

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of GIANT FOOD STORES, INC. )  
(TRADING AS MARTIN'S FOOD MARKETS) )  
Under DHMH Solicitation No. ) Docket No. MSBCA 1603  
DHMH PS91-788 )

October 23, 1991

Contract Award - Late Bid - Burden of Proof - Appellant established that the lateness of its bid should be excused pursuant to the exception set forth in COMAR 21.05.02.10B permitting consideration of a late bid where the bid would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees.

APPEARANCES FOR APPELLANT:

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APPEARANCES FOR RESPONDENT:

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APPEARANCES FOR INTERESTED PARTIES:

None<sup>1</sup>

OPINION BY MR. PRESS

Appellant filed this appeal from a Department of Health and Mental Hygiene (DHMH) Procurement Officer's final decision denying Appellant's bid protest.

Findings of Fact

1. On April 19, 1991, DHMH Solicitation No. PS91-788 relating to the State's WIC program within DHMH appeared in the Maryland Register. WIC is a DHMH special supplemental food program for low-income women, infants and children to ensure that they receive

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<sup>1</sup> There are twenty-one interested parties.

proper nourishment. Retail food vendors and pharmacies were requested in the solicitation to provide WIC authorized food and infant formula to WIC participants in exchange for food vouchers. The solicitation advised prospective vendors of the following:

Bids Due: May 13, 1991, 10 a.m., 201 W.  
Preston St., Rm. 104, Baltimore, MD 21201

2. By the bid due date and time, i.e., 10:00 a.m. on Monday, May 13, 1991, WIC had received 483 applications.

3. On May 10, 1991, Appellant arranged for United Parcel Service (UPS) airmail - ground delivery service to transport its applications from Carlisle, Pennsylvania to the Maryland WIC office. UPS makes weekday morning deliveries to DHMH's 201 W. Preston Street loading dock where packages of various sizes are signed for by Leonard Michels, the DHMH loading dock supervisor. The procedure customarily used by Mr. Michels and Gary Bouie, the UPS driver, was to first place bulky packages and then the smaller ones on to a flatbed which was eventually taken to a DHMH warehouse within 201 W. Preston St. complex for pickup by DHMH addresses. During the unloading of the UPS deliveries, Mr. Bouie would check-off, on a hand-held computer, the packages delivered, and when the entire delivery to DHMH was completed, Mr. Michels signed the UPS computer clipboard.

UPS deliveries to DHMH average about 50 packages a day. Deliveries of 50 packages require 35 minutes or more to be unloaded and checked-off. As a matter of long-standing practice, all UPS

deliveries are made to the DHMH loading dock, but UPS delivery drivers are not prohibited from entering the building to make deliveries to addressees.

4. Mr. Bouie testified that he usually arrives at the DHMH loading dock around 10:00 a.m., and he felt comfortable stating that on the morning of May 13, he arrived before 10:00 a.m. Mr. Michels, however, stated that UPS deliveries never occur before 10:00 a.m., and that they usually arrive between 10:15 a.m. and 10:30 a.m. Both witnesses agreed that on any morning, delay and congestion, caused by the presence of other delivery services, could occur within the loading dock, area, resulting on the average in a 10 minute delay.

5. The undisputed record is that the delivery was completed at 10:43 a.m., May 13, 1991 as that is the time when Mr. Michels signed the UPS computer clipboard as per his daily routine. It can be inferred that it takes approximately 10 minutes for the delivery drivers to wait in turn for Mr. Michels to receive deliveries. Furthermore, 66 packages were delivered the morning in question, and this would have required in excess of 35 minutes. In addition, Mr. Michels testified that on May 13, construction in proximity to 201 W. Preston St. had compounded the usual delays in the delivery procedure. Based on these facts we find that the UPS driver was at the 201 W. Preston St. loading dock ready, willing and able to deliver the Appellant's application prior to 10:00 a.m. on May 13.

6. UPS and DHMH loading dock employees, in a spirit of cooperation, have established the aforementioned procedures for

delivery of packages addressed to DHMH addressees, including Room 104, located within 201 W. Preston ST. These procedures while reasonable, were not noted in the solicitation and therefore would have been unknown to prospective applicants.

7. At about 2:50 p.m. on May 13, 1991, DHMH loading dock personnel delivered Appellant's application to JoAnn McGowen of WIC who date-stamped the application and recorded the time as being 2:50 p.m. Ms. McGowen also marked the package as late and initialed it, and then placed the package in the box which held late applications. On May 14, 1991, Ms. McGowen recorded this information in a log entitled "Late Receipt of Applications by County."

8. By a certified letter, mailed on July 8, 1991, WIC notified the Appellant that its applications had been rejected because they were late, and returned the applications. The return receipt card was received by WIC on July 15, 1991; the card was unsigned. Appellant alleged to WIC that it never received the notice of rejection, and the applications were returned to WIC. On August 2, 1991, WIC again returned the applications to Appellant with the notice of late receipt, which was received by Appellant on August 5, 1991. Appellant then filed a timely protest with the Procurement Officer.

9. On September 4, 1991, the Procurement Officer issued a final decision by certified mail denying the protest on the grounds that the applications were received after 10:00 a.m. on May 13, 1991 at the WIC office, Room 104, 201 W. Preston St. A timely appeal was

filed with this Board on September 13, 1991. Appellant states in its appeal that "the Procurement Officer refuses to accept WIC applications."

#### Decision

COMAR 21.05.02.10(A) provides "Any bid received at the place designated in the solicitation after the time and date set for receipt of bids is late." COMAR 21.05.02.10(B) states: "A late bid, late request for modification, or late request for withdrawal, may not be considered." "[E]xceptions may be made when a late bid, withdrawal, or modification is received before contract award, and the bid, modification, or withdrawal would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees."

It is undisputed that Appellant's applications was received at the loading dock of the 201 W. Preston St. building on May 13, 1991. The approved location for receipt of applications that were mailed was Room 104, as noted in the solicitation and emphasized in materials forwarded to prospective applicants. However, this Board finds that the loading dock is also an approved location for receipt of applications that were delivered as packages.

Every weekday, hundreds of packages of various sizes are delivered to the loading dock and then are eventually routed to the DHMH warehouse. DHMH warehouse employees were not advised to use any special procedure to ensure timely resorting and delivery of WIC applications. The use of private delivery services, which use the loading dock as their delivery point should have been

anticipated by DHMH as being likely to cause confusion and delay of receipt and processing for otherwise timely applications. The record reveals that DHMH handling procedures contributed to the determination by DHMH the Appellant's applications were received late.

The Board is cognizant it has consistently held that the burden is upon the Appellant to demonstrate with reasonable certainty that the lateness of a bid was caused by State personnel directing the procurement activity, or their employees. Appeal of Patco Distributors, Inc., MSBCA 1270 2 MICPEL ¶ 128 (1986). DHMH is aware that packages are customarily delivered to the loading dock, which, under the circumstances, the Board has found to be an acceptable location for receipt of applications, even though this is in variance with the solicitation notice to prospective applicants. The treatment of private delivery service application receipt, this Board finds differed from hand delivered applications which were allowed to be presented for receipt in the WIC, first floor office. The aforementioned procedure caused by State personnel directing the procurement activity or their employees demonstrates to this Board in this particular appeal by a preponderance of the evidence that the Appellant's applications would have been timely but for the action of State personnel directing the procurement activity or their employees. A reasonable inference to be drawn from the facts is that Appellant's applications were among the unsorted packages on the DHMH loading dock prior to 10:00 a.m. on May 13, 1991. Under the aforementioned

facts we find the applications should be treated as timely received within the exception set forth in COMAR 21.05.02.10(B).

Therefore, the appeal is sustained.

Dated:

