

BY THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of WARWICK SUPPLY &)
EQUIPMENT CO., INC.) Docket No.
) MSBCA 1580
Under Maryland State Police)
Contract No. 26-90 (11/27/89))

September 6, 1991

Procurement Officer's Decision - Where a procurement officer fails to issue a final decision in a contract dispute within 180 days from time of claim, that inaction of itself constitutes a final decision from which an appellant must appeal within the time allowed by law. COMAR 21.10.04.04(E).

APPEARANCE FOR APPELLANT: Robin John Pecora, Esq.
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APPEARANCE FOR RESPONDENT: Jeffrey H. Myers
Assistant Attorney General
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OPINION BY MR. MALONE

Appellant appealed to this Appeals Board pursuant to COMAR 21.10.04.06(B) and Respondent has filed a Motion to Dismiss based on timeliness.

Findings of Fact

1. Appellant requested an equitable adjustment by letter dated June 18, 1990 in which it outlined its claim.
2. Respondent's Procurement Officer received the letter of June 18, 1991 on June 22, 1991.
3. Appellant contacted Respondent by phone in September and October of 1991 concerning the claim letter. Respondent made no specific remarks but said it would examine what, if any, action would be taken, and did not give any definite time for a final decision.

4. Appellant's witness Ms. Bridget Wist testified that no agreement was ever made to enlarge the 180 day period for the procurement officer to issue a written decision. Her undisputed testimony was she was repeatedly "put off". She further testified that she did not demand a date certain for a decision on the claim.
5. The parties agree that 180 days from June 22, 1990 would fall on December 19, 1990. Under that time table January 18, 1991 is the last day for filing a timely appeal to this Board.
6. Appeal to this Board was filed April 22, 1991.

Decision

The facts are not materially in dispute in this appeal. A claim was filed by letter dated June 18, 1990 and no final decision was ever issued by the procurement officer. The Respondent ignored this claim until Appellant filed an appeal to this Board.

COMAR 21.10.04.04(E) provides that in the event a contractor's claim is not acted upon within 180 days of receipt with the procurement officer, the inaction becomes a final decision. Appellant must appeal to this Board within 30 days to preserve its right of appeal.

Chronologically, a claim by letter dated June 18, 1990 received by Respondent June 22, 1990 would have to be acted on by December 19, 1990, 180 days from filing with the procurement officer. A timely appeal to this Board should have been filed by January 18, 1991. However, Appellant did not file an appeal but contacted Respondent by phone several times in September and October of 1990. Appellant argues that this phone contact enlarged

the 180 day period pursuant to COMAR 21.10.04.04(E) which states "The requirement for notification is satisfied upon mailing of the decision within the 180 day period or the enlarged period." (emphasis added).

The State Finance and Procurement Article of the Annotated Code of Maryland ¶15-219 (c) Notice of decision (2) states that written notice of the contractor's claim resolution must be made within 180 days after receipt of the claim or a longer period to which the parties agree. COMAR states at 21.10.04.04(1) that the 180 day period may be enlarged as agreed upon by the contractor. This flexibility allows the parties to work together in resolving claims; but clearly any extension of the 180 period must be by agreement. Compare: The Driggs Corporation, MSBCA 1262, 2 MSBCA 121 (1986).

The purpose of the 180 day rule is to bring the matter to a conclusion. It assumes that the procurement officer may fail to ever issue a final decision and gives the Appellant a definite time to bring the claim forward despite the inaction of the State. Since the purpose is to bring the claim to resolution in a specific period of time, any enlarged period must also be specific. In this appeal there was no agreement to any specific enlarged period. The phone exchange in September-October of 1990 was vague at best, and only magnified the State's inaction on the matter. The open ended response of the State by phone exchange in September-October 1990 was not specific as to any future period of action and therefore could not have been an agreed to "enlarged period" for a final

decision. Therefore, the appeal to the Board should have been filed on or before January 18, 1991 to be timely. The appeal was not filed until April 22, 1991.

The thirty day time period for filing an appeal is a mandatory requirement which must be satisfied to perfect jurisdiction, Kennedy Electric Company, Inc., MSBCA 1479, 3 MSBCA 232 (1989).

Upon the aforesaid reasons, the appeal is DISMISSED.

Dated: 9/6/91