

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeals of	*	
HARBEL, INC.	*	
	*	Docket Nos. MSBCA 3135 & 3140
	*	(Consolidated)
Under		
Maryland Department of Transportation	*	
Motor Vehicle Administration	*	
IFB No. V-CUM-17013-C	*	
Appearance for Appellant	*	Gorman E. Getty, III, Esq.
	*	Gorman E. Getty, III, P.A.
	*	Cumberland, MD
Appearance for Respondent	*	David C. Merkin, Esq.
	*	Assistant Attorney General
	*	Maryland Department of Transportation
	*	Motor Vehicle Administration
	*	Glen Burnie, MD

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OPINION AND ORDER BY MEMBER STEWART

On November 26, 2019, Respondent, Maryland Department of Transportation Motor Vehicle Administration (“MVA”), filed a Motion for Summary Decision asserting that the protest (“Protest”) filed by Appellant, Harbel, Inc. (“Harbel”), was untimely. Harbel filed its response to the Motion on December 13, 2019. A hearing was held on February 6, 2020. Upon consideration of the filings of the parties and arguments of counsel at the hearing, the Board concludes that there are no genuine issues of any material facts, and Respondent is entitled to prevail as a matter of law. Appellant’s Protest was untimely filed because it was not filed within seven (7) calendar days of when Harbel knew the basis for its Protest.¹

¹ In its Motion and at the hearing, Respondent made additional arguments regarding its entitlement to summary decision, but given the Board’s conclusion that Appellant did not file its protest within the time mandated by COMAR 21.10.02.03B, the Board need not address those arguments.

UNDISPUTED MATERIAL FACTS

On February 27, 2019, MVA issued Invitation for Bids (IFB) Solicitation No. V-CUM-17013-C (“IFB”) for renovation of its Cumberland Branch Office. The IFB set an overall Minority Business Enterprise (“MBE”) goal with specific sub goals and a Veteran Small Business Enterprise (“VSBE”) subcontract participation goal for the contract.

Bid opening was on April 18, 2019, and Appellant’s bid was the lowest of three bids with a price of \$3,928,950. In its Certified MBE Utilization and Fair Solicitation Affidavit submitted with its bid, Appellant requested a waiver of the MBE participation goal and sub goals. Likewise, in its VSBE Utilization Affidavit and Prime/Subprime Participation Schedule submitted with its bid, Appellant also requested a waiver of the VSBE goal.

On July 25, 2019, the MVA Procurement Officer (“PO”) for the solicitation, Kai Moore, sent a letter via email and FedEx to David J. Madden, President of Harbel, denying Appellant’s MBE and VSBE waiver requests and informing Appellant that its bid was being rejected as nonresponsive. The PO also stated that: “[i]n accordance with COMAR 21.10.02.03, this decision may be protested by notifying the Procurement Officer, in writing, within seven (7) days of this notification.”

On July 26, 2019, Mark A. Faris, CEO/Sr. VP/General Counsel of Harbel, sent the PO a letter via both email and UPS stating that Harbel was “in receipt of your denial of our request for waiver of a portion of the participation goals for MBE and VSBE participation on the above referenced project,” and that Harbel intended “to file a formal protest in accordance with COMAR, Title 21.10.02.03.” Mr. Faris further stated that “[o]ur formal protest will be filed within the seven (7) days granted in accordance with COMAR. As we were notified for [sic] your decision on July 25, 2019, it is our understanding that the protest must be filed by August 1, 2019.”

On August 1, 2019, Harbel sent its Protest to the PO via both email and UPS next day air. The PO received Appellant's formal written Protest via UPS on August 2, 2019.² On August 14, 2019, the PO denied Appellant's Protest as untimely filed because it was not filed in accordance with the 7-calendar-day requirement in COMAR 21.10.02.03B. Instead, it was filed eight (8) days after Appellant received the notice of its MBE Waiver denial and bid rejection on July 25, 2019.

Appellant appealed the PO's decision to the Board on August 21, 2019, which was docketed as MSBCA No. 3135. On October 18, 2019, the Board granted a Consent Motion to remand the matter to MVA for a determination on the merits of Appellant's Protest while preserving MVA's right to contest the timeliness of the Protest upon further appeal. On October 29, 2019, the PO issued a final decision denying Appellant's Protest on the merits. Appellant appealed that final decision to the Board on October 31, 2019, which was docketed as MSBCA No. 3140. Both Appeals were consolidated by an Order of the Board dated December 2, 2019.

STANDARD FOR SUMMARY DECISION

In deciding whether to grant a Motion for Summary Decision the Board must follow COMAR 21.10.05.06D(2):

The Appeals Board may grant a proposed or final summary decision if the Appeals Board finds that (a) [a]fter resolving all inferences in favor of the party against whom the motion is asserted, there is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law.

The standard of review for granting or denying summary decision is the same as for granting summary judgment under Md. Rule 2-501(a). *See, Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726 (1993). To defeat a motion for summary judgment, the opposing party must show that there is a

² When the emailed protest was received is not a material fact as all parties acknowledge, and the Board concurs, that the IFB in Section 1.21 states that "[a] Protest filed by electronic means or facsimile, will not be permitted and will not be considered." (emphasis added).

genuine dispute of material fact by proffering facts that would be admissible in evidence. *Id.* at 737-738. While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *Clea v. City of Baltimore*, 312 Md. 662, 678 (1988).

DECISION

The parties do not dispute that Appellant knew the basis of its Protest on July 25, 2019 and that its Protest was not received by the PO until eight (8) days later on August 2, 2019. COMAR 21.10.02.03B mandates that all protests, other than those based upon alleged improprieties in a solicitation that are apparent before bid opening, “shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier.” COMAR 21.10.02.03C defines “filed” (as used in §B) as “receipt by the procurement officer.” COMAR 21.01.02.01B(32) defines “Day” as “calendar day” unless otherwise designated. COMAR 21.10.02.03C provides that “[p]rotesters are cautioned that protests should be transmitted or delivered in the manner that shall assure earliest receipt. A protest received by the procurement officer after the time limits prescribed in ... §B may not be considered.” Although it may seem harsh to dismiss a Protest that is received one day late, especially when it was sent electronically within the 7-day period, timeliness must be strictly construed and cannot be waived.

The timeliness requirements of COMAR 21.10.02.03 are substantive in nature and must be strictly construed since the rights and interests of the parties are at stake. *See, A.J. Billig & Co., LLC t/a A.J. Billig & Co.*, MSBCA No. 3096 (2018). The 7-day filing requirement is imposed by law, and it cannot be waived by a State agency. *Kennedy Temporaries v. Comptroller of the Treasury*, 57 Md. App. 22, 40-41 (1984).

Appellant argues that MD. CODE ANN., GENERAL PROVISIONS (“General Provisions Article”) §1-302 dictates how to compute time when filing a protest, and that per such computation, Appellant had until August 2, 2019 to file its Protest because Sunday, July 28th should not have been counted in the computation of the 7-day period. Appellant further asserts that the computation method set forth in COMAR 21.10.02.03 and as further defined by COMAR 21.01.02.01B(32) conflicts with §1-302 of the General Provisions Article, and that the statute trumps the regulation.

The Court of Appeals has addressed whether a statute trumps an administrative regulation when there exists a conflict between the two in *Dept. of Human Res., Balt. City Dept. of Soc. Servs. v. Hayward*, 426 Md. 638, 658 (2012):

Administrative agencies have broad authority to promulgate regulations, to be sure, but the exercise of that authority, granted by the Legislature, must be consistent, and not in conflict, with the statute the regulations are intended to implement. We have consistently held that the statute must control. *Lussier v. Maryland Racing Com’n*, 343 Md. 681, 688 (1996)(stating that “where the Legislature has delegated such broad authority to a state administrative agency to promulgate regulations in an area, the agency’s regulations are valid under the statute if they do not contradict the statutory language or purpose.”); *Christ by Christ v. Maryland Dep’t of Natural Resources*, 335 Md. 427, 437-38 (1994)(stating that “this Court has upheld [an] agency’s rules or regulations as long as they did not contradict the language or purpose of [a] statute.”).

Id. Upon examination of §1-302 of the General Provisions Article and COMAR 21.10.02.03, as further defined by COMAR 21.10.01.02.01B(32), and the promulgating authority therefor, the Board concludes that they do not conflict.

Section 1-302 of the General Provisions Article provides as follows:

- (a) In general. -- **In computing a period of time described in a statute**, the day of the act, event, or default after which the designated period of time begins to run may not be included.
- (b) Last day. -- The last day of the period of time computed under subsection (a) of this section shall be included unless:

(1) it is a Sunday or legal holiday, in which case the period runs until the end of the next day that is not a Sunday or legal holiday; or

(2) the act to be done is the filing of a paper in court and the office of the clerk of the court is not open on the last day of the period of time, or is closed for a part of a day, in which case the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day on which the office is not open the entire day during ordinary business hours.

(c) Sundays and legal holidays. --

(1) When the period of time exceeds 7 days, intermediate Sundays and legal holidays shall be counted in computing the period of time.

(2) **When the period of time is 7 days or less, intermediate Sundays and legal holidays may not be counted in computing the period of time.** (emphasis added).

The period of time in which to file a bid protest is not specifically prescribed by statute; rather, it is prescribed by regulation. The promulgating statutory authority for COMAR 21.10.02.03B is MD. CODE ANN., STATE FIN. & PROC. ("SF&P") §15-217(b), which provides, in pertinent part, that "a protest or contract claim shall be submitted within the time required under regulations adopted by the primary procurement unit responsible for the procurement." The primary procurement unit for this procurement is the Department of Transportation. *See*, SF&P §11-101(l)(4).

Pursuant to SF&P §12-101, the Board of Public Works ("BPW") has control authority over all procurements by units.³ Per SF&P §12-108, primary procurement units must promulgate regulations subject to BPW approval. COMAR 21.10.02.03 and 21.10.01.02.01B(32) were promulgated in accordance with SF&P §12-101 and §15-217(b) and approved by BPW. *See*, COMAR 21.10.02 ("Authority: State Finance and Procurement Article, §§12-101 and 15-201—15-223, Annotated Code of Maryland").

Because the time frame in which to file bid protests was not prescribed by statute, but was instead delegated to the primary procurement units to set by regulation, there is no conflict between

³ Capital expenditures by the Maryland Department of Transportation ("MDOT") or the Maryland Transportation Authority ("MTA") in connection with State roads, bridges, or highways are exempted from BPW's controlling authority.

the regulations and General Provision §1-302. Thus, General Provisions §1-302 is not applicable when computing the time in which a protest must be filed, and Sundays must be counted when computing time for filing a protest.

CONCLUSION

The parties admitted both in their pleadings and at the hearing that the Protest was not filed within seven (7) calendar days of when Harbel knew the basis of its Protest. As such, this Board finds that Appellant's Protest was untimely filed. There being no genuine issues of any material facts, this Board concludes that the Respondent is entitled to prevail as matter of law, and grants Respondent's Motion for Summary Decision in these consolidated appeals.

ORDER

Accordingly, it is this 11th day of February 2020, hereby:

ORDERED that Respondent's Motion for Summary Decision in these Consolidated Appeals is GRANTED; and it is further

ORDERED that a copy of any papers filed by any party in a subsequent action for judicial review shall be provided to the Board, together with a copy of any court orders issued by the reviewing court.

/s/
Michael J. Stewart Jr., Esq., Member

I concur:

/s/
Bethamy N. Beam, Esq., Chairman

/s/
Lawrence F. Kreis, Jr., Esq, 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 contested cases.

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 ten 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 Order in MSBCA Nos. 3135 & 3140, the Consolidated Appeals of Harbel, Inc., under Maryland Department of Transportation Motor Vehicle Administration IFB No. V-CUM-17013-C.

Dated: February 11, 2020

/s/
Ruth W. Foy
Deputy Clerk

IN THE CIRCUIT COURT FOR ALLEGANY COUNTY**IN THE MATTER OF HARBEL, INC.****CASE NO. C-01-CV-20-71****MEMORANDUM & ORDER**

Before the Court is the Petition of Harbel, Inc., Petitioner (or “Harbel”), for judicial review of a decision of the Maryland State Board of Contract Appeals, dated February 11, 2020.

BACKGROUND

Harbel is a Maryland corporation. It made a bid in April 2019, to construct certain improvements at the Cumberland Branch of the Maryland Motor Vehicle Administration, (“MVA”). The MVA rejected Harbel’s bid July 25, 2019. Harbel protested the rejection of its bid. The “Bid Protest” was sent via email on August 1, 2019, and by UPS next day air to the MVA. That physical letter was received by the MVA on August 2, 2019.

The MVA denied Harbel’s protest as being filed untimely pursuant to COMAR 21.10.02.03B. Harbel filed an appeal to the Board of Contract Appeals which summarily dismissed Harbel’s bid protest. The instant request for judicial review followed.

ANALYSIS

The relevant facts are not disputed. The only question is whether the MVA was legally correct in determining Harbel’s bid protest was not timely filed because it was received eight days, and not within seven days, after its bid was rejected.

The Maryland Code directs that a bid protest...“shall be submitted within the time required under regulations adopted by the primary procurement unit responsible for the procurement”. State Finance and Procurement, Section §15-217 (b). Here, the time by which a bid protest shall be submitted under the adopted regulation is seven days after the basis for the protest is known, COMAR 21.10.02.03 B. The basis of the protest was the bid rejection on July 25, 2019, and was known by Harbel on that date. The protest was received by the MVA on August 2, 2019. The parties agree that is eight days after the bid rejection as the day of the rejection, July 25, 2019, is not included in computing the seven day period of time. See Maryland Code, General Provisions Article, Section §1-302 (a).

The question then is whether the bid protest received eight days after the bid rejection was timely filed. The Court concludes here that the bid protest was timely filed when it was received at the MVA on August 2, 2019, eight days after July 25, 2019. That is because the General Provision Article, Section §1-302 (c) (2) states that in computing the last day of a period of time described in a statute, when the period of time is 7 days, Sunday is not counted in computing the period of time.

Here there is no statute that describes the period of time by which bid protests are to be filed. There is only the authority delegated to the procurement unit to adopt time requirements to submit protests. Md. Code, State Fin. & Proc. §15-217 (b). And here that regulation, COMAR 21.10.02.03, takes that delegated authority and adopts a “not later than 7 days” requirement. The regulations reference in the “Terminology” chapter that “day” means calendar day. COMAR 21.01.02.01 (32). But nowhere is there guidance on the *computation* of periods of time.

Obviously Sunday is a calendar day. Given, however, that the regulations are silent on the question of how to count Sundays and legal holidays, the Court sides with the Petitioner that Sunday, July 28, 2019, should not be counted in this situation. Again, the adoption regulations do not address at all whether to include or exclude the intermediate Sunday here. The Court finds the most reasonable resolution of this argument is that Harbel had until August 2, 2019, to file its protest. The period of time the MVA gave Harbel to file its protest was 7 days. As stated, the General Provisions Article instructs that in such case the intermediate Sunday (July 28) is not included in computing the period of time by which Harbel had to file its protest. Gen. Prov. Art., Sec. §1-302. In filing its protest on August 2, 2019, Harbel was timely.

ORDER

For the foregoing reasons it is this ^{2nd} day of February, 2021, **ORDERED** that the decision of the Maryland State Board of Contract Appeals, that Petitioner’s, Harbel, Inc.’s, bid protest was filed late is **REVERSED**, and it is

Further **ORDERED** that the Court finds the bid protest was timely filed, and it is

Further **ORDERED** that this matter is remanded to the Maryland State Board of Contract Appeals for further proceedings consistent with this order.

