

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of HOMETOWN MARKET)	
)	Docket No.
Under DHMH Solicitation No.)	MSBCA 1601
DHMH PS 91-788)	

October 22, 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.

APPEARANCE FOR APPELLANT: Thomas D. Browning, Owner
Oakland, MD

APPEARANCE FOR RESPONDENT: Sharon Krevor-Weisbaum
Assistant Attorney
General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTIES: None
Accident IGA
Brownings Foodland, Inc.
Buckels Market
Grantsville Food Store
S&S Market
Matthews Food Store
Mountain Lake Park IGA

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. Appellant has not submitted comments to the DHMH Agency Report nor requested a hearing.

Findings of Fact

1. On April 19, 1991 services solicitation DHMH PS 91-788 appeared in the Maryland Register. The notice advised prospective vendors the nature of the procurement, the date, time and place for pre-bid conference, and date, time and place bids were due. Bids

(applications) were due at the WIC office, 201 West Preston Street, First Floor, Baltimore, MD by 10:00 a.m. on May 13, 1991.

2. Appellant on May 10, 1991, mailed his application by certified mail, in the Oakland, Maryland post office.

3. On May 13, 1991, JoAnn M. McGowen of WIC made the following contacts with the DHMH mailroom pertaining to mail sorted for the WIC Program:

9:30 a.m. - Telephone - no mail

9:45 a.m. - Telephone call - no mail

10:00 a.m. - Personal visit - no mail¹

4. Appellant's application was signed for by DHMH mailroom personnel on May 13, 1991. On May 14, 1991, at approximately 2:30 p.m. WIC Program personnel made the daily mail pickup, and at this time, Appellant's application was present and was stamped received.

5. WIC by certified mail on July 11, 1991, notified Appellant his application was received late and Appellant filed a timely protest. On September 4, 1991, the Procurement Officer sent a final decision by certified mail denying the protest on the grounds that the application was received after the required due date and time. A timely appeal was filed with this Board on September 9, 1991, and Appellant in its appeal letter to the Board states the following:

"The application was to be in the Baltimore office by Monday, May 13, 1991, 10:00 a.m. I mailed my application on Friday, May 10, 1991 in the Oakland, Maryland post office by certified mail. When I questioned Mr. Eugene Salmons, our Oakland postmaster; he said there is a one day service delivery from here to Baltimore. Therefore I feel that the application

¹ By 10:00 a.m. on Monday, May 13, 1991, WIC had received 483 timely applications.

should have been received on time."

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."

DHMH in this solicitation contends that applications were to be received per the following as set forth in the solicitation:

"Bids due: May 13, 1991, 10 a.m., 201 W. Preston St., Rm. 104, Balto., Md. 21201."

DHMH concedes the Appellant's application was received in the DHMH mailroom on May 13, 1991. The Board finds that the DHMH mailroom was an approved location for receipt of mailed applications in addition to the location (Rm. 104 on 1st floor) noted in the solicitation.

Pursuant to DHMH practice an application mailed and not hand delivered to the first floor of 201 West Preston Street would be initially routed to the mailroom. The mailroom averages receipt of several thousand pieces of mail a day. DHMH mailroom personnel were not advised to use any special procedure to ensure timely sorting of WIC applications. The use of the mailroom, with a lack

of emphasis to State personnel handling incoming mail, as a receptacle for the WIC program applications could cause confusion. Even though there is no evidence affirmatively establishing the time Appellant's application was received on May 13, this Board finds the DHMH handling procedures contributed to the determination by DHMH that the application was considered to be received late in this particular appeal.

We recognize this Board has consistently held that the burden is upon the Appellant to demonstrate with reasonable certainty that the lateness was caused by State personnel directing the procurement activity or their employees. Appeal of Patco Distributors, Inc., MSBCA 1270, 2 MICPEL ¶ 128 (1986). It was a DHMH decision to handle receipt of mailed applications in the outlined manner and changed the designated place within DHMH offices for initial receipt of mailed applications in variance to the solicitation notice to prospective applicants.

The treatment of mailed application receipt, this Board finds differed from hand delivered applications as noted in the solicitation 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 application 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 the

Appellant's application was among the unsorted mail in the mailroom prior to 10:00 a.m. on May 13, 1991. Under the aforementioned facts we find the application should be treated as timely received within the exception set forth in COMAR 21.05.02.10(B).

Therefore, the appeal is sustained.

