, for costs incurred due to Appellant's alleged design errors and omissions. The final decision, of the Procurement Officer, was transmitted to counsel for Appellant on Friday morning, October 29, 1993, through a facsimile machine located at the Office of the Attorney General. The facsimile machine produced a "Transmission Result Report" which indicated that the entire final decision was successfully transmitted to counsel for MFE/NCP.
6. At 11:35 a.m. on October 29, 1993, Deborah Constable, a secretary at the Office of the Attorney General telephoned Carr, Goodson & Lee, P.C., counsel for Appellant, and confirmed that the final decision had been received.
7. The original of the October 28, 1993 final decision faxed to Appellant's counsel on October 29, 1993 was also forwarded by Federal Express Package No. 2980361731 to Appellant's counsel on October 29, 1993, and delivered on November 1, 1993.
8. Appellant alleges that its Notice of Appeal was sent to the

¹The record does not reveal what transpired between September 16, 1981 when Appellant entered into its contract and May 4, 1993 when the State apparently concluded that Appellant had negligently performed its contract.

Maryland State Board of Contract Appeals on November 29, 1993. The Notice of Appeal was received by the Board on November 30, 1993, more than 30 days after the final decision was received by Appellant, counting from the fax transmission on October 29, 1993.

9. Appellant argues that an affidavit of its secretarial staff supports its position that actual mailing was effected on November 29, 1993. Further, the postage meter applied by Appellant's staff shows November 29, 1993. However, under COMAR 21.10.04.06D neither of these evidentiary presentations are acceptable to show actual mailing. The evidence which is allowed to demonstrate actual mailing under COMAR was not presented in the record. Consequently, this Board must find that the actual date of mailing is unknown and, therefore, must deem the appeal filed with the Board the date it was received by the Board.

Decision

COMAR 21.10.04.04D states;

"D. Unless the claim is remanded to the Procurement Officer, the decision of the reviewing authority is the final action by the procurement agency and shall be furnished to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt."

The record does not reflect that the claim was remanded to the Procurement Officer, and consequently the decision of October 28, 1993 was the final action. The question of first impression before this Board is simply this; does a facsimile transmission of the entire final written decision of the Procurement Officer with a transmission result report, delivery of which is also confirmed by the telephone call, fulfill the requirement to furnish the decision to the contractor, "... by any other method that provides evidence of receipt."? We conclude that it does.

There is no expressed requirement that the decision be furnished by any particular method, only that it be furnished with evidence of receipt. The record clearly supports Appellant did

receive the facsimile copy of the final decision receipt of which is evidenced by the transmission report and follow-up telephone confirmation. The record leaves no doubt that Appellant had actual possession of the final decision by facsimile on October 29, 1993.

While not bound as precedent, this Board does seek guidance from the Federal Board's of Contract Appeals where appropriate. The Armed Services Board of Contract Appeals has recognized facsimile transmission of a final Contracting Officer's decision as sufficient notice for purposes of commencing the period for appeal. Tyger Construction Company, Inc., ASECA Nos. 36100, 36101, 88-3 BCA ¶21149. The Federal Acquisition Regulation (FAR) required the government to furnish the final decision "by certified mail, return receipt requested, or by any other method that provides evidence of receipt..." Id. at 106778.

There is a substantially similar requirement under COMAR and this Board is persuaded that facsimile transmission is "another method" encompassed within a reasonable reading of COMAR §21.10.04.04D. Certainly this and other methods of transmitting information were available when this regulation was enacted. Transmission of copies by fax has become an everyday event in the ordinary course of business. The fax is accurate, reliable and meets all of the substantive tests as a method of furnishing the final decision to the contractor.

The Board having decided when the Appellant's appeal period begins, must now address when it ends under the particulars of this appeal.

Md. Code Ann. State Fin. & Proc. Article § 15-220 states,

"Appeal from unit's decision - In general.

(a) In general. -- Except for a contract claim related to a lease for real property, a bidder or offeror, a prospective bidder or offeror, or a contractor may appeal the final action of a unit to the Appeals Board.

(b) Time for filing. -- An appeal under this section shall be filed:

(1) for a protest, within 10 days after receipt of the notice of a final action; and

(2) for a contract claim, within 30 days after receipt of the notice of a final action. (SF § 11-137; 1988, ch. 48, § 2.)"

COMAR 21.10.04.06 also discusses the time for filing an appeal which states,

"A. An appeal to the Appeals Board shall be mailed or otherwise filed within 30 days of the receipt of notice of the final decision. The notice shall indicate that an appeal is intended, shall reference the decision from which the appeal is being taken, and shall identify the contract involved.

B. An appeal based upon a failure to reach a decision within the period prescribed in COMAR 21.10.04.04E shall be filed within 30 days of the expiration of the prescribed period.

C. A copy of the notice of appeal shall be furnished to the procurement officer.

D. 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."

This Board has consistently held that the timely filing of contract claims appeals is a mandatory requirement which must be satisfied for this Board to have jurisdiction. Kennedy Electric Co., Inc., MSBCA 1479, 3 MICPEL §232 (1989); TEMP AIR COMPANY, MSBCA 1542, 3 MICPEL §257 (1990); McLean Contracting Co., MSBCA

1108, 1 MICPEL §41 (1983).

Appellant argues that under Federal Procurement the date the claim is mailed (i.e. in the hands of the U.S. Postal Service) constitutes filing a claim and this "mailbox rule" should be, also, enforced by this Board. Subsequent to this Board's decision in Hanks Contracting, Inc., MSBCA 1212, 1 MICPEL §91 (1984) where the Board applied the "mailbox" rule, COMAR regulation 21.10.04.06 was changed by subsection D. The COMAR provision in effect from July 1, 1981 through January 8, 1989 and in effect during Hanks Contracting, Inc., supra, was COMAR provision 21.10.04.02 which stated,

"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."

This is not the same language as was in effect for this appeal. For this appeal as we have noted the controlling language is as set forth in COMAR 21.10.04.06 effective January 9, 1989.

Ironically, if you count from October 29, 1993 to the "mailbox" date suggested by Appellant of November 29, 1993, the appeal remains late as October has 31 days and would have had to have been in the "mailbox" on November 28, 1993. Additionally, there is no U.S. Postal Service post mark on the envelope, which is the only acceptable evidence allowed of the actual mailing date in this appeal. COMAR 21.10.04.06D

The Appellant's appeal in theory becomes timely if you count from the date of receipt of the follow-up letter on November 1, 1993 (i.e. not the October 29, 1993 fax) to the date Appellant placed its appeal in the "mailbox" November 29, 1993.

The "mailbox" rule previously enforced by this Board in Hanks Contracting, Inc., *supra* was based upon a different COMAR regulation. The COMAR regulation which became effective on January 9, 1989, which controls this appeal, effectively eliminated the mailbox rule and requires actual delivery to this Board of the appeal, except in the certified and registered mailing scenarios expressed in COMAR 21.10.04.06D. The "may not be considered" language is restrictive of the "mail or otherwise file" language given in COMAR 21.10.04.06A. Special provision for sending appeals by mail is limited to certified and registered mail where the mailing is received at the Board beyond the 30 day filing period. A comparison of the language given in COMAR 21.10.04.02 which was in effect during the Hanks Contracting, Inc., *supra* appeal and the restrictive language given in COMAR 21.10.04.06 effective January 9, 1989 which controls the instant appeal makes this clear.

Sub-section D of COMAR 21.10.04.06 refers to an appeal "received by the Appeals Board" which indicates actual receipt not the constructive receipt inherent under a "mailbox" rule. This language when read with "shall be mailed or otherwise filed" emphasizes the word "filed" to require actual receipt by the Appeals Board. The language in 21.10.04.06D represents a shift from the constructive receipt of mailing alone. COMAR 21.10.04.06D further restricts the type of mailing to registered or certified mail which will be given special consideration in the calculation of the appeal period and only where the limited acceptable evidence is established in the record. Even registered or certified mail that potentially meets these criteria will be deemed filed when actually received by the Appeals Board if the post mark or

: As stated earlier there is no acceptable evidence of this mailing date before the Board.

automatic date indication is illegible. The general application of a "mailbox" rule allowing constructive receipt of appeals cannot reasonably be found reading subsection D together in harmony with the overall regulation.

COMAR 21.10.04.06 is consistent with State Finance and Procurement Article Annotated Code of MD §15-220 which requires,

"An appeal under this section shall be filed:...

...(2) for a contract claim, within 30 days after receipt of the notice of a final action."

Clearly, the emphasis is on actual filing with the Appeals Board. There is no language suggesting that constructive receipt under a "mailbox" rule would satisfy the time within which an appeal "shall be filed".

The Board cannot read the mandate of COMAR 21.10.04.06D out of context or in isolation. Subsection D limits what this Board may consider as timely received when an appeal is mailed.

This Board has no authority to ignore the plain meaning of a COMAR regulation in context giving meaning to all of its provisions. In 1989 the promulgation of the regulation changed the "mailbox" rule, and replaced it with a mandate not to consider appeals filed by mailing beyond the 30 day period unless certified or registered as prescribed and only where the evidence of the mailing date conforms to proof permitted as prescribed in Subsection D.

In summary, the October 29, 1993 facsimile transmission was sufficient here to begin the 30 day appeal period. The appeal was deemed to have been filed when received by the Appeals Board on November 30, 1993 which is not within 30 days of the receipt of notice of the final decision.

For these reasons the appeal is dismissed for lack of jurisdiction.

It is therefore ORDERED this 7th day of March, 1994 that the appeal is dismissed for lack of jurisdiction.

Dated: 3/7/94

Neal E. Malone
Neal E. Malone
Board Member

I concur:

Robert B. Harrison III
Robert B. Harrison III
Chairman

Sheldon H. Press
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 1781, appeal of MFE INCORPORATED/NCP ARCHITECTS, INCORPORATED, Under DGS Contract No. U-502-792-002.

Dated: March 7, 1994

Mary F. Priscilla
Mary F. Priscilla
Recorder

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