

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of B & M SUPERMARKET)
)
Under DHMH Refusal to Award) Docket NO. MSBCA 1758
Contract Under WIC Vendor RFP)
)

November 29, 1993

Request for Proposals - An agency may reject a proposal of an offeror as not being reasonably susceptible of being selected for award where the offeror fails to meet minimum criteria as set forth in the RFP.

APPEARANCE FOR APPELLANT: Richard H. Keller, Esq.
Baltimore, MD

APPEARANCES FOR RESPONDENT: Hellen E. Bowlus
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Asst. Attorneys General
Matthew A. Lawrence
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Baltimore, MD.

APPEARANCES FOR INTERESTED PARTIES None
Goldwater Food Market
Metro Belair Food Market
Sun Grocery
Chun Food Market
Foodtown Supermarket

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its protest that it should have been awarded a WIC vendor contract by the WIC Program.¹

Findings of Fact²

1. On May 4, 1993, services solicitation number DHMH-DCT-93-1055 appeared in the Maryland Register seeking available vendors to become authorized to accept WIC vouchers as payment for specific foods items as set forth on the voucher to meet the particularized dietary needs of the individual woman, infant or child.

¹The WIC Program provides nutritious supplemental foods, nutrition education and assistance in arranging on-going health care for eligible women, infants and children.

²Appellant did not comment on the Agency Report and neither party requested a hearing.

2. On May 4, 1993 an application package³ was sent to the Appellant and Appellant responded thereto.
3. On June 15, 1993, and again on August 1, 1993, a WIC investigator inspected Appellant's store and found that the Appellant did not have in the customer area of the store the required minimum stock of WIC foods as set forth in the application packet. Accordingly, its application was deemed unqualified pursuant to criteria set forth in the application packet and by letter dated August 16, 1993, Appellant was informed that it was not awarded a WIC vendor contract.
4. On August 20, 1993, Appellant sent a letter of protest to the DHMH Procurement Officer asserting that during the second inspection all the required items were, in fact, stocked in the store but that store personnel were unable to locate the items missing from the customer area.
5. On September 30, 1993, the DHMH Procurement Officer denied the protest, finding Appellant did not meet minimum stock requirement. Minimum stock requirements, to ensure that particular foods listed on a voucher for a particular person are available, are important relative to meeting the nutritional requirements of the women, infants and children who are participants in the WIC Program.
6. On October 12, 1993, Appellant appealed the denial of its protest.

Decision

Appellant has alleged that the WIC Program erred in denying it a contract based on its failure to meet the minimum requirements. This Board finds, however, that the WIC Program properly disqualified Appellant's application in accordance with the criteria set forth in the application packet and that the Procurement Officer, thus, properly denied Appellant's protest.

It is settled that an agency may reject a proposal of an offeror as not being reasonably susceptible of being selected for

³The application package consisted of a cover letter, the Request for Proposal (RFP), the Contract Application Packet and a form contract.

award where the offeror fails to meet minimum criteria set forth in the RFP. See COMAR 21.05.03.03; Section 13-206(a) State Finance and Procurement Article. Identification of those proposals that are acceptable is a matter within the discretion of the procurement officer. See Systems Associates, Inc., MSBCA 1257, 2 MSBCA ¶ 116 (1985) at p. 12; Group Health Association, MSBCA 1679, 4 MSBCA ¶ 310 (1992).

By submitting its contract application Appellant explicitly agreed to the terms and conditions of the application packet, including the evaluation criteria. The RFP provides that the WIC Program would visit qualified offerors who were not currently WIC vendors to determine if such vendors satisfied the Program's minimum qualifications for vendor status. Under § II.S. of the RFP, the offeror was required to permit WIC inspection of its store. Section III.D. of the RFP requires that [t]he store, for which authorization is sought, . . . must maintain the required food stock on shelves in the customer service area during normal business hours. The store must be operational and open for business at the time of the visit from WIC staff. Section III.C. of the RFP also provides that the "[t]he offeror must meet the minimum stock requirement" as specified in the Contract Application Packet.

Further, under the terms of the Contract Application Packet, incorporated by reference into the RFP, '[t]o be considered for a Contract, . . . the offeror must meet minimum stock requirements.' In addition, '[t]he store for which authorization is sought . . . must maintain the specified WIC food stock on shelves in the customer service area at all times." Finally, the Contract Application Packet, under the heading "Required Minimum Stock," provides that stores "applying for authorization to participate in the WIC Program must have in the customer areas of their stores at all times a minimum amount of WIC authorized food in the brands and container sizes approved by the Program for purchase by WIC participant." "Required Minimum Stock" continues with a listing of the

types and amounts of foods which a store must have.

Section VI.A. of the RFP sets forth the initial procedure for the evaluation of applications--the classification of an application as either "qualified" or "unqualified." A qualified application "shall: a. [m]eet the minimum qualifications specified in Section III." In addition, the RFP provides that if any of the minimum qualifications are not met, the application must be considered "unqualified" and that "[u]nqualified applications shall not be considered." If Appellant believed that the above requirements of the RFP were improper it was required to file a protest prior to the date proposals were due. See COMAR 21.10 .02.03A. It did not and therefore, is bound by such requirements. See Transit Casualty Company, MSBCA 1260, 2 MSBCA ¶119 (1985) at pp. 37-38. We shall now examine the requirements of the RFP in light of the facts revealed in this appeal.

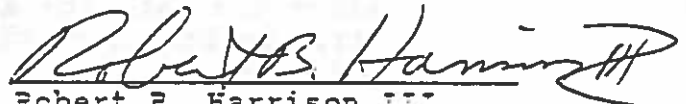
On June 15, 1993, a WIC investigator visited Appellant's store. At that time, the Appellant was not displaying in the customer area of the store the required minimum stock of WIC authorized foods. Specifically, the store did not have in the customer area the following items of required minimum stock in the amounts specified in the Contract Application Packet: (1) fluid milk; (2) ultra-high-temperature milk; (3) fresh carrots; (4) ready-to-feed Enfamil w/Iron; 5) dry (powdered) Enfamil w/Iron; (6) liquid concentrate Prosobee; (7) ready-to-feed Prosobee; and (8) dry (powered) Prosobee. Although the WIC Program could have properly considered Appellant's application as "unqualified" at that time, the Appellant was told it would be given a second chance to comply with the requirements of the RFP. Subsequently, on July 1, 1993, a WIC investigator returned to Appellant's store and found that once again, Appellant did not have the required minimum stock in the customer area. On this date, Appellant specifically lacked:

(1) ultra-high-temperature milk;⁴ (2) dry (powdered) Enfamil w/Iron; and (3) dry (powdered) Proscbee.


Appellant argues in its protest letter of August 20, 1993, that after learning that its stock was insufficient, it subsequently did "stock the required items" However, in reference to the second WIC inspection, the proprietor of Appellant's store contends that his wife "did not know where the Vitamin D milk was or that there was a case of infant formula and powdered milk in the back." Appellant thus admits that the required amount of WIC foods was not in the customer service area at the time of the inspection. It is clear that Appellant did not meet the requirements of the RFP. Accordingly, the WIC Program properly determined that Appellant was "unqualified," and therefore its appeal must be denied.


Therefore, it is this 29th day of November, 1993 Ordered that the appeal is denied.

Dated: 11/29/93


Robert E. Harrison III
Chairman

I concur:


Sheldon H. Press
Board Member


Neal E. Malone
Board Member

Certification

COMAR 21.10.01.02 Judicial Review.

A decision of the Appeals Board is subject to judicial review

⁴ The WIC Program subsequently removed ultra-high-temperature milk from its required stock and Appellant's failure to have such food was not considered in the determination of minimum stock requirements, for purposes of the RFP.

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 MSECA 1758, appeal of B & M Supermarket under DHMH Refusal to Award Contract Under WIC Vendor RFP.

Dated: 11/29/93



Mary E. Friscilla
Recorder