

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of McLean Contracting Co.)

Under MPA Contract No.)
MPA-E80-18(20018))

) Docket No. MSBCA 1108

December 21, 1982

Timeliness - An appeal which was hand delivered to the Board's offices 36 days after receipt of the agency final decision was deemed to be untimely.

Statutory Interpretation - The appeal period set forth in Md. Ann. Code, Art. 21, §7-201(d) (2) and COMAR 21.10.04.02.A was construed to be mandatory and not directory. The Board, therefore, has no discretion to waive the 30 day period.

OPINION BY CHAIRMAN BAKER
ON MPA'S MOTION TO DISMISS

Findings of Fact

On September 17, 1980, Appellant was awarded a Maryland Port Administration (MPA) contract for certain renovation work at the Dundalk Marine Terminal. During performance of this contract, a dispute arose concerning the permissible use of 115# R.E. rail in placing trackwork. Appellant alleges that the contract specified the use of this rail, that the MPA approved its shop drawings wherein the use of 115# R.E. rail was shown, and that on the basis of the foregoing, it ordered the rail. After receipt of the 115# R.E. rail, but before its installation, MPA allegedly apprised Appellant that the rail was not in conformance with the contract and that it would have to be replaced with girder rail. Appellant complied with this directive but thereafter filed a claim seeking the additional costs incurred in substituting girder rail for 115# R.E. rail. This claim was denied both by the MPA procurement officer and the Maryland Port Administrator. A written final decision was issued on August 4, 1982 and was transmitted to Appellant by certified mail, return receipt requested. Appellant acknowledges that the decision was received by a receptionist in its offices on August 9, 1982, and that an appeal therefrom subsequently was hand delivered to this Board's offices on September 14, 1982.

On September 24, 1982, the MPA filed a motion to dismiss the captioned appeal on the ground that it was untimely. While oral argument on the motion was not requested, both parties submitted legal memoranda addressing the jurisdictional issue raised.

Decision

This Board previously has ruled that the 30 day appeal period established by Md. Ann. Code, Art. 21, § 7-201(d)(2)¹ is jurisdictional and that the Board has no authority under Maryland's procurement law to waive a failure to appeal within that period. Jorge Company, Inc., MSBCA 1047 (July 7, 1982). Notwithstanding this prior ruling, Appellant contends that the foregoing statutory language is directory only and thus the time requirement for appeal should be construed as having some degree of flexibility. In support of this position, Appellant cites the Maryland Court of Appeals decision in Toomey v. Gomeringer, 235 Md. 456, 201 A.2d 842 (1964) concerning the proper construction of Rule B4 of the Maryland Rules of Procedure. Rule B4 reads as follows:

An order for appeal shall be filed within thirty days from the date of the action appealed from, except that where the agency is by law required to send notice of its action to any person, such order for appeal shall be filed within thirty days from the date such notice is sent, or where by law notice of the action of such agency is required to be received by any person, such order for appeal shall be filed within thirty days from the date of the receipt of such notice.

In concluding that the foregoing language did not impose a mandatory time requirement, the Court stated that:

The provisions of Rule B4 a and b with regard to the time for filing an appeal are generally similar to those of Rule B9 for the time of filing an answer. All use the word "shall," as does Rule B2 e, which deals in part with the time for filing a petition which, if not joined with, must follow an order for appeal. We note that Rule B4 c requires an application for extension of time for filing an order of appeal to be made within the time allowed for filing the order of appeal. There is no counterpart to this provision in Rule B9, nor is there any to Rule B5. The latter provides that the appeal shall be dismissed for failure to file an order for appeal within the time prescribed by Rule B4, or to file a petition of appeal under Rule B2 e within the time prescribed by the Rule, "unless cause to the contrary be shown." If the provision as to time of Rule B4 a and b or of Rule B2 e

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.

were mandatory requirements, there would hardly be any necessity for the provisions of Rule B5 for the dismissal of the appeal...

Toomey v. Gomeringer, supra at 235 Md. 459. Appellant analogously argues that if the time requirement contained in Md. Ann. Code, Art. 21, § 7-201(d)(2) were mandatory, there would be no purpose served by COMAR 21.10.04.02 which provides that:

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. (Underscoring added.)

Appellant submits that if the Board can docket an appeal received in its offices 33 days after receipt by a contractor of an agency final decision, the statutory language governing the appeal period must be directory and not mandatory.

Maryland Annotated Code, Art. 21, § 7-201(d)(2) expressly states that a contract appeal shall be taken within 30 days of receipt of a procurement officer's final decision. 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 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 21.10.04.02A. Although these procedural regulations permit the Board to consider a mailed appeal received in its offices, without a legible U.S. postmark, as late as 33 days after the contractor received its agency final decision, they do not authorize the Board to docket an appeal taken after the 30 day statutory period. The regulations simply provide that where an appeal letter is received by the Board with an illegible U.S. postmark or automatic date indication (mailgram), no later than 33 days after the contractor's receipt of a final decision, the Board may presume that the appeal letter was mailed, and the appeal thus taken, within the prescribed 30 day period. Accordingly, we find nothing in COMAR 21.10.04.02B. nor anywhere else in the law or regulations which delegates discretionary authority to the Board to consider appeals taken after the 30 day statutory period.

Here Appellant hand delivered its appeal 36 days after receiving the MPA final decision. Under applicable laws and regulations, the appeal therefore was untimely.

Appellant further argues that the mailing of the MPA final decision was defective in that it was not sent to its Vice President and Construction Manager by certified mail, restricted delivery. For this reason it is urged

that the time period for appeal be measured from the date when Appellant's Vice President and Construction Manager actually became cognizant of the final decision. However, we find that neither the contract documents nor Maryland's procurement regulations require that a final decision be transmitted by certified mail, restricted delivery. Instead, COMAR 21.10.04.02B simply provides, in pertinent part, that " ... [the procurement officer shall immediately furnish a copy of the [final] decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt" Since this precisely is what the MPA did in this instance, Appellant has no ground to complain.

For all of the foregoing reasons, therefore, the captioned appeal is dismissed.