

Circuit Court for Allegany County
Case No. C-01-CV-20-71

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1470

September Term, 2020

MARYLAND DEPARTMENT OF
TRANSPORTATION, MOTOR VEHICLE
ADMINISTRATION

v.

HARBEL, INC.

Berger,
Shaw Geter,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.
Concurring Opinion by Wilner, J.

Filed: November 4, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case is before us on appeal from an order of the Circuit Court for Allegany County reversing the summary decision of the Maryland State Board of Contract Appeals (“MSBCA”). The Maryland Department of Transportation, Motor Vehicle Administration (“MVA”), appellant, asserts that the circuit court erred by reversing the MSBCA, presenting the following single issue for our consideration on appeal:

Did the MSBCA correctly grant summary decision in favor of MVA when Harbel failed to file a protest of MVA’s decision within the seven-day limitations period set forth in COMAR 21.10.02.03B?

As we shall explain, we shall answer this question in the affirmative. Accordingly, we shall reverse the judgment of the circuit court and remand for entry of an order affirming the decision of the MSBCA.

FACTUAL AND PROCEDURAL BACKGROUND

The following undisputed material facts were set forth by the MSBCA in its decision:

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 [Harbel]’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, [Harbel] 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, [Harbel] 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 [Harbel]’s MBE and VSBE waiver requests and informing [Harbel] 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. Farris, 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 2 1.10.02.03.” Mr. Far[r]is 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 [Harbel]’s formal written Protest via UPS on August 2, 2019.¹ On August 14, 2019, the PO denied [Harbel]’s Protest as untimely filed because it was not filed in accordance with the 7-calendar-day requirement in COMAR 21.1 0.02.03B. Instead, it was filed eight (8) days after [Harbel] received the notice of its MBE Waiver denial and bid rejection on July 25, 2019.

[Harbel] 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 [Harbel]’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 [Harbel]’s

¹ 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).

Protest on the merits. [Harbel] 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.

Harbel, Inc., MSBCA 3135 & 3140 (2020) (footnote in original).

Following briefing and a hearing, the MSBCA entered summary decision on behalf of MVA. The MSBCA determined that Harbel’s bid protest was not filed within the seven-day time period set forth for the filing of a bid protest in the applicable regulation. Accordingly, the MSBCA did not address the merits of Harbel’s bid protest. Harbel filed a Petition for Judicial Review in the Circuit Court for Allegany County. The circuit court reversed the decision of the MSBCA, concluding that Harbel’s bid protest had been timely filed. This appeal followed.

STANDARD OF REVIEW

When we review the decision of an administrative agency, such as the MSBCA, “we ‘look[] through the circuit court’s . . . decision[], although applying the same standards of review, and evaluate[] the decision of the agency.’” *Piney Orchard Cmty. Ass’n v. Maryland Dep’t of the Env’t*, 231 Md. App. 80, 91 (2016) (quoting *People’s Counsel v. Surina*, 400 Md. 662, 681 (2007)). “[J]udicial review of an administrative agency action ‘is limited to determining if there is substantial evidence in the record as a whole to support the agency’s findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.’” *Bd. of Liquor License Commissioners for Baltimore City v. Kougl*, 451 Md. 507, 514 (2017) (quoting *United Parcel Serv., Inc. v. People’s Counsel for Balt. Cty.*, 336 Md. 569, 577 (1994)). “Although judicial review of

an agency’s factual findings is ‘quite narrow,’ ‘it is always within our prerogative to determine whether an agency’s conclusions of law are correct.’” *Id.* (quoting *Adventist Health Care, Inc. v. Md. Health Care Comm’n*, 392 Md. 103, 120-21 (2006)). We will not uphold an agency’s conclusion when it is based on an error of law. *Id.*

The Court of Appeals has explained, however, that “[e]ven with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency.” *Id.* at 514 (quotation and citation omitted). “Appellate courts should ordinarily give ‘considerable weight’ to ‘an administrative agency’s interpretation and application of the statute which the agency administers.’” *Id.* (quoting *Md. Aviation Admin. v. Noland*, 386 Md. 556, 572 (2005)).

DISCUSSION

The issue before us in this case is whether the MSBCA erred by granting summary decision in favor of MVA on the grounds that Harbel’s bid protest was untimely filed. As we shall explain, we shall hold that the MSBCA did not err by granting summary decision in favor of MVA. Accordingly, we shall reverse the judgment of the Circuit Court for Allegany County and remand for entry of an order affirming the decision of the MSBCA.

Pursuant to COMAR 21.10.05.06.D.(1), “[a] party may move for summary decision [before the MSBCA] on any appropriate issue in the case.” The MSBCA may grant a motion for summary decision if it finds that:

- (a) After 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.

COMAR 21.10.05.06.D(2). The standard for the entry of a summary decision before the MSBCA is substantially similar to a motion for summary judgment in the circuit court. *See* Md. Rule 2-501(f) (“The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.”).

There is no dispute that Harbel’s formal bid protest was not received until eight days after the denial of Harbel’s MBE and VSBE waiver requests. MVA asserts that the MSBCA correctly concluded that Harbel’s bid protest was filed outside the seven-day time limit set forth in COMAR 21.10.02.03B. Harbel contends that its bid protest was timely pursuant to Md. Code (2014, 2019 Repl. Vol.), § 1-302 of the General Provisions Article (“GP”), which provides:

(a) **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) 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)(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 supplied.)

Pursuant to Md. Code (1985, 2015 Repl. Vol.), § 15-217(a)(1) of the State Finance and Procurement Article (“SFP”), “[a] prospective bidder or offeror, a bidder, or an offeror may submit a protest to the procurement officer.” The statute specifically authorizes the adoption of regulations setting forth the time period for submission of such a protest. SFP § 15-217(b) (“[A] a protest or contract claim shall be submitted within the time required under regulations adopted by the primary procurement unit responsible for the procurement.”).

COMAR 21.10.02.03B sets forth a seven-day time limit that must be followed by aggrieved bidders in order to timely file a protest regarding the denial of their bid. That section provides that “protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier.” “The term ‘filed’ . . . means receipt by the procurement officer.” COMAR 21.10.02.03C. Protests that are not brought within this time period “may not be considered.” COMAR 21.10.02.03C. The Court of Appeals has explained that this “strict timeliness requirement is reasonable generally for protests of alleged procurement” because normally, “both the awardee and the government proceed (presumably promptly) to expend time and resources on the completion of the procurement’s goal.” *State Center, LLC v. Lexington Charles Ltd. Partnership*, 438 Md.

451, 606 (2014). “Allowing an extended period for protests to be brought forth would hinder the government’s ability to obtain the needed item or service (and would increase costs for developers and contractors interested in government contracts).” *Id.*

We have explained that “comply[ing] strictly with the . . . requirements of the regulation” protects a bidder’s “interest in knowing promptly (and within the time limit established by the regulation) . . . whether he may be called upon to defend his bid.” *Kennedy Temporaries v. Comptroller of the Treasury*, 57 Md. App. 22, 40-41 (1984). Indeed, we have explained that a procurement officer has “no authority in the law . . . to waive [the timeliness] requirement,” because the regulation is “externally imposed pursuant to clear statutory authority” and “[s]uch a power would be inconsistent with the whole thrust and scheme of the law.” *Id.* at 40.

Notably, previous decisions of the MSBCA reflect that the Board has a long history of strictly enforcing the seven-day requirement. The MSBCA has characterized the seven-day limitations period as a “hard and fast rule” and has observed that “failure to comply with the 7-day filing rule is cited as the sole ground for dismissal in innumerable appeals.” *Gilford Corp.*, MSBCA Nos. 2871 & 2877 at 9 (2014). The MSBCA “has strictly enforced this jurisdictional requirement, even if the [bid] protest was only a day late.” *Aunt Hattie’s Place, Inc.*, MSBCA No. 2852 at 4 (2013) (citing *ISMART, LLC.*, MSBCA No. 1979 at 2 (1997); *Aquaculture Systems Technologies, LLC.*, MSBCA No. 2141 at 2-4 (1999)).

Despite the clear statutory authority, regulatory authority, and precedent establishing a strict seven-day time limit for the filing of a bid protest, Harbel nonetheless

asserts that its bid protest was timely filed even though it was filed eight days after Harbel was notified that its waiver request was denied and its bid was rejected. As we explained *supra*, Harbel relies upon GP § 1-302, which sets forth a rule of interpretation governing the computation of periods of time “described in a statute” and provides that “[w]hen the period of time is 7 days or less, intermediate Sundays and legal holidays may not be counted in computing the period of time.”

Harbel asserts that the intermediate Sunday should not have been counted in the seven-day limitations period, and, therefore, the filing of the bid protest on the eighth day was timely.² Critically, the seven-day limitations period for the filing of a bid protest is not “described in a statute.” Rather, it is set forth in a regulation promulgated by statute and adopted by the Department of Transportation to specifically govern the time for filing bid protests. Indeed, in other contexts, the legislature has specified that certain general principles apply to both statutes and regulations. *See, e.g.*, GP § 1-203 (“In this Code ***and any regulation or directive adopted under it***, the phrase ‘may not’ has a mandatory negative effect and establishes a prohibition.”) (emphasis supplied). Notably, the General Assembly did not include language specifically making GP § 1-302 applicable to periods of time set forth in regulations.

We disagree with the trial court that because the regulations “are silent on the question of how to count Sundays and legal holidays,” Sundays should be excluded from

² Harbel does not assert on appeal that its bid protest was timely based upon the emailed bid protest sent on the seventh day.

the seven-day computation pursuant to GP § 1-302. COMAR 21.01.02.01B specifically defines “day” as “calendar day unless otherwise designated.” No ambiguity needs to be resolved by looking to statutory language that specifically addresses computation of periods of time “described in a statute.” The seven-day proscribed time period for the filing of the bid protest, combined with the regulatory definition of the term “day,” provided clarity as to the critical time period. Indeed, Harbel CEO Mark Farris appeared to understand as much when he wrote a letter to the Procurement Officer on July 26, 2019 indicating an intent to file a bid protest and specifically stated as follows:

Our formal protest will be filed within the seven (7) days granted in accordance with COMAR. As we were notified of your decision on July 25, 2019, it is our understanding that the protest must be filed by August 1, 2019.

Harbel attempts to excuse its failure to abide by the time requirement it had itself acknowledged by manufacturing ambiguity that does not exist and looking to inapplicable statutory authority to resolve the alleged ambiguity.

For these reasons, we hold that the MSBCA’s determination that Harbel’s bid protest was untimely was legally correct, and therefore, the MSBCA did not err in its grant of summary decision in favor of MVA. Accordingly, we shall reverse the judgment of the Circuit Court for Allegany County and affirm the MSBCA’s grant of summary decision on behalf of MVA.

**JUDGMENT REVERSED. CASE
REMANDED TO CIRCUIT COURT FOR
ALLEGANY COUNTY FOR ENTRY OF
JUDGMENT AFFIRMING DECISION OF
MARYLAND STATE BOARD OF**

**CONTRACT APPEALS. APPELLEE TO
PAY THE COSTS.**

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I concur in the result and in Judge Berger's Opinion. The Court applies a strict, but correct, reading of COMAR 21.10.02.03B and Md. Code, General Provisions Article, § 1-302. Under the regulation, seven days means seven calendar days, including Saturdays, Sundays, and holidays, and § 1-302 does not preclude that because, by its terms, it applies only to times set by statute.

I find that result, though correct, troubling and unfortunate, because it counts days on which, absent a system of electronic filing, such as MDEC, the response cannot be filed because there is no one to receive it. COMAR 21.10.02.03C requires that the bid protest be received by the procurement officer who, I think we can probably take judicial notice of, is not likely to be in his or her office on Sunday, or Christmas, or Thanksgiving, and whose home address is not likely to be known by bid protesters. So, the regulation, in its majestic wisdom, effectively says that seven days doesn't always mean seven days. It may mean five days, or four days if the last three days happen to be a holiday weekend.

There are, of course, solutions to this problem. Electronic filing is an easy one; requiring procurement officers, like district court commissioners, to be on duty seven days a week is another. Or amending Gen. Prov. § 1-302 to apply to agency regulations, which is probably the best solution. But that is not for this Court to do.