BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of NATIONAL ELEVATOR COMPANY, INC.	)	
	)	Docket No. MSBCA 1370
Under DGS Project No. BPB&G 861108M	)	

July 1, 1988

Jurisdiction of MSBCA - Timeliness--An appeal received by the Maryland State Board of Contract Appeals within thirty days of the contractor's receipt of the agency's written final decision is timely.

Jurisdiction - Notice - Timeliness--The requirement that a contractor file its appeal within thirty days of receipt of notice of a final action runs from the time the contractor receives a copy of the written procurement officer's final decision which complies with the formal requirements of COMAR 21.10.04.01B. COMAR 21.10.04.01B intends that the contractor receive a written procurement officer's final decision that clearly informs the contractor of the nature of the decision and of its right to appeal within a prescribed time. Verbal notice of the default determination received by telephone does not normally satisfy the notice requirement of the statute of COMAR 21.10.04.01B.

Jurisdiction - Timeliness - Burden of Proof--A Contractor's failure to receive a certified letter that it knew through a telephone conversation with an agency official contained notice of termination of its contract for default did not amount to constructive notice that started the running of the thirty day appeal period. In support of its motion to dismiss for untimely filing, the procurement agency failed to prove that Appellant intentionally avoided or refused receipt of the certified letter containing the procurement officer's final decision.

APPEARANCE FOR APPELLANT: Barbara Solomon Brown, Esq.
Alvin Solomon, P.A.
Baltimore, MD

APPEARANCE FOR RESPONDENT: John H. Thornton
Assistant Attorney General
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MEMORANDUM OPINION BY MR. KETCHEN

This is an appeal from a decision by the Department of General Services (DGS) to terminate Appellant's contract. DGS has filed a motion to dismiss on the ground that the appeal is untimely. The issue raised concerns when the contractor received the decision of DGS so as to start the running of the thirty day appeal period. DGS asserts that the date on which Appellant had notice that a certified letter containing the decision was available to be claimed as the date of constructive notice, even though the decision remained unclaimed at the post office and was finally returned to the sender, DGS.

Findings of Fact

1. Appellant entered into a service contact with the DGS on October 8, 1986 to provide elevator inspection, maintenance and repair services for the elevators in the State Office Buildings located at 201, 300, 301 W. Preston Street, Baltimore, MD.

2. On November 27, 1987, John C. Reese, the superintendent of the Baltimore Public Buildings and Grounds, a DGS agency, and the procurement officer, issued his final decision terminating Appellant's contract for default. It was mailed on that day by certified mail, return receipt requested, to Mr. Herlen E. Bess, Vice President of the Appellant company, who is its duly authorized representative, at the correct corporate address.

3. On November 28, 1987, December 3, 1987, and December 13, 1987, the U.S. Postal Service left notices at Appellant's corporate address advising that a certified letter was available to be picked up.

4. On December 2, 1987, a telephone conversation between Mr. Bess and Mr. Tucker, Mr. Reese's assistant, took place during which Mr. Bess was notified orally that the contract had been terminated for default.

5. On December 3, 1987, Mr. Bess telephoned Mr. Reese to inquire about the reasons for the termination. On that same day, a second certified letter was sent by Mr. Reese to Appellant advising that the contract had been terminated and that notice to that effect had been given on November 27, 1987. This letter did not contain a copy of the procurement officer's final decision of November 27, 1987.

6. On December 7, 1987 the certified letter dated December 3, 1987 was received by Appellant. The original November 27, 1987 letter still had not been claimed.

7. On December 8, 1987, the Appellant contacted its attorney, Barbara S. Brown, and told her that there was a problem with the DGS contract. She, in turn, contacted an Assistant Attorney General and was informed orally of the procurement officer's final decision terminating the contract for default. That same day, a copy of the final decision of November 27, 1987 was made available to Ms. Brown at her request.

8. On December 16, 1987, the November 27, 1987 procurement officer's final decision was returned unclaimed to DGS after three unsuccessful attempts by the U.S. Postal Service to deliver it.

9. On January 6, 1988, Appellant filed an appeal with this Board.

Decision

DGS moved to dismiss the appeal based on lack of Board jurisdiction for Appellant's failure to notice an appeal within the thirty day statutory appeal period. The jurisdiction of this Board rests upon the timely appeal of a procurement officer's final decision. See Maryland New Directions, Inc., MSBCA 1367, 2 MSBCA ____ (1988); Eastern Chemical Waste Systems, MSBCA 1310, 2 MSBCA ____ (1986). The issue raised by DGS's motion is whether the requirement that a contractor file its appeal within thirty days of receipt of notice of a final action[1] runs from the time (1) it receives actual knowledge of a final decision or (2) it receives a copy of the written final decision which complies with the formal requirements of COMAR 21.10.04.01(B).

COMAR 21.10.04.01(B), which implements the notice requirements of §11-137(f)(ii), has the force and effect of law. See McLean Contracting Company, MSBCA 1288, 2 MSBCA ____ (1988). It requires that the procurement officer "furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt." The procurement officer's final decision is required to include a description of the controversy with references to pertinent contract provisions, statements of controverted and uncontroverted facts, supporting rationale for the decision, and a statement as to rights of appeal. The requirement that a final decision give a contractor notice of its right of appeal to the Appeals Board within thirty days (COMAR 21.10.04.01(B)(5)) is designed

[1] Md. Ann. Code, State Finance and Procurement, Art., §11-137(f)(ii) (1987 Cum. Supp.)

to serve a jurisdictional as well as a procedural function. In this instance, the notice's procedural function is to satisfy the due process requirement that the contractor receive actual notice of the final procurement officer's decision rendered by the agency that its contract was terminated for default. The notice requirement's jurisdictional function is to serve as evidence of service since the issuance of the final decision is a condition precedent to the right of appeal to this Board. The Maryland Court of Appeals has consistently held that when notice serves a jurisdictional function it must be afforded in strict compliance with the rule applicable to service of process. Moreover, where defective service of notice involves jurisdictional consequences, actual knowledge on the part of the party to be notified is irrelevant. Miles v. Hamilton, 269 Md. 708 (1973); Sheehy v. Sheehy, 250 Md. 181 (1968); Little v. Miller 220 Md. 309 (1959); Guen v. Guen, 38 Md.App. 578 (1978). Appellant received oral notice by telephone of the final decision to terminate its contract for default, and was also informed that the written decision had been mailed. However, it did not receive notice sufficient to satisfy the statutory requirement, §11-137(f)(ii), supra, that the procurement officer's written final decision be received by the contractor. See Gonzalez Construction Co., NASA BCA 678-16, 79-1 BCA ¶13,663 (1979); Lone Star Multinational Development Corp., ASBCA 20126, 75-2 BCA ¶11,530 (1975).

There is a presumption that a letter, properly mailed and posted reaches its destination and is received by the addressee. The Goodyear Tire & Rubber Co. v. Ruby, No. 23 (Md., filed April 22, 1988); Rosenthal v. Walker, 111 U.S. 185 4, S.Ct. 382, 28 L. Ed 395 (1884). See Greene v. Lindsey, 456 U.S. 444, 102 S.Ct. 1874, 72 L. Ed. 2d 249 (1982). DGS thus takes the position that it had done everything it was required to do when it

sent the final decision to terminate by certified mail on November 27, 1987. However, Appellant did not, in fact, receive a copy of the final decision until December 8, 1987, although it had actual knowledge of DGS's intent to terminate its contractual relationship with it as of the December 2nd conversation between Mr. Bess, its vice president, and Mr. Tucker. COMAR 21.10.04.01.B. requires that the contractor be in actual receipt of a copy of the written decision since it mandates that only methods which provide evidence of receipt be employed.

Appellant never received the original decision that was mailed to it on November 27th. DGS, however, avers that Appellant's failure to claim the original decision, after three notices from the postal service, and after being told by Mr. Tucker that it had been sent, amounted to a refusal of service of process. It relies on Sancolmar Industries, ASBCA 16879, 73-1 BCA ¶9812 (1972) which held that a contractor who refused one attempted delivery of registered mail and failed to call for five other mailings did, in effect, receive the final decision. DGS buttresses this authority by a public policy argument that protesting parties should not be allowed to avoid the finality of procurement officer's decisions, and thereby leave the possibility of appeal open indefinitely by unilaterally refusing to accept service by mail.

While we might support DGS's position under an appropriate set of facts, we do not find sufficient evidence in this record to support a finding that Appellant deliberately avoided receiving the procurement officer's final decision. In this regard, the facts of Sancolmar and those in this appeal are distinguishable. In Sancolmar, the contractor apparently instructed the person receiving the mail at its address not to sign for the certified letter. That was distinct evidence of refusal of a kind we do not have in the appeal at hand. Compare this with Gonzalez Construction Co., supra, with facts

similar to the appeal before us, in which the government moved to dismiss the appeal for untimeliness because the contractor had been advised by telephone of a termination for default letter awaiting it at the post office more than thirty days before filing its appeal. The NASA Board held that the government failed to meet its burden of showing that Appellant intentionally thwarted the government's disposition of the matter by its failure to accept delivery of the certified letter.

Even if we accept the testimony of Mr. Tucker that in his conversation with Mr. Bess on Wednesday, December 2, he made reference to the letter (Finding of Fact No. 4), it is reasonable to infer that Mr. Bess then contacted his attorney on the following Tuesday and she promptly obtained a copy. This delay does not seem sufficient to us to allow an inference that Appellant was deliberately avoiding receipt of the letter, although it may support an inference of indifference on the part of Appellant in obtaining its certified mail. The record in this regard does not provide an explanation of what happened to the postal service notices or why Appellant either never received them, or, if it did, why it did not immediately respond to them.

This Board is under an obligation to recognize that a determination that this Board lacks jurisdiction over the appeal forecloses Appellant's administrative remedy of our review of the merits of DGS' default termination of Appellant as well as review of DGS' action by any other judicial forum. Md. Ann. Code, State Finance and Procurement Art., §11-139(a); McLean Contracting Co. v. Maryland Transportation Authority, 70 Md.App. 514, 521 A.2d 1251 (1987); McLean Contracting Co., supra, MSBCA 1288. See generally Sherry Richards Co., ASBCA 6905, 61-2 BCA ¶3167 (1961) citing

Franklin Clothes, Inc. ASBCA 4302, 58-2 BCA ¶1967 (1958). In order for a final agency decision to commence the running of the thirty day appeal period the decision must be communicated to the contractor in such a fashion that he is clearly informed as to the nature of the decision and his right of appeal within a prescribed time as set forth in the regulations. On the factual record before us, we are not satisfied that this occurred before December 8, 1987. Therefore, the January 6, 1987 filing was timely.

For the foregoing reasons, therefore, DGS' motion to dismiss is denied.