

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of NUTRITION MANAGEMENT)
SERVICES COMPANY)
) Docket Nos. MSBCA 2063
Under Upper Shore Community Health)
Center Dietary Services Solicitation)
DHMH - DCT-98-4959)

July 6, 1998

Timeliness - In order to toll the ten (10) day filing requirement under COMAR 21.10.02.10, a bid protest appeal sent by registered or certified mail must be mailed at least five (5) days before the ten (10) day filing period otherwise would end.

APPEARANCES FOR APPELLANT: None

APPEARANCES FOR RESPONDENT: Joel Tornari
Assistant Attorney General
Baltimore, Md

OPINION BY CHAIRMAN HARRISON ON RESPONDENT'S
MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

The Respondent Maryland Department of Health and Mental Hygiene (DHMH) has filed a motion to dismiss the above referenced appeal for lack of jurisdiction pursuant to COMAR 21.10.06.05. Specifically, DHMH alleges that the appeal is time-barred under COMAR 21.10.02.10A. Only the facts necessary to a determination of the motion are set forth.

Findings of Fact

1. Appellant filed a protest letter with the Department on March 20, 1998, protesting the award of the Dietary Services Contract at Upper Shore Community Health Center to a different vendor.
2. The final agency decision denying the protest was mailed on March 27, 1998 by certified mail. The decision contained a notice of the protester's appeal rights, directing the protester to file an appeal with the Board of Contract Appeals no later than ten days following receipt of the decision.
3. The United States Postal Service Return Receipt Card indicates that this decision was

- received by Appellant on March 30, 1998.
4. The appeal to this Board, dated April 13, 1998, was sent by certified mail on April 13, 1998, and was received by this Board on April 16, 1998.
 5. DHMH filed the instant Motion to Dismiss on June 17, 1988. Appellant has filed no response thereto.

Decision

COMAR 21.10.02.10A requires protesters to file an appeal of a final agency decision within ten days of notice of that decision. Thus, since Appellant received the final agency decision on March 30, 1998, Appellant's appeal should ordinarily have been filed no later than April 9, 1998. The appeal was not received by the Board until April 16, 1998. There is an exception for appeals sent by registered or certified mail five days before the date for filing an appeal which might apply since this appeal was sent by certified mail. COMAR 21.10.0210B.¹ Under no circumstances, however, may the Board assume jurisdiction of an appeal mailed by registered or certified mail later than five days before the ten day period otherwise would end. Thus, since the appeal arrived after April 9, 1998 the Board must dismiss the appeal unless the Appellant can show that the appeal was mailed by registered or certified mail no later than April 4, 1998.

The appeal was sent by certified mail on April 13, 1998 according the U.S. Postal Service postmark on the envelope containing the appeal. Thus the appeal mailed on April 13, 1998 was mailed nine days after the last acceptable mailing date for an appeal sent by certified mail. Accordingly, the Appellant's appeal is not timely filed and must be dismissed. See Acme Market #6762, et al., MSBCA 1763, 4 MSBCA ¶346 (1993).

¹ COMAR 21.10.02.10 provides:

.10 Time for Filing Appeal.

- A. Protesters are required to seek resolution of their complaints initially with the procurement agency. A subsequent appeal by an interested party to the Appeal Board shall be filed within 10 days of receipt of notice of the final procurement agency action.
- B. An appeal received by the Appeal Board after the time prescribed in §A. 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 with received by the Appeals Board.

Wherefore, it is Ordered this 6th day of July, 1998 that the appeal is dismissed with prejudice.

Dated: July 6, 1998

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

Randolph B. Rosencrantz
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 1810 & 1823, appeal of Nutrition Management Services Co. under DHMH Services Solicitation No. DHMH - DCT-94-794.

Dated: July 6, 1998

Mary F. Priscilla
Recorder