

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of GIANT FOOD STORES,)	
INC. T/A MARTIN'S FOOD MARKETS)	
Nos. 36, 58 & 76)	
)	Docket No. MSBCA 1764
Under DHMH Refusal to Award)	
Contract Under WIC Vendor RFP)	
)	

March 23, 1994

Bid Protest - Timeliness - Grounds of protest apparent before the closing date for receipt of proposals are required to be raised prior to the closing date for receipt of proposals.

Negotiated Contracts - Evaluation Criteria - The Board of Contract Appeals may not substitute its judgment for that of an agency in applying the selection criteria set forth in an RFP and will not set aside a selection unless the agency application of such criteria is inherently unreasonable.

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OPINION BY CHAIRMAN HARRISON

Appellant appeals the determination by the Department of Health & Mental Hygiene (DHMH) not to award WIC vendor contracts to its Martin's Food Markets (Martin's) No. 36, 58 & 76. The essence of the appeal is that the WIC Program (within DHMH) did not properly apply RFP evaluation criteria to select WIC vendors in Hagerstown in Washington County (Martin's 58 & 76) and Westminster in Carrol County (Martin's 36). The elements that make up this aspect of the appeal are timely. A number of items should have been raised prior to the due date for receipt of proposals, are the subject of a Motion to Dismiss¹ and are dismissed herein as more fully discussed below.

¹The motion was made at the commencement of the hearing. At that time it appeared that certain material facts necessary to a disposition of the motion were in dispute. Therefore, the Board deferred ruling on the motion pending the hearing on the merits.

Under this procurement, the WIC Program sought retail food stores, pharmacies, and combination retail food store/pharmacies to serve as WIC vendors where WIC participants can redeem WIC vouchers. To carry out the award of contracts under this procurement, the WIC Program divided the State into six regions. Each region was further divided into service areas, which consisted of a zip code area or a combination of zip code areas. Based upon research and previous experience with WIC participants, the WIC Program established a vendor quota, i.e. the maximum number of vendors needed to serve WIC participants, for each service area at a ratio of one store per 300 active participants. Pursuant to the RFP, this vendor quota could be increased if the WIC Program determined at any time that participant hardship necessitated the award of more contracts in any given service area.

Timely proposals submitted in response to the RFP were evaluated pursuant to the evaluation procedures and criteria set forth in the RFP. All proposals were initially evaluated to determine if the offeror qualified for consideration for a contract award. In order for an offeror to qualify, its proposal had to meet the minimum qualifications specified in the RFP. Qualified offerors were then ranked in each region according to the total of their bid prices; the total of their highest shelf price for the various WIC foods on the date of their offer. This ranking, as well as a consideration of other RFP evaluation criteria discussed below determined the award of contracts.

Pursuant to the RFP, two separate rankings were done -- one for both retail food stores and combination retail food store/pharmacies and one for pharmacies alone. In each of these categories, the offeror with the lowest bid price was ranked as number 1; the offeror with the next lowest bid price was ranked as number 2, and so on until all qualified offerors were ranked. Adjustments in offeror ranking were made if an offeror previously incurred certain WIC sanctions. The WIC Program's evaluation committee had the option of further adjustment in the selection of vendors in a service area in order to ensure that the best interests of the WIC Program and its participants were met.

Among the options available to the WIC Program is a process to prevent vendor "clustering." As set forth in the RFP, a cluster occurs when the bid price ranking process would result in the award of contracts to two or more stores located less than five miles apart. If these stores were awarded contracts, other sections of the service area might not adequately be served by WIC vendors. In order to ensure that WIC vendors are available to serve all parts of a service area, the WIC Program retained the option of awarding a contract to an offeror located in the needed area, even though the selected store was not as highly ranked as one or more of the clustered stores. Conversely, the WIC Program could select stores within 5 miles of each other in order to fill the vendor quota for a given region.

Findings of Fact²

1. The subject RFP to provide WIC vendors to provide nutritious food to women and children Statewide was advertised in early May 1993 and various vendors who submitted proposals were awarded contracts effective October 1, 1993. Many vendors who submitted proposals were not awarded contracts and a number of protests and appeals to this Board followed including the instant appeal. Appellant's three stores were not awarded contracts on grounds "store location not where vendor is needed".
2. The following elements of the Appellant's appeal was untimely because such matter pursuant to COMAR 21.10.02.03A was required to be raised prior to the due date for receipt of proposals.
 1. That the RFP contained vague standards. Any vagueness perceived in such standards as existed in the RFP would have been apparent and should have been the subject of a pre-proposal opening protest.
 2. That the criteria set forth in the RFP to evaluate proposals were deficient in allegedly failing to adequately "consider important relevant factors, including but not limited to, past performance in the WIC Program, proximity of vendor location to the

²Where not contested, the Findings of Fact generally reflect factual description set forth in the Agency Report.

residences of WIC participants...." Such alleged deficiencies in evaluation criteria would have been apparent and were thus required to be raised prior to the due date for receipt of proposals.

Accordingly, the Board lacks jurisdiction to consider these grounds of appeal and they are dismissed. See E&M Supermarket, MSBCA 1759, 4 MSBCA ¶ _____ (1993).

3. The following elements of Appellant's appeal were specifically protested in a timely fashion or arise out of the matter that was the subject of Appellant's timely protest on August 23, 1993.
 1. A proper evaluation of Appellant's store prices and those of its competitors by the WIC Program would have resulted in Appellant's stores being awarded a WIC vendor contract.
 2. The WIC Program erred in determining that Appellant's store locations are not where a vendor is needed.³
4. Appellant challenges the pricing of its competitor stores in Hagerstown and Westminster contending that certain of these stores prices were understated for purposes of the application to become a WIC vendor. Appellant asserts that had the true highest shelf price for WIC foods been set forth on the bid price forms of these offerors, Appellant in comparison would have had a lower total price and a consequent higher ranking entitling its stores to award. The WIC Program contends this specific pricing issue was not raised in timely fashion since the protest only allegedly dealt with the evaluation of

³ Appellant also suggested that the WIC Program erroneously concluded that its stores did not meet minimum qualifications and "other requirements" for WIC vendor status. It is clear from the record that Appellant's stores met all requirements and qualifications as set forth in the RFP and that the WIC Program so determined. The Appellant's stores prior contract performance was also appropriately considered by the WIC Program in its determination that Appellant's stores were qualified.

Appellant's prices not the prices of its competitors. We find, however, that this issue properly arises out of the Appellant's protest and is timely. The Appellant's protest clearly raises the issue of the ranking of Appellant's stores which of necessity involves the prices of competing offers.

A. Martin's #58 and Martin's #76, Hagerstown.

5. Appellant's stores, Martin's Hagerstown Food Market #58 and Martin's Food Market #76 are located in Hagerstown, Maryland. Martin's #58 is located in zip code area 21740; Martin's #76 is located in zip code area 21742. For purposes of this procurement, both stores are located in Region 3, Service Area 3. Service Area 3 comprised all of Washington County. This service area at the time of the RFP consisted of 2,955 WIC participants. It was determined, using the 1 vendor to 300 participant ratio explained above, that the vendor quota for this service area was nine WIC vendors.

For Service Area 3 of Region 3, twenty-three offerors submitted proposals as shown in the following reproduction of Exhibit 14 of the Agency Report.

REGION 3

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1994 VENDOR AUTHORIZATION BY REGIONS
LISTING OF VENDORS BY REGION AND PRICE RANK
Created by: S. Parsons

COUNTY	NAME	ADDRESS	CITY	PRICE	ZIP CODE	RANKING	SELECTED	REJECT CODE
* SERVICE AREA 3								
21	SUPER FRESH #247	304 MAIN ST	HANCOCK		21750	0		1
21	DECA COMMISSARY, FT. RITCHIE	BLDG. 508, W. BANFILL AVE	FT. RITCHIE		21719	0 X		
21	PEOPLES DRUG STORE #1435	1519-21 POTOMAC AVE	HAGERSTOWN	61.65	21742	1		3
21	FOOD LION #1050	22401 JEFFERSON BLVD.	SMITHBURG	19.80	21763	1 X		
	COUNTRY MARKET	835 W. HILLCREST RD.	HAGERSTOWN	22.35	21742	3 X		
21	FOOD LION #1147	18717 LONGMEADOW RD.	HAGERSTOWN	23.74	21740	6 X		
21	OLD ORCHARD SUPERMARKET	17837 VIRGINIA AVE	HAGERSTOWN	27.99	21740	7 X		
21	SMITHBURG MARKET	P.O. BOX 481	SMITHBURG	24.30	21763	8		2
21	FOOD LION #626	761 E. WILSON BLVD	HAGERSTOWN	24.30	21740	9 X		
21	SANDERS MARKET	BOX 176 MILITARY ROAD	CASCADE	24.54	21719	10 X		
21	WETS #07	VALLEY PLAZA	HAGERSTOWN	24.73	21740	12 X		
21	WETS #61	1161 MARYLAND AVE. CENTER	HAGERSTOWN	24.73	21740	12 X		
21	WEST END MARKET INC	806 W WASHINGTON STREET	HAGERSTOWN	25.07	21740	14		3
21	MARTIN'S FOOD MARKET #33	601 DUAL HIGHWAY	HAGERSTOWN	25.96	21740	16		3
21	MARTIN'S FOOD MARKET #70	13200 FOUNTAIN HEAD PL.	HAGERSTOWN	25.96	21742	18		3
21	MARTINS #50	1580 WESEL BLVD.	HAGERSTOWN	25.96	21740	18		3
21	ROCKY RIDGE FARM MARKET	14716 PENNA. AVENUE	HAGERSTOWN	26.71	21740	23		3
21	PITTMANS MARKET INC	PENNSYLVANIA AVE EXTENDED	HANCOCK	26.90	21750	25 X		
21	BONNSBORO PRODUCE MARKET	7638 OLD NATIONAL PIKE	BONNSBORO	28.00	21713	36 X		
21	LEWIS MARKET	931 PENNSYLVANIA AVE.	HAGERSTOWN	28.02	21740	37		3
21	VALLEY MARKET	13722 NATIONAL PIKE	CLEARSPRING	28.37	21722	40 X		
21	SUPER FRESH #930	1003 MARYLAND AVE.	HAGERSTOWN	30.75	21740	48		4
21	HOSBYS MARKET	249 1/2 NORTH JONATHAN ST	HAGERSTOWN	35.50	21740	54		4

6. The first two stores listed on Exhibit 14 were given a ranking of "0" due to the fact that these stores, Super Fresh #247 and the commissary at Ft. Ritchie, failed to meet certain minimum qualifications and thus were not qualified offerors under the terms of the RFP. However, the commissary, as part of a federal entity, was given authorization to accept WIC vouchers, but it was not given one of the vendor slots for this service area. One of the offerors in this service area was a pharmacy, Peoples Drug Store #1435. Because previous WIC participant voucher redemption at a pharmacy in this service area showed only an average of seven vouchers redeemed per month at a pharmacy, the WIC evaluation committee determined that a pharmacy was not needed to serve the needs of the participants in this service area. It was, therefore, decided that there would be no award of a contract to a pharmacy or a combination retail food store/pharmacy in this service area. This left twenty offerors to fill the nine vendor quota slots in service area 3.
7. The highest ranked retail food store in this region was Food Lion #1050, located in Smithsburg.¹ The listing shows that the next highest ranked offeror in this service area was Country Market, located in Hagerstown and ranked number 3. The next highest ranked offeror was Old Orchard Supermarket, located in Hagerstown and ranked 7. The listing sets forth the remaining retail food store offerors in Service Area 3 and their ranking for Region 3 based upon the total of their submitted bid prices, following the same procedures as set forth above.
8. In order to choose the offerors for the awards of WIC vendor contracts in Region 3, Service Area 3, the evaluation committee initially considered the rankings of the offerors. Initial

¹ The next highest ranked store in the region was located in another service area and thus is not included in the listing for Service Area 3.

review of offerors showed that the nine highest ranked stores to fill the service area's nine store vendor quota were: Food Lion #1050, County Market, Food Lion #1147, Old Orchard Supermarket, Smithsburg Market, Food Lion #626, Sanders Market, Weis #87, and Weis #61.

9. The evaluation committee awarded a contract to the highest ranked store in this service area, Food Lion #1050, which is located in Smithsburg. It also awarded a contract to the next three highest ranked stores, County Market in Hagerstown in zip code area 21742, ranked number 3, and Food Lion #1147, ranked number 6, and Old Orchard Supermarket, ranked number 7, both in zip code area 21740 in Hagerstown.
10. The next highest ranked store was Smithsburg Market, ranked number 8, which is located in Smithsburg. At the time of this selection, the committee felt that the needs of the 101 participants in the Smithsburg zip code area, 21783 could be met by one vendor. Because a higher ranked store had already been awarded a contract in Smithsburg, it was determined at this time not to award a contract to Smithsburg Market.
11. The evaluation committee awarded a contract to the next highest ranked store, Food Lion #626, ranked number 9 and located in zip code 21740 in Hagerstown. A contract was also awarded to the next highest ranked offeror, Sanders Market in Cascade, in order to serve the 122 WIC participants residing in Cascade's zip code area, 21719, and any adjacent areas in northeast Washington County.
12. The WIC evaluation committee awarded two more contracts to the next two highest ranked stores, Weis #87 and Weis #61, both ranked tied for number 12 and both located in zip code area 21740. At this point eight of the nine vendor slots for this area were filled. Six of these vendor slots had been filled by stores located in Hagerstown. It was determined based on the 2,093 WIC participants residing in the Hagerstown zip code areas, 21740 and 21742, and the ratio of one vendor per 300 participants, that six vendors in Hagerstown were sufficient

to meet the needs of the WIC participants residing in Hagerstown.

13. The WIC evaluation committee recognized that there were offerors in other areas of the county where significant numbers of participants reside. Accordingly, it decided to award the last vendor quota slot to an offeror in Hancock, Pittman's Market, Inc., ranked number 26 and located in zip code area 21750, to serve the 143 participants residing in that zip code area and any other participants in adjacent zip codes in the western part of Washington County. Thus, WIC considered the locations of the offerors, as set forth in the RFP at §VI.C.5 and chose the store that could serve the participants in the Hancock area. By so doing, WIC was also exercising its options as set forth in §VI.D.7.b. of the RFP to award a contract to a lower ranked store that serves participant need rather than a higher ranked store that is located in an area where the need is already met.
14. A further examination of the vendor ranking listing showed that offerors also existed in Boonsboro in zip code area 21713 and Clearspring in zip code area 21722, where significant numbers of WIC participants live. The WIC evaluation committee decided on the basis of participant hardship to award contracts to Boonsboro Produce Market in the Boonsboro zip code area and Valley Market in the Clearspring zip code area to serve the needs of WIC participants in their respective areas of the county. In summation for Region 3, Service Area 3, the WIC evaluation committee awarded a total of twelve vendor contracts -- nine to fill the vendor quota, two based on participant hardship, and one to a commissary.
15. Subsequent to the award of WIC vendor contracts in this service area, the local WIC agency requested that certain stores be added as WIC vendors in this service area to serve WIC participants whose needs could not be met by the vendors already selected. After evaluating the circumstances relating to each request, contracts were awarded on the basis of

participant hardship to several stores in this service area. The WIC Program awarded a vendor contract to Smithsburg Market in Smithsburg in order to serve participants who would, without the award of a contract to Smithsburg Market be forced to walk along a busy highway, which does not have a sidewalk, in order to reach a vendor.

In response to a further request from the local WIC agency, a contract was also awarded to Martin's Food Market #33, located in Hagerstown in zip code area 21740, in order to serve WIC participants living in subsidized housing on Marnor Drive and Frederick Manor Apartments, who would have to cross two busy highways without sidewalks to reach a WIC vendor.

16. As noted in Finding of Fact No. 4 above, Appellant asserts that certain of its competitors who were ranked higher in Region 3, Service Area 3 on the basis of price should have received lower rankings based on who had the true highest shelf price for certain WIC foods notwithstanding the prices set forth on their bid price forms submitted with their proposals.
17. The Appellant submitted documentary evidence which the WIC Program did not rebut showing wide variation in the prices of certain of these competitors before and after the closing date for receipt of proposals (June 8, 1993). The RFP required the vendors to maintain firm prices for 120 days after submitting proposals ("proposals... are irrevocable for 120 days following the submission deadline..."). Several of the prices of higher ranked competitors of Appellant's, Weis #61 and Weis #87, were increased prior to the expiration of 120 days as measured from June 8, 1993, the closing date for receipt of proposals. Compare Board Ex. 7, tab 47, Board Ex. 1, Tab 31. Even Appellant with respect to one item slightly increased its prices. We find that the prices as increased during the 120 day period reflect the actual prices for the highest shelf price item at the time Weis #61 and Weis #87 submitted their bids. Had the true prices of the offerors been known, to include the pricing of eggs as discussed in Section C below,

Appellant would have been ranked high enough (at least higher by two stores than it was) to have been awarded a contract for Martin's 58 and 76 in the Hagerstown area in Service Area 3 of Region 3 pursuant to uniform application of price and all other RFP selection criteria.

18. The WIC Program due to budget constraints lacked personnel and resources to check the prices of stores in Service Area 3 of Region 3.

B. Martin's #36, Westminster

19. Appellant's Martin's #36 Westminster store is located at 140 Village Shopping Center, Westminster, Maryland 21157. For the purposes of this WIC vendor procurement, Martin's #36 was located in Region 2, Service Area 14. Service Area 14 comprised all of Carroll County. This service area at the time of the issuance of the RFP consisted of 1,279 WIC participants. It was determined, using the 1 vendor to 300 participants ratio that the vendor quota for this service area was four WIC vendors.
20. For Service Area 14 of Region 2, twelve offerors submitted proposals. These twelve offerors were evaluated according to the procedure set forth in the RFP. The results appear below as taken from Agency Report Exhibit 12.

REGION 2

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1994 VENDOR AUTHORIZATION BY REGIONS
LISTING OF VENDORS BY REGION AND PRICE RANK
Created by: S. Parsons

COUNTY	NAME	ADDRESS	CITY	PRICE	ZIP	CONE	RANKING	SELECTED	REJECT CODE
* SERVICE AREA 14									
06	WEIS B138 *	720 HANOVER PIKE	HANSTEAD		21074	0			1
13	WEIS B110 *	1001 TWIN ARCH RD.	MT. AIRY	25.89	21771	3	X		
06	WESTMINSTER COOPERATIVE INC	ROUTE 140 & ENGLAR RD.	WESTMINSTER	25.89	21157	8			5
06	WEIS B111 *	630 BALTIMORE BLVD	WESTMINSTER	26.05	21157	8	X		
06	MARTIN'S FOOD MARKET B36	140 VILLAGE SHOPPING CTR	WESTMINSTER	27.50	21157	15			3
06	MARTIN'S FOOD MARKET B67	6300 GEORGETOWN EDWARD ELLENBOROUGH		27.50	21784	15	X		
06	GIANT B209 *	405 N. CENTER ST.	WESTMINSTER	27.71	21157	16			3
06	SUPER FRESH B023	ROUTE 825	CUMBERBURG	27.88	21284	19			3
06	SUPER FRESH B012	400 ENGLAR CENTER	WESTMINSTER	28.03	21157	20			5
06	TANEYTONN SUPERMARKET	520 E BALTIMORE ST	TANEYTONN	28.12	21797	21	X		
06	MANCHESTER SUPER MARKET	2306 HANOVER PIKE	HANSTEAD	28.76	21074	25			6
06	SAFEWAY B104	400 RIDGEVILLE ROAD	MT AIRY	30.91	21771	46			6

21. This listing states the code for the county where the offeror is located, the name of the offeror, its street address, its city, its total bid price as listed on its bid price form, its zip code, its ranking in Region 2, whether it was selected to receive a contract award as indicated by an "x" in the "Selected" column if it was selected, and its rejection code if it was denied a contract award. The number in the "Ranking" column indicates the offeror store's ranking for Region 2 in one of two ranking categories: 1) pharmacies or 2) retail food stores and combination retail food store/pharmacies. The store with the lowest bid price in each category was assigned the ranking of 1; the store with the second lowest priced bid was ranked 2 and so on until all the stores in a region were ranked. A combination retail food store/pharmacy was indicated on the listing of vendors by an asterisk after the name of the store.

22. Referring to the above it is ascertained that the first store listed, Weis #139, was given a ranking of "0" due to the fact that this store failed to meet certain minimum qualifications and thus was not a qualified offeror under the terms of the RFP. The vendor quota of four stores would have to be filed by the remaining eleven offerors. The listing shows that Weis #119, located in Mt. Airy and ranked number 3 in Region 2, was the highest ranked store in this service area. The two highest ranked stores were located in another service area of Region 2 and were thus not included in the listing for Service Area 14. The next highest ranked store in this service area was Westminster Cooperative, Inc., which was ranked number 6. The next highest ranked store was Weis #111, located in Westminster, which was ranked number 8 in Region 2. The next highest ranked store was Martin's Food Market #36, located in Westminster and ranked tied for 15 in the region. This store was tied for 15 with Martin's Food Market #67, which is located in Eldersburg.

The listing sets forth the remaining retail food store

- offerors in Service Area 14 and their rankings for Region 2 based upon the total of their submitted bid prices.
23. In order to choose the offerors for the awards of WIC vendor contracts, the WIC evaluation committee initially looked at the rankings of the offerors in Region 2, Service Area 14 as set forth above. The initial phase of vendor selection, based on vendor ranking, showed that the four highest ranked stores were: Weis #119, Westminster Cooperative, Inc., Weis #111, and either Martin's Food Market #36 or Martin's Food Market #67, based on how the tie was broken between the two Martin's stores.
 24. Based on the 300 to 1 ratio of participants to stores the evaluation committee determined that it could only fill the vendor quota with the four top ranked stores if the needs of WIC participants in the entire service area would be met. The evaluation committee examined the stores as they appeared on the ranking listing. An award was determined to go to the highest ranked store in the service area, which was Weis #119, ranked number 3 and located in Mt. Airy, which could serve participants in the southwestern part of the county. The only other offeror in Mt. Airy was Safeway #104, which was ranked number 46.
 25. The next ranked store was Westminster Cooperative, Inc. The evaluation committee then looked at the vendor ranking to ascertain what other offerors are located in Westminster. The next highest ranked offeror was Weis #111, a combination retail food store/pharmacy. Because the WIC evaluation committee had no information that a pharmacy was not needed in the Westminster area, it decided to award a contract in Westminster to a combination retail food store/pharmacy, in order to ensure that specialized formulas would be available to WIC participants. Although pharmacy services were already provided in this service area in Mount Airy, the location of Mount Airy in the extreme southwestern part of Carroll County (the service area) did not adequately provide pharmacy coverage for the rest of

4the service area. Because Westminster is located in the central portion of the service area, the evaluation committee decided that based on location of the offerors and participants throughout the service area, a Westminster store would offer the best location of a pharmacy to serve any pharmacy need for the service area as a whole. Thus, a contract award was not made to Westminster Cooperative, Inc., the next highest ranked store on the list, but rather to the highest ranked combination retail food store/pharmacy, Weis #111. Because the number of participants in the Westminster area, zip code area 21157, is 482, the evaluation committee determined, pursuant to the ratio of 1 vendor per 300 participants as set forth in the RFP, that only one WIC vendor was needed in Westminster. Thus, only one contract was awarded in the Westminster zip code area.

26. The next store on the ranking list not located in Westminster was Martin's Food Market #67 in Eldersburg, which was tied for 15th. The WIC Program determined that a WIC vendor was needed to serve participants in the southeastern part of the country. The only other offeror located in the Eldersburg area was Super Fresh #823, which was ranked number 19. The award of a contract was made to the higher ranked Eldersburg store, Martin's Food Market #67.
27. The next highest ranked store in the service area which was not located in Mt. Airy, Westminster, or Eldersburg, locations where stores were already awarded contracts, was Taneytown Superthrift, located in Taneytown and ranked number 21. The evaluation committee determined that a WIC vendor was needed to serve the participants in the Taneytown zip code area, 21787, and participants in adjacent zip code areas in the northwestern part of Carroll County and thus awarded a contract to this store, which filled the last vendor slot for this service area.
28. Subsequent to the award of contracts, the local WIC agency in Carroll County requested on the basis of participant hardship, that an additional contract be awarded to a store to better

- serve WIC participants residing in the northeastern part of the county, which includes the Manchester, Hampstead, Millers, and Lineboro zip codes. The WIC Program agreed with this request and awarded a contract to Manchester Super Thrift in Hampstead.
29. The local agency also requested that an additional store in Westminster be awarded a contract due to the fact that many participants would have to walk along and across a busy dual lane highway to get to Weis #111. The WIC Program agreed with the local agency's assessment. Because Westminster Cooperative, Inc., was the highest ranked store in Westminster and is located on the other side of the dual lane highway from Weis #111, it was awarded a contract on the basis of participant hardship. Therefore Region 2, Service Area 14 has a total of six WIC vendors.
30. Appellant makes the identical assertions concerning the faulty pricing of its competitors in the Westminster area as set forth in Findings of Fact Nos. 16 and 17 above for the Hagerstown area. Documentary evidence to this effect submitted by Appellant has not been rebutted by the WIC Program.
31. The Board also finds that the WIC Program lacked personnel and resources to check prices of stores in Region 2, Service Area 14. The Board likewise finds that had the true prices of the offerors been known, to include the pricing of eggs as discussed in Section C below, the Appellant's Martin's #36 would have been ranked high enough pursuant to the RFP criteria to have been awarded a WIC vendor contract pursuant to uniform application of all the RFP selection criteria.

C. Low Cholesterol Eggs

32. Offerors were to submit the price of their highest shelf price product for the various WIC foods as their price offer as of the date of the offer (price proposal). Appellant contacted the WIC Program prior to submitting its proposal and was

advised that low cholesterol eggs⁵ must be included as the highest shelf price item if stocked on the date set forth in the price proposal. Such contact was oral.

33. Pursuant to this advise Appellant submitted a price for the low cholesterol eggs that was \$1.01 higher than the price for its next highest price egg (non low cholesterol). Other offerors (in the service areas involved in this appeal) submitted a price for a non low cholesterol egg notwithstanding that they had on their shelves the higher priced low cholesterol egg on the date of their price offer. Notwithstanding the advise of the WIC Program to Appellant, no addenda giving similar advise was sent to prospective offerors. However, reducing Appellant's price by \$1.01 would not result in a change in ranking in the Westminster or Hagerstown area. Therefore, Appellant would not solely for this reason have been awarded a contract had it not submitted a price based on its low cholesterol egg price. (Compare prices as set forth in the charts at pp. 6 and 11 supra). However, the \$1.01 price factor when combined with the undercharging described above in Findings of Fact 16, 17, 18, 30 and 31 does result in a change in ranking pursuant to which Appellant would be awarded a contract.

Decision

The RFP on page 17 states that "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)". Appellant asserts that the WIC Program improperly applied the 300 to 1 ratio of WIC participants to WIC vendors in determining how many WIC

⁵ The RFP allowed "Medium or large eggs" but did not allow "Eggs substitutes; extra large eggs." Appellant was concerned that the WIC Program might consider low cholesterol eggs as an egg substitute. The record reflects, however, that offerors should have reasonably read the RFP as allowing and therefore requiring the pricing of low cholesterol eggs if such eggs represented an offerors highest shelf price egg. The WIC Program also orally advised Appellant that low cholesterol eggs could only be used until October 1, 1993.

vendor contracts to award. Appellant argues that the WIC Program should have rounded up rather than rounded down when focusing on the Hagerstown area WIC population such that eight (8) rather than six (6) vendors should have been awarded contracts in the Hagerstown area based on WIC participant population. If eight stores should have been awarded contracts, Appellant's Martin's 58 and 76 would have been awarded contracts. The WIC Program determined not to round up. Therefore, based on the finding that there are 2,093 WIC participant residents in zip code areas numbered 21740 and 21742 in the Hagerstown vicinity, the rounding down to 1800 to produce six (6) vendors^f results in a ratio of 348 to 1 (six (6) divided into 2093 equals 348). Rounding up the 2093 to 2100 on the other hand would result in award to seven (7) stores because seven (7) times 300 equals 2100 and achieves the precise 300 to 1 ratio.

In like manner based on a finding that there are an additional 62 persons to be included in a proper application of the zip code criteria which would incorporate substations, eight stores would be awarded contracts. Adding 62 persons results in a total WIC participation population in the Hagerstown area of 2,155. Application of seven (7) stores to 2,155 derives a ratio of 307 to 1. Rounding up to 2,400 would provide for eight (8) stores and achieves a ratio of 300 to 1.

As noted the RFP provides that "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)." There is no direction in the RFP concerning rounding up or rounding down. The question then becomes whether the internal decision by the WIC Program to only round down was arbitrary and capricious relative to the application of rational selection criteria under the RFP. The 300 to 1 ratio only provides a mathematically precise 300 participants to one store where there are exactly 300 participants in a service area. Rounding down is consistent with the agency's overa!!

^f Six (6) times 300 equals 1800 which produces a 300 to 1 ratio if six (6) stores are awarded a WIC vendor contract.

goal in this procurement to reduce the number of WIC vendors statewide due to budget constraints.

This Board may not substitute its judgment for that of the agency. We decline to find that the decision by the WIC Program to only round down made the selection process arbitrary and capricious. The decision to only round down is not inherently unreasonable. Compare Fujitsu Business Communications Systems, MSBCA 1729, September 17, 1993 at pp. 32-33. We deny Appellant's appeal on this ground.

Appellant contends that in order to have all offerors competing on a level playing field its price for eggs should be reduced by \$1.01 because it was orally advised by the WIC Program that the RFP required offerors to submit as their highest shelf price the price of low cholesterol eggs if the offeror stocked low cholesterol eggs. Citing Capitol Dental Supply, Inc., MSBCA 1351, 1355, 2 MSBCA ¶161(1987) and J&L Industries, Inc., MSBCA 1230, 1 MSBCA ¶98(1985) and COMAR 21.05.03.02E, Appellant contends it was entitled to rely on such advise. DHMH on the other hand, citing several federal cases including Appeal of Sol Mart Janitorial Services, 87-2 BCA 19713 (1987) and Protest of Rocky Mountain Trading Co. Systems Division, GSBGA No. 10844-P-R, 91-1 BCA 23589(1991), contends that Appellant relied on such advise at its own risk, no addenda need have been issued and that the Board should accept the interpretation of other offerors that low cholesterol eggs were not allowed by the RFP. The Board finds that low cholesterol eggs were allowed by the RFP and notwithstanding that such eggs would not be allowed at the time of contract performance in October of 1993 were required to be priced and included if the low cholesterol egg was the highest shelf priced item at the time of submission of offers in June of 1993. Accordingly, to maintain a level playing field Appellant's price should be reduced by \$1.01.

We, therefore, sustain Appellant's appeal on the ground that had the WIC Program had the resources and personnel to check offerors prices in the Hagerstown and Westminster areas, Appellant's Martin's 36, 58 and 76 would have received a higher score based on

price than offerors located in these areas who were awarded WIC vendors actually received. Based upon uniform application of the revised prices of the offerors to include a reduction of Appellant's eggs price of \$1.01 and all other RFP selection criteria Appellant's stores would have been awarded contracts. See Findings of Fact Nos. 17, 18, 30, 31, 32 and 33.

Therefore, it is Ordered this 23rd day of March, 1994 that Appellant's appeal is sustained for the reasons set forth above.

Dated:

March 23, 1994

Robert B. Harrison III

Robert B. Harrison III
Chairman

I concur:

Sheldon H. Press

Sheldon H. Press
Board Member

Neal E. Malone

Neal E. Malone
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 1764, appeal of GIANT FOOD STORES, INC. T/A MARTIN'S FOOD MARKETS Nos. 36, 58 & 76 under DHMH Refusal to Award Contract Under WIC Vendor RFP.

Dated: *March 24, 1944*

Mary L. Priscilla
Mary L. Priscilla
Recorder