

type, i.e. distributor, manufacturer, broker, dealer, or factory representative, (2) whether the business is independently owned, (3) the number of employees on payroll in Maryland facilities, and in total, (4) gross sales for the most recently completed fiscal year, (5) whether majority ownership is by a "minority" person or group, and (6) the locations within the State a bidder desires to serve. From this information vendors are placed on a DGS Purchasing Bureau vendors list¹ for the item or class of items it wishes to supply, regionally or Statewide, together with a code designation as to its qualifications as a minority or small business entity. Recertification of each vendor for all of the above purposes is required annually.²

2. Prior to this procurement, Appellant in accordance with the above re-submitted a "Bidder's Application" to the DGS Purchasing Bureau for its annual recertification. This application indicated that: (1) Appellant was a distributor, (2) independently owned, (3) one person was employed, and (4) its gross sales for the most recently completed fiscal year totaled \$893,725.01. Appellant on August 25, 1992, was re-approved and placed on the DGS Purchasing Bureau vendor's list and was qualified as a small business for purposes of Maryland's Small Business Act.³

Subtitle 2, Title 14, State Finance and Procurement Article (SF).

3. On August 14, 1992, Printing and Publication issued a Request for Quotation (RFQ) for the supply of 55,000 crab rulers for the Department of Natural Resources. Sealed bids were due on August 28, 1992. When bids were opened Appellant and Park Sign Company, Inc. (Park) were low bidders, tied at \$385 per thousand.

4. Appellant objected to a tie - breaking drawing and filed a

¹COMAR Regulations 21.11.01.01A(3) states: "A vendor that successfully meets the criteria identified in COMAR 21.01.02.01B(80) shall be designated as a small business and shall be included on the Department of General Services' "Small Business" vendor list."

²Qualification of vendors could be challenged by interested parties.

³Appellant has qualified as a small business for purposes of Maryland's Small Business Act with the Maryland State Police and the Maryland Aviation Administration.

timely protest by letter dated September 22, 1992 claiming entitlement to the 5% small business preference in accordance with COMAR regulations.⁴ Park was not a small business thus application of a 5% small business preference would resolve the tie bid and Appellant's bid would be the most favorable to DGS.

5. The Procurement Officer denied the protest by letter dated October 27, 1992, stating Appellant did not meet the criteria for qualification as a small business manufacturer as defined under COMAR Regulations 21.01.02.01B(80)(f).⁵ The Procurement Officer also stated that if Appellant intended to subcontract the crab rulers, the Printing and Publication's Special Contract Provisions

⁴COMAR 21.05.02.14B(4) provides - If identical favorable bids are received from in-State bidders or from out-of-State bidders, and no rules for implementing a procedure for resolving a tie bid apply, a drawing shall be conducted

⁵COMAR 21.01.02.01B (80) states:

"Small business" means a firm which meets the following criteria:

- (a) It is independently owned and operated;
- (b) It is not a subsidiary of another firm;
- (c) It is not dominant in its field of operation;
- (d) Its wholesale operations did not employ more than 50 persons, and its gross sales did not exceed \$1,000,000 in its most recently completed fiscal year;
- (e) Its retail operations did not employ more than 25 persons, and its gross sales did not exceed \$500,000 in its most recently completed fiscal year;
- (f) Its manufacturing operations did not employ more than 100 persons, and its gross sales did not exceed \$500,000 in its most recently completed fiscal year;
- (g) Its service operations did not employ more than 100 persons, and its gross sales did not exceed \$500,000 in its most recently completed fiscal year; and
- (h) Its construction operations did not employ more than 50 persons, and its gross sales did not exceed \$2,000,000 in its most recently completed fiscal year.

Construction and service are defined elsewhere in COMAR. Wholesale, retail and manufacturing are not defined.

would prohibit application of a 5% preference unless Appellant was subcontracting to another small business manufacturer meeting DGS criteria. Appellant appealed to this Board on November 2, 1992 alleging that it did not claim small business status as a manufacturer but as a "distributors/wholesalers."

6. Appellant does not provide "service" or "construction" as defined by COMAR. Furthermore, it admits it does not manufacture any of the goods it sells to the State, nor does it conduct any individual retail sales. It provides supplies in large bulk quantities which in turn are used as "give-away" items by the buyer.⁶

7. The Small Business Program sheet prepared by Printing and Publication which is included with the qualification package sent to bidders departs from COMAR 21.01.02.01B(80) and defines small businesses as involving either wholesale, dealer, manufacturing or distributor operations. The categories of operations set forth in the DGS "Bidders Application" form (distributor, manufacturer, broker, dealer, factory representative) also do not correspond with the four types of operations on the Small Business Program sheet or the five set forth in COMAR 21.01.02.01B(80).

8. On previous procurements Appellant inquired how DGS could redefine COMAR regulations pertaining to small business criteria. DGS agrees it is unable to redefine the criteria as set forth in COMAR but asserts it does have authority to supplement COMAR with contract "procedures" pursuant to COMAR 21.11.01.01B(4) which provides:

"A small business preference procurement that involves a purchase of supplies shall be made according to the procedures of the Purchasing Bureau of the Department of General Services. These regulations do not replace but supplement the contracting procedures identified elsewhere in this title...."

9. Under COMAR regulations only the Purchasing Bureau of DGS has

⁶ Give-away is a term used to describe the practice of businesses promoting themselves by giving items free to the public.

authority to supplement the contracting procedures. The Purchasing Bureau has previously and currently finds Appellant is a small business and Appellant was listed on the Small Business vendors list at the time of the instant procurement.

10. Printing and Publication is a sub-unit within DGS co-equal with the Purchasing Bureau that periodically is in need of customized items - supplies. These items are not generally available as stock items. The Printing and Publication Procurement Officer believes that an RFQ of this type is susceptible of manipulation by a "front" business attempting to gain the small business preference.

11. The Printing and Publication Procurement Officer herein acted under belief that implied within his authority he could add requirements to an RFQ that went beyond those contained in COMAR and the DGS Purchasing Bureau procedures in order to verify whether a vendor is a small business. In view of his belief, the Procurement Officer added a specification requiring sub-contractors of a vendor bidder to qualify as a small business⁷.

12. The Procurement Officer believed this would eliminate the use of a "front" in an attempt to circumvent the intent of the Small Business preference. In this procurement the Procurement Officer refused to award the Small Business preference because Appellant declined to reveal the name of his sub-contractors who would manufacture the crab rulers. Appellant testified that he declined on the basis that this would involve release of information that was confidential and proprietary.

13. The DGS Purchasing Bureau and Printing and Publication application of the small business preference indicates a disparity within DGS of how to determine Small Business status which this Board must necessarily resolve to decide this appeal. The lack of a definition of wholesaler in COMAR contributed to the varying

⁷ There was no limit on the names of which sub-contractors could be demanded. Conceptually the sub-contractor qualification could extend to the ultimate source of supply.

interpretations within DGS of how to determine and define Small Business status.

The DGS Purchasing Bureau recognized that the application of the Small Business preference to the unique category of the business of Appellant has been unevenly applied in the past. To correct this DGS has unsuccessfully attempted to clarify the COMAR regulation to specifically include distributors such as represented by Appellant and its specialty advertising business.

Decision

The Printing and Publication Division Procurement Officer in attempting to maintain the integrity of Maryland's Small Business procurement procedure unilaterally applied an undisclosed view that only manufacturers would qualify for the Small Business preference. This Board finds the Procurement Officer's view is misplaced and incorrectly applied in this particular procurement. The Appellant has offered itself as a wholesale/dealer, found qualified and listed on the Small Business vendors list. This Board finds DGS is required to use this vendors list to identify vendors found eligible for the percentage preference as a Small Business. Seims Rental & Sales Co., Inc., MSBCA 1555 and 1548, 3 MICPEL ¶265(1991). Printing and Publication is not authorized to expand requirements for a Small Business designation beyond COMAR. Only the Board of Public Works has ultimate authority to effectuate modification of COMAR regulations. SF 12-101. Accordingly, we find Appellant was entitled to the Small Business preference by virtue of being on the DGS Purchasing Bureau's Small Business Vendors list. The Procurement Officer's denial of such status on grounds that Appellant was not a manufacturer is in error.

We turn now to the Procurement Officer's denial of the protest pursuant to the sub-contracting question. We observe that COMAR does not authorize Printing and Publication to create and impose an additional specification or requirement that a sub-contractor also qualify as a small business for the bidder to be allowed the small business preference. Accordingly, the DGS Procurement Officer was not authorized to refuse to apply the preference upon Appellant's

refusal to identify its sub-contractor. However, a procurement officer may investigate the legitimacy of a small business under the existing requirements of COMAR and the DGS Purchasing Bureau rules. The Procurement Officer was not seeking names of sub-contractors to ascertain responsibility. It was sought by the Procurement Officer so he could determine if that entity also qualified as a Small Business. As noted above this requirement for qualifying sub-contractors in order to qualify bidders does not appear in COMAR regulations or DGS Purchasing Bureau rules. At the hearing before the Board DGS raised an issue of whether Appellant was a "front" for its sub-contractor. This Board has authority pursuant to COMAR 21.11.01.01A(8) to review in the context of a bid protest appeal whether an alleged Small Business is a "front" for a larger business entity. The record before this Board supports a finding that Appellant's business concern is independently owned and operated and not dominant in its field of operation as defined by COMAR notwithstanding that the record also reflects that Appellant's sub-contractor supplier in this procurement was not a business that would qualify as a Small Business.

This Board finds Appellant does not have a single source of supply nor is Appellant controlled by others. The essence of the Appellant's operation is one of independence, controlled by one individual who purchases and establishes prices for its goods and supplies, to be sold to private and governmental entities.

DGS this Board finds has failed to meet the burden of proof necessary to demonstrate Appellant should not be afforded the 5% Small Business preference. The DGS allegation that Appellant is controlled by its sub-contractor is not supported by this record.

Therefore, the Appeal is sustained.

Dated: January 25, 1993

Sheldon H. Press
Sheldon H. Press
Board Member

I concur:

Robert B. Harrison, III
Robert B. Harrison, III
Chairman

Neal E. Malone
Neal E. Malone
Board Member

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1693, appeal of Merjo Advertising and Sales Promotions Company under DGS RFQ #Q31819.

Dated: January 25, 1993

Mary G. Priscilla
Mary G. Priscilla
Recorder