

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CAMELLIA FOOD STORES )  
INC./EASTERN SHORE MARKETS, )  
INC., STORES MEATLAND #002 & )  
#246 ) Docket No MSBCA 1754  
Under DHMH Solicitation DCT- )  
93-1055 )

December 16, 1993

Bid Protest - Timeliness - A protest based upon alleged improprieties in a solicitation that are apparent before the closing date for receipt of initial proposals shall be filed before the closing date for receipt of initial proposals.

Board of Contract Appeals - Jurisdiction - The Appeals Board has jurisdiction reasonably found arising from the final action of the unit. Issues not reasonably found in that first stage of the dispute resolution process are lost and can not for the first time be raised in an appeal to the Appeals Board.

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OPINION BY MR. PRESS

Appellant timely appeals from a Department of Health and Mental Hygiene (DHMH) WIC Program Procurement Officer's final decision denying Appellant's protest that it should have been awarded a WIC vendor contract for stores Meatland #002 and Meatland #246.

Findings of Fact

1. DHMH issued state-wide solicitation DHMH DCT-93-1055 on May 4, 1993 seeking retail food stores, pharmacies, and combination retail food store/pharmacies to serve as WIC vendors to fulfill the program goal of providing basic specific nutritional needs of women and infant children.
2. The WIC Program (or WIC) provides qualified WIC participants

with food vouchers which can be redeemed for food by authorized WIC vendors. The WIC Program attempted to provide basic nutritional need for its participants while at the same time obtaining these foods at the lowest price.

3. WIC personnel in structuring the Request for Proposals (RFP) for this solicitation determined that some of the infant formula needed by the program participants would normally be found at a pharmacy rather than a retail food vendor and expressed a preference for pharmacies to fulfill this need in the RFP by processing those pharmacy applications and ranking them separate from the retail food vendor and combination retail food/pharmacy vendors.

4. The RFP established six (6) evaluation criteria for the offers, being;

"1. Vendor prices for WIC food items submitted in response to this RFP.

2. WIC Program participation history.

3. Store type: retail food store, pharmacy and combination retail food store/pharmacy.

4. Vendor quota established for the designated service area within the region (a ratio of 1 vendor for each 300 active participants in the service area).

5. Location of the store.

6. Best interest of the State of Maryland WIC Program and its participants as explained in Section VI, D, 7."

5. DHMH personnel reviewed the approximately 500 offers by first reviewing the vendor prices to rank the offers. This ranking was then altered to reflect the previous history of an offeror where sanctions may have been made against the offeror as follows;

"4. The Program shall adjust an offeror's ranking if an offeror while previously serving as a WIC vendor was  
\* sanctioned for violating between October 1, 1992, and May 1, 1993 any of the provisions of the Vendor Sanction Policy as stated in a,b, and c below:

a. An offeror shall be moved down three places in the vendor ranking for any one of these violations:

- i. Vendor charges participants a service charge or fee on WIC vouchers.
  - ii. Vendor charges WIC participant more than other customers.
  - iii. Vendor provides cash for returned item purchased with WIC voucher.
  - iv. Vendor charges the Program for food not received by the participant.
- b. An offeror shall be moved down three places in the vendor ranking for two or more sanctions for this violation:
- Vendor accepts a voucher for an unauthorized food brand, quantity, or type within a WIC food category.
- c. An offeror shall be moved down six places in the ranking if the offeror was sanctioned as set forth in both a and b."

The result of this process was a list of offerors ranked from highest to lowest based upon price, store type and sanction history.

6. The RFP also divided the statewide contract into six (6) regions. The regions were to reflect geographically related areas of the State where prices would be expected to be comparable. The regions were sub-divided into service areas. The service areas were defined by zip code or combination of adjoining zip codes within a region, declared as a service area by WIC, for which the active WIC participant count was at least 900. The zip code method was used since WIC participants could easily and uniformly be organized within the region by zip code information stored in the WIC computer files.
7. WIC personnel in an attempt to manage costs wanted to reduce the number of authorized WIC vendors since the more vendors that were authorized, the greater the cost to WIC for training, management, oversight and other administrative costs. Previously WIC used a ratio of one (1) vendor for every 200

WIC participants. After reviewing the history of the WIC Program and comparing it with other similar States, it was decided that a vendor ratio of 1-300 would adequately serve Maryland WIC participant's needs. The RFP to enforce this ratio expressed a vendor quota, (i.e. a ratio of 1 vendor for each 300 active participants in the service area). In effect, if a service area had 900 WIC participants it could have a maximum of three (3) vendors; if it had 1100 participants still only three vendors, and if it had 1200 it could have (4) vendors. The RFP reflected a reasoned approach to providing the lowest cost food in the areas needed and at the same time only required supervision of the number of vendors necessary thereby reducing overall WIC administrative costs.

8. This appeal concerns the Eastern Shore of Maryland designated as Region Six (6) and only service area four (4) of that region which is comprised of the zip codes for Somerset and Wicomico Counties. The Appellant offered store Meatland #002 in Salisbury (Wicomico County) and store Meatland #246 in Princess Anne (Somerset County) under the RFP.
9. Service area four(4) has 2,678 active WIC participants and under the vendor quota was entitled to only eight WIC vendors. The offers for Region Six (6) were ranked by price, store type and sanction history as required by phase one of the RFP. The ranking at that stage was as follows;

NAME	CITY	PRICE	ZIP CODE	RANKING SELECTED
Apple Discount Drugs <sup>1</sup>	Salisbury	58.42	21001	1 X
Food Lion #800	Salisbury	21.54	21801	2 X
Food Lion #1211	Salisbury	21.54	21801	2 X
Salisbury Whse. Food Mkt.	Salisbury	24.35	21001	5 X

<sup>1</sup> Eight vendors were eventually selected and then WIC added a ninth vendor in Hebron based on participant hardship.

<sup>2</sup> This pharmacy was the only offeror under store type pharmacy.

NAME	CITY	PRICE	ZIP CODE	RANKING SELECTED
Food Lion #1153	Princess Anne	25.03	21853	6 X
Giant #51	Salisbury	26.03	21801	7 X
Meatland #246	Princess Anne	26.41	21853	10
Meatland #002	Salisbury	26.41	21801	10
Meatland #243	Crisfield	26.42	21817	11 X
Acme #6845	Salisbury	27.45	21801	13
Super Fresh #871	Salisbury	27.91	21801	15
Super Fresh #883	Salisbury	27.91	21001	15 X
Smith IGA Market	Hebron	29.30	21830	26 X
Riggin's Market	Crisfield	30.24	21817	32

This ranked list was then given to the Evaluation Committee to determine if any adjustments in the ranking should be made based on the provisions of the RFP. The Committee applied other criteria and options in the RFP and issued the following revised ranking award;

SELECTED VENDORS  
REGION 6, SERVICE AREA 4

<u>VENDOR</u>	<u>LOCATION</u>	<u>PRICE</u>
Apple Discount Drugs	Salisbury	\$58.42
Food Lion #800	Salisbury	21.54
Food Lion #1211	Salisbury	21.54
Salisbury Whse. Food Mkt.	Salisbury	24.35
Food Lion #1153	Princess Anne	25.83
Giant #51	Salisbury	26.03
Meatland #243	Crisfield	26.42
Super Fresh #883	Salisbury	27.91
Smith IGA Mkt.	Hebron	29.30

A comparison of the two rankings reflects that several lower priced offerors were displaced namely Appellant's Meatland #002, Salisbury, \$26.41 and Meatland #246, Princess Anne, \$26.41 and other offerors stores, Acme #6845, Salisbury, \$27.45 and Super Fresh #871, Salisbury, \$27.91.

10. The main focus of Appellant's protest at the hearing was that the decisions by WIC to re-rank the offerors for award, based

on other sections<sup>3</sup> of the RFP, were inappropriate since price was the most important evaluation criteria. However, the RFP clearly provided discretion for vendor selection based on store type, vendor quota, location and best interest of the WIC Program and its participants based upon hardship as defined in the RFP.

11. Vendors were divided into types. Pharmacies were a type of vendor given preference by the RFP to insure that special infant formula needs would be provided for in each Region. Pharmacies were required to be able to provide within 48 hours of a request any of the specified infant formula listed on the pharmacy application package. Pharmacy applications were to be ranked separately from retail food vendors and would only be considered for the purchase of those special infant formulas routinely unavailable at retail food stores or combination retail food store/pharmacies in the region. In order to insure the best interest of special needs for WIC participants the Program reserved the option to award at least one contract to a pharmacy or combination retail food store/pharmacy to insure the infants special formulas were available. This is consistent with the goal of the WIC Program to provide the nutritional needs of WIC participants.
12. The intent of the RFP read as a whole allowed WIC personnel to chose a pharmacy vendor over other higher ranked vendors, who do not routinely provide specialty infant formula.
13. WIC personnel chose Apple Discount Drugs as the pharmacy for Region Six (6) since it was the only pharmacy in Region Six (6) who made an offer. WIC personnel appropriately listed Apple Discount separately under the options allowed by the RFP which stated;

"7. To ensure that the best interests of WIC and its participants are met, WIC shall have the

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<sup>3</sup> These other sections of the RFP as discussed more fully below included hardship, pharmacy preference and clustering criteria allowing for re-ranking of offerors.

following options for awarding Contracts.

- a. For the most part, pharmacies are only able to provide all of the items listed on the infant vouchers; therefore, whenever a choice exists, the Program will select the combination retail food store/pharmacy instead of a pharmacy only.
- b. The Program shall have the option of awarding at least one Contract to the best ranked combination retail food store/pharmacy located in the service area instead of awarding a Contract to the retail food store that would have filled the last slot for the vendor quota."

This Board finds that the reference in b. above to "combination retail food store/pharmacy" also reasonably includes pharmacy, reading the RFP as a whole.

14. This preference in ranking a pharmacy is obviously contrary to the first stage of ranking based on price and sanction history where the requirement for ranking was that,

"5. After the adjustment for sanctions has been made in the vendor ranking, beginning with the vendor ranked number 1, vendors in a service area will be selected until the vendor quota for the service area has been met."

At first glance the \$58.42 average cost of Apple Discount would suggest other lower priced vendors should be selected. However, pharmacies offered prices on specialty items and here there were no other pharmacies offering to do business under the WIC Program in Region Six (6). Consequently, selection of the pharmacy was provided for under the RFP to fill the special needs of the Program and they were appropriately listed first in award ranking. Price, while important, was not determinative in this RFP since the RFP also provided for humanitarian criteria and judgment of WIC personnel.

15. The RFP also allowed options for selection based upon "clustering" of offerors. The RFP stated that;

- b. There may be instances where the selection of the offerors with the lowest bid prices and therefore the best ranking in a service area would result in a clustering of stores (2 or more stores located less than 5 miles apart). This would mean that other parts of the service area, where the Program has determined WIC vendors are needed, would have to be served by offerors that are not as well ranked as the offerors that are in the cluster.

The Program may select instead the offerors located in and needed to serve these other areas even though they are not better ranked than some of the clustered offerors.

In instances where the offerors are clustered, the Program may select stores within 5 miles of each other, if such selection is necessary to meet the vendor quota for the service area.

16. The clustering rule gave the WIC evaluators the express authority to award to higher price ranked vendors to break up a cluster. In this way the vendors would be spread over a large area to better serve the WIC participants. The potential for a clustering scenario was present in both Salisbury and Princess Anne since many of the offerors were located within five miles of each other. No offerors protested the restrictive potential affects of this RFP provision prior to proposal submission nor the potential for formation of one cluster over another cluster.
17. The clustering rule was applied to Appellant's store, Meatland #246, in Princess Anne since a lower price vendor, Food Lion #1153, was within the five mile area, in fact, just west of Appellant's Meatland #246 store across Route 13. The clustering rule was also applied to Appellant's store Meatland #002 in Salisbury which formed a cluster with Giant #51. However, the Appellant's store in Salisbury was displaced by Super Fresh #883 which then formed another second cluster with Giant #51. WIC personnel reasoned that while they broke-up the cluster formed by Giant #51 and Meatland #002 they were allowed to form another cluster with Giant #51 and Super Fresh



#883 since Super Fresh #883 was farther from Giant #51 than Meatland #002 and in a better location to serve WIC participants overall. WIC personnel relied on the RFP which expressly provided that, "... the Program may select stores within 5 miles of each other, if such selection is necessary to meet the vendor quota for the service area." Appellant points the fact that WIC had provided offerors a Procurement Procedure Comparison comparing provisions of the instant solicitation with provisions from the previous years solicitation which stated;

"Right of the Program to break up a cluster of stores (2 or more stores located less than 5 miles apart) by awarding the contract to another vendor located elsewhere in the service area where a need exist, outside of the cluster;

Right of the Program to award contracts to stores within 5 miles of each other, if the selection is necessary to meet the vendor quota for the service area;

While the language, "... outside of the cluster; ..." is troubling, read as a whole the RFP allows selection of another vendor within 5 miles to break up a cluster. In effect, one cluster can replace another cluster as long as some reasonable basis, such as selecting a less concentrated cluster or overall better location, supports the selection.

18. The RFP also allowed selection options based upon hardship. The RFP stated that;

"6. Once the initial selections for a service area have been made, an assessment shall be made to determine if any of the instances outlined in D, #7 of this section exist. Adjustment in the selection of vendors for the service area will be made accordingly."

Hardship was defined in the RFP as follows;

"7. c. In the best interest of the Program and its participants, WIC may have to award a contract based upon participant hardship. Only the Office of the Maryland WIC Program, Department of Health and Mental Hygiene, has the author-

ity to determine what constitutes participant hardship. Participant hardship shall be determined by WIC on a case-by-case basis. Awarding of authorization based on hardship determination shall be to the vendor determined by the Program to be best suited to alleviate the hardship.

For the awarding of Contracts, "participant hardship" rather than just "participant inconvenience or preference", shall be determined to exist if one of the following conditions is indicated:

i) A significant number of WIC participants (50 or more) would be required to travel an unreasonable distance to reach an authorized vendor.

For the purpose of this procedure, unreasonable distance shall be defined as travel in excess of ten miles to reach an authorized vendor;

ii) Constant or permanent physical barriers or conditions which would make normal travel to another authorized WIC vendor impossible (e.g., an unbridged river, an expressway, an airport, frequent road closings due to bad weather);

iii) Fifty (50) or more WIC participants whose specific nationality can only be properly served by a specific vendor due to a language barrier; and

iv) Fifty (50) or more WIC participants whose specific dietary needs can only be properly served by a specific vendor due to religious mandates.

d. Under this solicitation, an offeror or vendor may not submit a protest based on the grounds of participant access or preference."

19. WIC personnel received no request for review of either of Appellant's stores from any source for exemption based on hardships. At the hearing Appellant argued that in other WIC proposal reviews several vendors, who were denied WIC awards, were later granted awards based on a hardship finding which

allegedly violated the RFP. Appellant filed with its Supplement to Comments on Agency Report a WIC document obtained in discovery which contained a summary of justifications for awarding additional vendors based on hardship during the course of this RFP. These summaries for the most part recite facts sufficient on their face to fall under the hardship definition of the RFP. However, some of the summaries suggest that hardship exceptions were allowed based on participant access or preference. A sample of these types of summaries is given below;

"Region 3, Area 1

Brownings Foodland Inc., Rt. 135, P.O. Box 129, Oakland, 21550 - added to address hardship of participants who would have to walk two to three miles to reach an authorized vendor in Oakland. The highways that would be used to walk lack sidewalks; also there is no public transportation in Oakland. Of the two stores available to meet this hardship, Brownings had the highest-ranked bid.

Region 3, Area 2

Garlitz Brothers Market, 101 Grand Avenue, Cumberland 21502 - added to serve the population living in low-income housing located off of Oldtown Road, south Cumberland; according to the intercept survey of WIC participants conducted by the Allegany County Health WIC-Agency, approximately one-third of all participants walk to the store while another third rides with a friend, suggesting that pedestrian access to the store is required in this area. Authorized WIC stores are located over a mile away and would require a walking on steep grades and/or on busy streets. Of the two stores located in this area, this store had the highest ranking."

20. The Board can not infer or speculate what facts were available outside of these summaries of the State's unit final action. Appellant offered no evidence at the hearing that these hardship exceptions were not based on the RFP definition. The RFP gives DKMH the decision making power on what constitutes hardship and it is presumed correct unless proven otherwise.

Appellant has not met its burden of proof that hardship criteria were unfairly applied to offerors. No written evidence or witness testimony was offered to support allegations of undue influence, arbitrariness, fraud or other impropriety. While the characterization given by several of the summaries taken alone are troubling, Appellant fails in its burden of proof to overcome the presumptive correctness of the units final action.

21. WIC personnel notified rejected offerors by letter. Appellant after receiving its notice, did not ask for a debriefing where it could have had WIC personnel explain their rationale, but rather filed a protest by letter dated August 20, 1993 to the Procurement Officer listing the following grounds of protest;
  1. The rejection of Meatland Store #246 in Princess Anne on the grounds that the store is not where a vendor is needed was improper, in error, and unfair.
  2. The rejection of Meatland Store #002 in Salisbury to prevent clustering was not valid.
  3. The rejection of Stores #249, 237, 238 and 244 for failure to meet minimum qualifications was not supported by a specific explanation.
22. The Procurement Officer by letter dated September 30, 1993 issued a final decision based upon rejection of Meatland Store #002 in Salisbury and Meatland Store #246 in Princess Anne. Apparently the issues of minimum qualification for stores #249, 237, 238 and 244 were resolved by the parties and are not subject to the proceedings before the Board since the Appellant either resolved or withdrew these issues prior to appeal to this Board. Clearly the Appellant intended to dismiss these issues since they were not addressed or mentioned during the hearing and thus the record contains no evidence to support the minimum qualification allegations.
23. On October 6, 1993 Appellant filed an appeal to this Board listing the following three grounds for appeal;

### "Grounds for Appeal

1. The denial of the proposal of Meatland #246 is arbitrary because the Department awarded a contract to a vendor directly across the street although the Department rejected Meatland #246 because a vendor was not needed at the location.

2. The Department's decision not to accept the proposal of Meatland #002 to prevent "clustering" of stores is based on a standard that is vague and arbitrary and fails to consider the needs of WIC participants who rely on this store as the most accessible location to buy food.

3. The criteria used to evaluate the submitted proposals and the way in which the Department applies the criteria fail adequately to consider important relevant factors, including but not limited to, past performance in the WIC Program, proximity of vendor location to the residences of WIC participants and higher operating costs of vendors in low-income locations in close proximity to WIC participants."

24. The Board finds that the grounds recited by Appellant in its appeal fairly arise out of the final action of the unit and the Board heard the merits of such grounds on December 6, 1993.

### Decision

The rejection of Meatland #246 in Princess Anne on the grounds a vendor was not needed at that location is permitted under the RFP. The endemic problem of lowest price competition used together with the social program evaluation criteria becomes apparent. Under the general criterion given in stage one of the RFP the Meatland store #246 based on price, store type and sanction history would have been one of the eight vendors selected. However, price while important was not determinative of award since the goal was to serve the humanitarian objective of nutritional needs of WIC participants. Cost saving to the WIC Program, while considered was not the only criterion. WIC personnel applied the cluster rule to Princess Anne under the option allowed in the RFP. Food Lion #1153 was enough to serve the 270 WIC participants in Princess Anne in

light of other vendors in other parts of service area four(4). The RFP did not prefer clustered vendors and there was no need for a second vendor at that location.

A RFP must be evaluated based upon the criteria given in the RFP. COMAR 21.05.03.03A. The potential that low priced offerors could be displaced under the clustering rule was clearly expressed in the RFP. An offeror who desires to protest the language of the RFP as being unfair, or otherwise in violation of the General Procurement Law must file that protest prior to the submission deadline for proposals. COMAR 21.10.02.03A requires that;

"A protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or closing date for receipt of initial proposals."

The reasonably diligent bidder should have known the impact a clustering rule would have on vendors located in Princess Anne and Salisbury. Each city has vendors who compete for WIC contracts within 5 miles of each other. Additionally the use of a vendor quota ratio of 1-300 was apparent in the solicitation which could have been challenged by Appellant. Appellant did not timely protest these issues and consequently any alleged improprieties arising out of the expressed criteria which were apparent prior to closing date for receipt of proposals are late and can not now be raised.

The inconsistency of language in the Procurement Procedures Comparison and the RFP as to clustering is patent. Appellant made no protest or inquiry and accordingly is bound by the interpretation of DHMH. COMAR 21.10.02.03A; See Bernie's Vending Service, Inc., MSBCA 1420, 3 MICPEL 207 (1989).

We have noted that a RFP must be evaluated based on the criteria set forth in the RFP. COMAR 21.05.03.03A. states,

"Evaluation. The evaluation shall be based on the evaluation factors set forth in the request for proposals and developed from both the work statement and price. Technical proposals and price proposals shall be evalu-

ated independently of each other. Numerical rating systems may be used but are not required. Factors not specified in the request for proposals may not be considered. Initial evaluations may be conducted and recommendation for award made by an evaluation committee. Final evaluations, including evaluation of the recommendation of the evaluation committee, if any, shall be performed by the procurement officer and the agency head or designee."

Pursuant to Maryland's General Procurement Law and its implementing regulations offerors are entitled to know the relative importance of each of the evaluation factors, and it is incumbent upon the procuring agency to adhere to the stated criteria. A&R/Bowie Limited Partnership, MSBCA 1690, 4 MICPEL 316 (1992); See Mid Atlantic Vision Service Plan, Inc., MSBCA 1368, 2 MICPEL ¶ 173 (1988).

"[I]t is essential that offerors be informed in an RFP of all evaluation factors and the relative importance to be attached to each such factor so that they may submit accurate and realistic proposals and compete on an equal basis." E. Paul Elaine Associates, Inc., MSBCA 1123, 1 MSBCA ¶58, at 9 (1983). Offerors are entitled to rely on the stated evaluation criteria, and the relative weight of those criteria, so as to configure their proposals in the manner they consider most advantageous. Id. See Systems Associates, Inc., MSBCA 1257, 2 MSBCA ¶116, at 15 (1985) ("Once offerors are informed of the criteria against which their proposals will be evaluated, the procuring agency is required to adhere to those criteria, or inform all offerors of the changes made in the evaluation scheme"). See Also Arltec Hotel Group, Comp. Gen. Dec. B-213788, April 4, 1984, 84-1 CPD ¶ 381, at 3 ("procuring agencies . . . do not have the discretion to announce in the solicitation that one plan will be used and then follow another in the actual evaluation."); Genasys Corp., 56 Comp. Gen. 835, 838 (1977) (same).

United Technologies Corp. and Bell Helicopter, Textron, MSBCA Nos. 1407 and 1409, 3 MICPEL ¶ 201 at p. 35 (1989).

Also fundamental to the General Procurement Law is the requirement for offerors to protest alleged improprieties apparent in the proposal prior to the due date for proposals. See; B. Paul Blaine Associates, Inc., MSBCA 1123, 1 MICPEL 58 (1983), Dryden Oil Company, MSBCA 1150, 1 MSBCA ¶55(1983), Neoplan USA Corporation, MSBCA 1186, 1 MICPEL 84 (1984), Transit Casualty Company, MSBCA 1260, 2 MICPEL 119 (1985) and Homecoming, Inc., MSBCA 1647, 3 MICPEL 309 (1992).

Failure to timely protest defects apparent in the RFP must result in the dismissal of issues which arise out of those defects.

During the hearing Appellant argued that it should be granted an exception for Meatland store #246 based upon the hardship definition of the RFP. This was a new issue which was not raised before the Procurement Officer. Appellant argued that Food Lion #1153 was west of Route 13 and that Route 13 constituted a constant or permanent physical barrier or condition which would make normal travel to another authorized WIC vendor impossible and thus entitling Meatland #246 to a hardship exception. Nothing in the Appellant's protest letter or Procurement Officer's final decision states that Route 13 is or is not a barrier upon which hardship could be found as a ground for protest. Route 13 is simply not mentioned in either document. This ground of protest was not raised at the first tier in the procurement process and consequently can not be raised for the first time during the hearing.

The General Procurement Law process for bid protest or contract claim review has two tiers. Initiation of a protest or contract claim must begin with the procurement officer. State Finance and Procurement Article §15-217 states;

"(a) In general. --- (1) A prospective bidder or offeror, a bidder, or an offeror may submit a protest to the procurement officer."

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<sup>4</sup> The bid protest must state the reasons for the protest and be filed with the Procurement Officer for a decision. COMAR 21.10.02.02, 21.10.02.04 and 21.10.02.09. It is this final bid protest decision which is the subject of appeal to this Board. COMAR 21.10.07.02.



(2) A person who has been awarded a procurement contract may submit a contract claim to the procurement officer.

(b) Time for submission. --- 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 protest or contract claim must be reviewed by the Procurement Officer under State Finance and Procurement Article §15-218 (or §19-219 for contract claims for construction) which states,

(a) In general. --- Except as provided under §15-219 of this subtitle, a procurement officer who receives a protest or a contract claim shall comply with this section.

(b) Review by procurement officer. --- (1) On receipt of a protest or contract claim under §15-217 of this subtitle, a procurement officer:

(i) shall review the substance of the protest or contract claim;

(ii) may request additional information or substantiation through an appropriate procedure;

(iii) may discuss with interested parties and, if appropriate, may conduct negotiations with the person initiating the protest or contract claim; and

(vi) shall comply with any applicable regulation.

(2) Unless clearly inappropriate, the procurement officer shall seek the advice of the Office of the Attorney General.

(c) Same --- Decision. --- (1) Subject to subsection (b) of this section and consistent with the State budget and other applicable laws, the procurement office shall:

(i) resolve the protest or contract claim by agreement of the parties;

(ii) wholly or partly deny the protest or contract claim; or

(iii) wholly or partly grant the relief sought by the person who submitted the protest or contract claim.

(2) The procurement officer promptly shall send the decision in writing to the reviewing authority.

(d) Review of procurement officer's decision. --- Unless otherwise provided by regulation, the decision of the procurement officer shall be reviewed promptly by:

(1) the head of the unit; and  
(2) the head of the principal department or other equivalent unit of which the unit is apart.

(e) Action of reviewing authority. -- (1) Except as provided under paragraph (3) of this subsection, the reviewing authority shall approve, disapprove, or modify the decision of the procurement officer.

(2) The action of the reviewing authority under this subsection shall be the final action of the unit.

(3) The reviewing authority may remand the proceeding with instructions to the procurement officer.

(4) On remand, the procurement officer shall proceed under subsection (b) of this section in accordance with those instructions."

In the event the Appellant is still aggrieved by the final action of the unit under the first stage of the process further appeal is made to the second tier to the Appeals Board under State Finance and Procurement Article §15-220 which states;

"(a) In general. --- Except for a contract claim related to a lease for real property, bidder or offeror, a prospective bidder or offeror, or a contractor may appeal the final action of a unit to the Appeals Board.

(b) Time for filing. --- An appeal under this section shall be filed:

(1) for a protest, within 10 days after receipt of the notice of a final action; and  
(2) for a contract claim, within 30 days

after receipt of the notice of a final action. (SF §11-137; 1988, ch. 48, §2.)"

The jurisdiction of the Appeals Board (i.e. the Maryland State Board of Contract Appeals) lies in appeals arising from the final action of the unit under State Finance and Procurement Article §15-211 which states:

"(a) Jurisdiction. --- The Appeals Board shall have jurisdiction to hear and decide all appeals arising from the final action of a unit:

(1) on a protest relating to the formation of a procurement contract; or  
(2) except for a contract claim relating to a lease of real property, on a contract claim concerning:

- (i) breach;
- (ii) performance;
- (iii) modification; or
- (iv) termination.

(b) Finality of decision. --- A decision of the Appeals Board is final, subject to any judicial review."

This Board can only hear and decide issues over which jurisdiction is reasonably found arising from the final action of the unit. Issues not reasonably found in that first stage of the process are lost and can not for the first time be raised in an appeal to this Board.

The Board in attempting to fulfill its mandate to provide a fair, simple, expeditious forum looks liberally on the articulation of issues by the Appellant in its protest and the unit in its final decision to find jurisdiction over issues asserted in the Appellant's appeal to the Board. In some cases it is difficult to determine without the benefit of a hearing exactly what issues have concerned the parties during stage one of the process. In an abundance of caution the Board has allowed broad latitude in presentation to clarify and present the issues. However here, as to the alleged Route 13 hardship, it is clear that Appellant has

attempted to challenge the final action of the unit based upon issues which under any reasonable reading can not be found in the protest before the Procurement Officer or in the Procurement Officer's final decision and as such must be dismissed for lack of jurisdiction since they are raised for the first time before this Board.

Even in the abstract if the hardship issue was timely raised as to Meatland #246 in Princess Anne, Appellant also fails on burden of proof. The record clearly supports that participants could by normal means of travel have access to Food Lion #1153 by walking or car. Traffic lights and other normal<sup>5</sup> routine routes of travel are available for access across Route 13.

Similarly, during the hearing Appellant attempted to raise a new issue as to hardship for Meatland store #002 asserting that Route 50 was a barrier to access. The hardship issue based on Route 50 was not raised before the Procurement Officer and as stated above was thus improperly brought before the Board for the first time during the hearing. Additionally, if Appellant had timely raised Route 50 as a barrier under hardship it would have failed on burden of proof. The record reflects Route 50 as being accessible by walking or driving using stop lights and other normal means of travel.

This Board realizes that clustering the Giant #51 store with Super Fresh #883 instead of with Meatland #246 is a subjective decision, but even though subjective, the decision is based on the rationale to provide low-cost vendors in locations to best serve WIC participants.

The rejection of Meatland #002 in Salisbury under the clustering rule is reasonable and permitted by the RFP. There is little doubt that the RFP allows the WIC personnel to substitute

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<sup>5</sup> The Board does agree that inconvenience and participant preference would be affected by the refusal to award to Appellant's stores, however, these grounds are precluded as a basis of relief by the RFP.

one cluster for another cluster which, based on location, best serves the needs of WIC participants.

The record supports the decision by DHMH to select Super Fresh #883 over Meatland #246 even though another cluster results since in the judgment of DHMH the location of Super Fresh #883 is better for the WIC participants. WIC personnel correctly relied on the RFP language over the patent discrepancy given in the Procurement Procedure Comparison. The General Procurement Law requires offerors to raise issues as to patent conflicts in the RFP. Appellant failed to ask for clarification if it was confused.

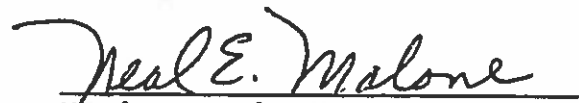
Additionally, at the hearing counsel argued several other theories for sustaining the appeal not found in the protest letter, the Procurement Officer's final decision nor the issues set forth in the appeal to this Board. Those new issues can be described as;

- (1) DHMH improperly listed the pharmacy application of Apple Discount Drugs as the first to receive an award.
- (2) DHMH improperly used the vendor quota ratio for regions to be applied to non-disclosed sub-categories of zip code service areas, and
- (3) Award to a ninth (9th) vendor, Smith IGA Market in a service area limited to an eight (8) vendor quota based upon hardship was improper.

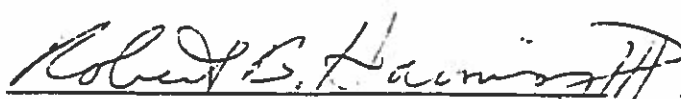
All of these issues are untimely and must be dismissed for the reasons set forth above.


Wherefore, it is this 16<sup>th</sup> day of December, 1993  
Ordered that the appeal is denied.

Dated: 12/16/93

  
Neal E. Malone  
Board Member

I concur:

  
Robert B. Harrison III  
Chairman

  
Sheldon H. Press  
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 1754, appeal of Camellia Food Stores, Inc./Eastern Shore Markets, Inc., Stores Meatland #002 & #246 under DHMH Solicitation DCT-93-1055.

Dated: *December 16, 1993*

*Mary E. Priscilla*  
Mary E. Priscilla  
Recorder