

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of KLEIN'S OF ABERDEEN )  
 )  
 ) Docket No. MSBCA 1773  
Under DHMH Refusal to Award )  
Contract Under WIC Vendor RFP )  
 )

February 17, 1994

Bid Protest - Timeliness - By waiting until after the date for receipt of proposals to challenge criteria set forth in an RFP, Appellant waives its right to protest such criteria and have the Board consider the challenge. COMAR 21.10.02.03A requires protests based on alleged improprieties in a solicitation that are apparent before the closing date for receipt of proposals to be filed prior to the closing date for receipt of proposals.

Competitive Negotiation - Application of Criteria - The Board will not substitute its judgment for that of the agency in determining whether criteria set forth in an RFP have been properly applied.

APPEARANCE FOR APPELLANT:

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APPEARANCES FOR RESPONDENT:

Helen E. Bowlus  
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Matthew A. Lawrence  
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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that it was not awarded a WIC vendor contract.

Findings of Fact

1. On May 4, 1993, the Department of Health and Mental Hygiene (DHMH)<sup>1</sup> services solicitation number DHMH-DCT-93-1055 appeared in the Maryland Register seeking available vendors to become authorized to handle WIC vouchers to provide food for eligible

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<sup>1</sup>"DHMH" and "WIC Program" are sometimes used herein interchangeably.

women, infants and children (WIC participants). Vendors were to be selected on the basis of various criteria, with price being paramount, from around the State organized into regions and service areas.

2. On May 4, 1993, an application package was sent to the Appellant. The application package consisted of a cover letter, the Request for Proposal ("RFP"), the Contract Application Packet and a form contract. Responses (proposals) were due on June 8, 1993.
3. 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. For 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.<sup>2</sup> This vendor quota could be increased if the WIC Program determined at any time that participant hardship<sup>3</sup> necessitated the award of more contracts in any given service area.
4. 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 Request for Proposal (RFP). Qualified offerors were then ranked in each region according to the total of their highest shelf prices for various required foods as set forth in the RFP.

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 total bid price was ranked as number 1; the offeror with the next lowest total bid price was ranked as number 2, and so on until all qualified offerors were ranked. Adjustments in offeror ranking were made pursuant to the RFP if an offerer had 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.

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<sup>2</sup>The maximum number of vendors needed to serve WIC participants, for each service area at a ratio of one store per 300 active participants.

<sup>3</sup>Hardship is defined in the solicitation.

Among the options available to the WIC Program is a process to prevent vendor "clustering."<sup>4</sup> If clustered 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.

5. This appeal concerns Region 2, Service Area 12, located in Harford County. The Appellant met all of the minimum qualifications and requirements set forth in the RFP. Mars Store #14 (total price: \$25.77), received the best ranking in the service area, followed by Michael's Food Rite on Churchville Road (total price: \$26.50), which was then followed by the Appellant (total price: \$27.45). Ranked after the Appellant was, inter alia, Michael's Food Rite at 135 North Parke Street (total price: \$28.62).
6. By letter from DHMH dated August 18, 1993, Appellant was advised that it was not awarded a WIC vendor contract. The reason given for this action was to prevent clustering of stores.

Appellant's store is located at 1018 Beards Hill Road, across the street from Mars #14, located at 949 Beards Hill Road, one of the stores originally awarded a contract. Mars #14 was ranked higher than Appellant. DHMH believed that awarding a contract to Appellant would form a cluster. Therefore, the

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<sup>4</sup>A cluster occurs when the price/sanction ranking process would result in the award of contracts to two or more stores located less than five miles apart.

WIC Program awarded an additional contract to Michael's Food Rite at 135 North Parke Street, the next highest ranked offeror in the Aberdeen area after Appellant located 1.5 miles away from Mars #14 and Appellant.

7. Appellant filed a protest by letter dated August 26, 1993 and by letter dated October 26, 1993, the DHMH Procurement Officer denied the protest.
8. On November 3, 1993, the Appellant appealed the denial of its protest to this Board on the following grounds:
  - A. DHMH improperly awarded an additional WIC vendor contract to Michael's Food Rite, a higher priced, lower ranked store, because it is within 1.5 miles of Mars #14 thereby forming a cluster;
  - B. It was unfair of the WIC Program to permit Mars #14 to submit a price proposal when the store had not yet opened;
  - C. Mars #14 misrepresented its price for American cheese because it priced a one pound package which it does not have in stock. Without this misrepresentation, Appellant's price submission for this product would have been lower than Mars' #14 submission;
  - D. The RFP's requirement that WIC offerors submit the "highest shelf price" on each WIC commodity penalizes offerors who offer the highest selection and quality;
  - E. The WIC Program should have limited the brands of WIC commodities WIC participants could purchase from WIC vendors; and
  - F. Due to the denial of a WIC vendor contract, Appellant is losing \$10,000.00 a week in sales. Therefore, it is an "aggrieved" party with standing to protest its contract denial based on resulting hardship to WIC participants.

#### Decision

At the commencement of the hearing DHMH moved to dismiss grounds of appeal involving alleged errors discovered in the course

of post appeal document discovery in the prices offered by the Michael's Food Rite, North Parke Street and Churchville Road stores. The basis of the motion was that these pricing error allegations and the assertion that offerors' standings would be affected thereby were raised for the first time on appeal and never considered by the DHMH Procurement Officer and therefore, this Board lacks jurisdiction to consider these allegations. The Board deferred ruling on the motion pending the hearing on the merits. We agree that this Board does not have jurisdiction over issues that were not the subject of an agency final decision on a bid protest or reasonably arise out of an item that was the subject of an agency final decision on a bid protest. See § 15-211, Division II, State Finance and Procurement Article. The alleged errors in the two Michael's store prices were raised for the first time on appeal as a result of document discovery and have not been the subject of an agency final decision. Accordingly, the DHMH motion is granted. We turn now to the grounds of appeal (issues) over which the Board has jurisdiction.

A. Cluster issue

Appellant contends that the WIC Program improperly awarded an additional vendor contract to Michael's Food Rite, North Parke Street, instead of Appellant's store, because this Michael's Food Rite is a higher priced, lower ranked store than Appellant, and because it is clustered within 1.5 miles of Mars #14, a selected vendor.

When the initial awards for Region 2, Service Area 12, were made, the WIC Program considered awards to military commissaries to fill vendor slots allotted for the service area. However, because commissaries are not accessible to all WIC participants the WIC Program later determined they should not occupy vendor slots. Thus, the WIC Program decided to award a vendor contract to a retail store wherever a vendor slot had originally been allotted to a commissary.

Appellant's store is located at 1018 Beards Hill Road, across the street from Mars #14, located at 949 Beards Hill Road, one of

the stores originally awarded a contract. Rather than award an additional contract to Appellant, the WIC Program awarded an additional contract to the Michael's Food Rite which was the next highest ranked offeror in Aberdeen after Appellant. This Michael's Food Rite is located 1.5 miles away from Mars #14 on 135 North Parke Street.

The RFP defines "clustering" as "2 or more stores located less than five miles apart." Because Michael's Food Rite on North Parke Street is located within 5 miles of Mars #14, the award of a contract to Michael's Food Rite did result in a cluster. Award to Appellant whose store is across the street from Mars #14 would also result in a cluster.

However, the RFP also provides that the WIC Program may select lower ranked offerors in order to better serve under served areas within the service area and the RFP evaluation criteria provide that the WIC Program may consider the location of a store when awarding vendor contracts. No protest of such criteria was filed prior to the date for receipt of proposals and offerors are, therefore, bound by such criteria. See Comar 21.10.02.03; Transit Casualty Company, MSBCA 1260, 2 MICPEL ¶119(1985) at pp. 37-38. The WIC Program had the discretion to break-up a cluster by forming an additional cluster which better met the needs of the areas' WIC participants. As noted by this Board in Camellia Food Stores, Inc./Eastern Shore markets, MSBCA 1754 (December 16, 1993), at p. 9 (presently pending appeal in the Circuit Court for Wicomico County) "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." Herein, unlike Camellia Food Stores where there were articulated reasons for concluding a reasonable basis existed to replace one cluster with another, there is no specific rationale given other than the assumption as expressed in the testimony of the Assistant Director of the WIC Program that the best interest of the WIC Program and WIC participants would be served by having two stores in a service area one and one-half miles apart rather than across the street

from one another. However, such assumption is not rebutted. There is no demographic or other evidence in the record that WIC participants encounter hardship as a result of the decision to award to the Michael's Food Rite store on North Parke Street located 1.5 miles from Mars #14 and Appellant. We recognize that an offeror's price offer may be meaningless particularly in urban areas because the application by DHMH of the cluster rule may result in a higher priced applicant displacing it. Nevertheless, we will not sustain the appeal. To sustain the appeal would require the Board to impermissibly substitute its judgment for that of the WIC Program which has the responsibility to run the program and will have to live with the results. Compare AGS Genasys Corporation, MSBCA 1325, 2 MICPEL ¶158(1987) at p. 16.

B. Acceptability of Mars #14 proposal issue

In its Notice of Appeal, Appellant contends that it was unfair for the WIC Program to permit Mars #14 to submit a proposal for this procurement although the store had not yet opened at the time of its submission.

DHMH argues that the Appellant's appeal in this regard is untimely pursuant to 21.10.02.03A requiring protests based on improprieties in a solicitation that are apparent to be filed before the closing date for receipt of proposals. According to DHMH, if Appellant wished to object to the fact that the RFP permits the WIC Program to consider the price proposals of unopened stores, Appellant should have raised such a protest before the closing date for proposals, June 8, 1993. Thus, DHMH asserts that because Appellant's protest was filed after this date, its appeal, to the extent based on the grounds that the RFP should not permit price proposals from unopened stores to be considered, must be dismissed.

Appellant argues, however, that the RFP requires vendors to be "conducting business" at fixed locations and that an "offeror must be a retail food store ... operating at a fixed location within the State of Maryland...." RFP at p. 4, paragraph I and p. 12, paragraph IIIB. Appellant submits Mars #14 did not meet these

criteria.

Mars #14 dated its price proposal May 18, 1993, as of which date the store was not opened to the public. The "Bid Price" form recites that the signature affirms that the prices "are reflective of the offeror's stock and the prices on the date listed below." Appellant argues that by definition, there cannot be any meaningful "prices" when nothing is available for sale to the public and that likewise, in the context of not being operational, the concept of "stock" is eviscerated.

However, we find that the RFP does not require a responding offeror to be open for business at the time it submits its price proposal. We find that reading the sections of the RFP that bear on this issue together it is only required that "[t]he store must be operational and open for business at the time of the visit from the WIC staff." RFP at p 12, paragraph IIID. Mars #14 was operational at the time of the inspections by WIC staff. At the time of these inspections on June 30, 1993, Mars #14 was found to meet the RFP's minimum stock requirements, and it was therefore found to be a qualified offeror. As a qualified offeror, Mars #14 was properly evaluated against other qualified offerors in this service area and was subsequently awarded a WIC vendor contract in accordance with the terms of the RFP.

Appellant further submits that it was unfair for the WIC Program to consider the Mars #14's proposal because Appellant was unable to check the prices submitted by Mars #14 until Mars #14 was open for business, although Mars #14 was able to check the prices submitted by Appellant's store.

It was the responsibility of the WIC Program at DHMH to check prices submitted by offerors and not the Appellant's responsibility to do so. Accordingly, we reject Appellant's argument that it was unfair to it that it could not check Mars #14 prices until it was open. Appellant could not have had access to the Mars #14 prices set forth in its proposal nor indeed even been advised of the identity of the offerors until after contract award. See COMAR 21.05.03.02G. Appellant would not have knowledge of the date that



Mars #14 submitted its proposal setting forth its highest shelf prices as of a date certain until it could gain access to the Mars #14 proposal. Therefore, it could not have been prejudiced as alleged.

C. Price of cheese issue

Appellant has asserted that Mars #14 set forth an erroneous price for American cheese in its price proposal because Mars #14 submitted a price for a one pound package of cheese which Appellant claims they currently do not carry in stock. Appellant contends that Mars #14 should have inserted in its price proposal the price for smaller quantities of American cheese which added together equal one pound, which would have made the Mars #14 bid higher. If the Mars #14 price offer was higher than Appellant's, Appellant would then be ranked higher than Mars #14, and the Mars #14 store would have been eliminated rather than Appellant's store pursuant to the DHMH application of the cluster rule.

The price proposal form submitted by all responding offerors contains a signature line with the following language, "[t]he signature below affirms that the prices entered are reflective of the offeror's stock and the prices on the date listed below." There was no protest of this limitation filed by any offeror. Therefore, the only price and package size of American cheese that is relevant to this inquiry is the price and package size of American cheese for Mars #14 on the date appearing on its price proposal. Mars #14 submitted a price proposal form dated May 18, 1993, listing a price of \$2.89 for one pound of American cheese.

After Mars #14 had opened to the public on June 16, 1993, the Appellant on August 24, 1993, shopped the bid list at the Mars #14 store and determined on that date that one pound of American cheese was neither carried, stocked nor displayed. At that time, Mars #14 was selling 8 ounce (not 16 oz.) American cheese for \$2.89. Accordingly, a pound (16 oz.) would have cost twice this amount since two 8 ounce packages would need to be purchased. compare Appellant's Ex. 7 with Appellant's Ex. 4.

Other higher prices on August 24, 1993 at Mars #14, in excess

of 10% higher than the Mars' bid prices, include orange juice for \$1.49 rather than \$1.09 bid and lima beans for \$.89 instead of \$.59 as bid. On December 2 and 3, 1993, Mars #14 was marketing one pound American cheese for \$3.79, a \$.90 or 31% increase over its bid price. See Appellant's Ex's. 8 & 9. The RFP mandates that proposals are firm for 120 days after the due date for receipt of proposals or of best and final offers, if any. RFP p.7, paragraph IF. Thereafter, the WIC vendor contract requires that a vendor, inter alia, not raise the price of any WIC items by more than 10% above the average price charged by other WIC vendors in the area.

However, the record does not reveal whether the post award price increases by Mars #14, pointed out by Appellant, exceeded the 10% cap alluded to above or whether the apparent violation of the requirement that prices remain firm for 120 days alluded to above occurred on days other than August 24, 1993. The record also reflects that on or about October 20, 1993 one pound of American cheese was available at Mars #14 for \$2.89. Based on the record before us we are unable to find that Mars' #14 intended that its prices were to be higher when opened for business than as stated in its offer as submitted to DHMH. We are also unable to find from the record that any Mars #14 price increases after it submitted its offer should result in reversing the ranking of Mars #14 over Appellant. Appellant has failed to carry the burden on this issue.

D. The RFP's requirement that offerors submit in their price proposals the highest shelf price on each WIC item issue

Appellant has argued that requiring offerors to submit the highest shelf price on each WIC item in their price proposals penalized offerors with the highest quality and selection of items. Appellant's protest to the extent based on these grounds is untimely.

By submitting its proposal, Appellant explicitly agreed to the terms and conditions of the RFP. In the Contract Application Packet, incorporated by reference into the RFP the WIC Program instructed all offerors in filling out the bid price form to "use the price for the WIC approved brand in your store with the highest

shelf price." Any alleged impropriety in the RFP's requirement that vendors include the highest shelf price on each WIC item contained on the bid price proposal form should have been apparent to the Applicant before June 8, 1993, the date proposals were due.

From the allegations in its Appeal, it is clear that Appellant was aware of this alleged problem prior to June 8, 1993. For example, Appellant alleges that it raised concerns about the highest shelf price requirement "in conversations with Ms. Delores Rice...." prior to June 8, 1993. However, Appellant admits that it "did not file any further protest in writing prior to the June 8, 1993 [closing] date, ... because it was not clear at that time that the RFP guidelines would work to create any hardship for my client." Appellant contends that its phone calls to personnel of the WIC Program in which Appellant voiced its concerns over the brand selection issue are a sufficient memorialization of a protest and that no further action was necessary.

After receiving and reviewing the RFP and the Contract Application materials, Appellant believed that the types and brands of authorized WIC foods contained in the Contract Application Packet might adversely affect the evaluation of its proposal. If an offeror receives a solicitation, and the offeror believes the solicitation contains an alleged impropriety, COMAR requires that the offeror must file a written protest prior to the closing date for the receipt of proposals, or the opportunity to protest lapses. See COMAR 21.10.02.02B and 21.10.02.03A.

Appellant did not file a written protest with the Procurement Officer, as required by COMAR, until August 26, 1993 more than two months after the closing date for the receipt of proposals, June 8, 1993. Therefore, Appellant's appeal, to the extent based on an alleged impropriety concerning the requirement that offerors submit on their bid price sheets the highest shelf price for the specified WIC commodities, must be dismissed. See Appeal of Parker's Thriftways, MSBCA Docket No. 1756 (November 30, 1993), footnote 5, p. 6. Appeal of B&M Supermarkets, MSBCA Docket No. 1758 (November 29, 1993), p.4.

E. Limiting of brands of WIC commodities WIC participants could purchase from WIC vendors issue

Appellant argues that "[p]ermitting WIC clients to purchase from an unlimited number of brands [of a particular WIC commodity] undermines the ability of the WIC Program to control its costs and to assure that its clients are purchasing foods of the highest nutritional value." Appellant also concludes that the existence of this policy entitles Appellant to a contract award. Appellant's contention is untimely and without merit.

First, as noted above, by submitting its proposal, Appellant explicitly agreed to the terms and conditions of the RFP and the Contract Application Packet, incorporated by referenced into the RFP, wherein the authorized types and brands of WIC foods are clearly listed. If the Appellant wanted to protest the authorized types and brands of WIC food contained in the Contract Application Packet, it should have filed a written protest on such grounds with the Procurement Officer before the closing date for the receipt of proposals for this solicitation, June 8, 19883. Because Appellant's protest was filed after the closing date for the receipt of proposals, Appellant's appeal, to the extent based on the authorized types and brands of WIC foods, is untimely and must be dismissed. Second, there is no evidence nor rational set forth in the record which supports Appellant's allegation that WIC Program policy regarding acceptable foods entitles Appellant to a contract award.

F. Appellant's alleged loss of sales does not give it standing to protest the denial of a WIC vendor contract based on the alleged resulting hardship to WIC participants issue

Finally, Appellant argues that an alleged loss of anticipated sales to its store allegedly resulting from the denial of a WIC vendor contract permits Appellant to protest this denial based upon hardship to the WIC participants.

The Appellant argues that an alleged loss of anticipated sales makes it an "aggrieved" party, as defined in COMAR 21.10.02.01B(3). Appellant alleged loss of anticipated sales, however, was not

caused by any hardship suffered by WIC participants but was caused by the WIC Program's decision not to award Appellant a WIC vendor contract.

Appellant explicitly agreed to the terms and conditions of the RFP, including the evaluation criteria. The RFP explicitly defines the various factual circumstances which would constitute participant hardship:

- 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 purposes 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 served by a specific vendor due to religious mandates.

The only evidence of hardship offered by Appellant is its claim that it is allegedly losing \$10,000.00 a week in sales. This allegation does not fit within any of the RFP's definitions of participant hardship. Compare Parker's Thriftways, supra at p. 6. If the Appellant wanted offerors to be able to raise the issue of WIC participant hardship based on the loss of anticipated sales, the Appellant should have filed a written protest with the Procurement Officer seeking amendment of the RFP before the closing date for the receipt of proposals for this solicitation, June 8, 1993. Because Appellant's protest was filed after the closing date for the receipt of proposals, Appellant's appeal, to the extent based on the definitions of participant hardship contained in the RFP, is untimely and must be dismissed.

For the foregoing reasons Appellant's appeal is denied.

Therefore, it is this ~~17<sup>th</sup>~~ day of February, 1994 ORDERED that Appellant's appeal is denied.

Dated:

*February 17, 1994*

*Robert B. Harfison III*  
Robert B. Harfison III  
Chairman

I concur:

*Sheidon H. Press*  
Sheidon 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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1773, appeal of KLEIN'S OF ABERDEEN under DHMH Refusal to Award Contract Under WIC Vendor RFP.

Dated: *February 17, 1994*

*Mary F. Priscilla*  
Mary F. Priscilla  
Recorder

