

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of Parker's Thriftways)
)
Under DHMH Refusal to Award) Docket No. MSBCA 1756
Contract Under WIC Vendor RFP)
)

November 30, 1993

Request for Proposals - An agency may reject a proposal of an offeror as not being reasonably susceptible of being selected for award where the offeror fails to meet minimum criteria as set forth in the RFP.

APPEARANCE FOR APPELLANT: Archie E. Parker, Sr.
President
Dover, Del.

APPEARANCES FOR RESPONDENT: Helen E. Bowlus
Sharon Krevor-Weisbaum
Asst. Attorneys General

Matthew A. Lawrence
Staff Attorney
Baltimore, MD

APPEARANCE FOR INTERESTED PARTIES: None
Meatland #241
Mitchell's Market

OPINION BY MR. PRESS

Appellant timely appeals the denial of its bid protest for the denial by the Department of Health and Mental Hygiene (DHMH) WIC Program to award one of its stores located in Maryland a contract.¹

Findings of Fact

1. On May 4, 1993, services solicitation Number DHMH - DCT-93-1055 appeared in the Maryland Register.

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

¹Appellant did not comment of the Agency Report and neither party requested a hearing.

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.² This vendor quota could be increased if the WIC program determined at any time that participant hardship³ necessitated the award of more contracts in any given service area.

All proposals were initially evaluated to determine if the offeror qualified for consideration of 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 bid prices.

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 2, and so on until all qualified offerors were ranked. Adjustments in offeror ranking were made pursuant to the RFP, 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 WIC and its participants were met.

Among the options available to the WIC Program is a process to prevent vendor "clustering."⁴ If clustered stores were awarded contracts, other sections of the service area might

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

³Hardship is defined in the solicitation.

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

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. Another option available to the WIC Program is to award contracts based upon participant hardship. As stated above, the RFP provides that WIC's determination that participant hardship exists may result in an increase in the assigned vendor quota. As set forth in the RFP, participant hardship may be determined only by the Maryland WIC Program and will be determined on a case by case basis. The WIC Program assesses any alleged hardship to WIC participants, and if necessary, awards a contract to the vendor most able to alleviate the hardship that is found to exist.

Those factors upon which WIC judged whether a hardship exists are set out in the RFP and include instances where: i) at least 50 participants would be required to travel over 10 miles to a WIC vendor; ii) constant or permanent physical barriers or conditions that make normal travel to another WIC vendor impossible; iii) at least fifty WIC participants of a specific nationality need a specific vendor due to a language barrier; and iv) at least 50 WIC participants have special dietary needs due to religious mandates and these dietary needs can only be served by a specific vendor. It is further noted in the RFP that under this solicitation, an offerer may not submit a protest based upon the grounds of participant access or preference.⁵

⁵The WIC Program has reviewed the need for Appellant's store. Using the ration set forth in the RFP of one store for every 300 active participants the WIC Program has determined that the needs of the 303 WIC participants residing in Pocomoke, Region 6, Service Area 5, Zip Code area 21851 are adequately served by the one vendor, Meatland #241, who received a contract in Pocomoke.

2. On May 4, 1993, Appellant was sent an application package consisting of a cover letter, the RFP, Contract Application Packet and a Contract. Proposals were due on June 3, 1993.
3. Appellant submitted its proposal on May 19, 1993 for its store located in Pocomoke, Maryland for a WIC contract that would be effective as of October 1, 1993. However, Appellant was notified by letter dated August 18, 1993, that it was not awarded a contract.
4. On August 25, 1993, Appellant sent a letter of protest to the Procurement Officer alleging the following:

"Pocomoke Thriftway has been a dependable vendor for several years with no suspensions from the program.

Meatland, Eastern Shore Markets, is the only other supermarket in the city, their largest store has been suspended within the past year for violations.

Thriftway does more total business and offers a more complete variety than does Meatland. We also make frequent price checks to guarantee that our prices are as low or lower than Meatland.

All other competitors are at least 15 miles from Pocomoke City.

Based on the above, we believe it to be in the best interest of the State of Maryland DHMH to award the contract to Parker's Thriftway of Pocomoke."

5. The Procurement Officer by letter dated October 4, 1993, denied the protest and by letter dated October 8, 1993 Appellant appealed to this Board.
6. On October 18, 1993, DHMH filed with the Board a Motion to Dismiss the appeal because of Appellant's failure to include in its Notice of Appeal a statement of grounds of appeal pursuant to COMAR 21.10.07.02 C(3).

Decision

Turning first to DHMH's Motion to Dismiss, the Board finds from a reasonable reading of the record and Notice of Appeal that

one vendor, Meatland #241, who received a contract in Pocomoke.

it is the Procurement Officer's decision that is being appealed and the Board will thus incorporate Appellant's letter of protest and the Procurement Officer's decision rejecting the protest in Appellant's appeal letter to this Board. Thus the grounds for appeal are adequately set forth. COMAR 21.10.07.02C(3). Compare A&R Bowie Limited Partnership, MSBCA 1690, 4 MICPEL ¶316 (1992).

As to the merits of the appeal this Board agrees with DHMH that Appellant in submitting its proposal assented to the terms and conditions of the RFP, and in particular the evaluation criteria. DHMH is required to maintain those criteria. Systems Associates, Inc., MSBCA 1257, 2 MICPEL ¶116 (1985). In this procurement one of the criteria is the "WIC Program participating history" and in reviewing Appellant's ranking it is noted that Appellant received the highest score in his particular area and was not penalized for past performance. Accordingly, this Board agrees with DHMH that Appellant's protest on grounds it was penalized is factually incorrect.⁶

Appellant also alleges that a Meatland Store was awarded a contract despite it being suspended from the program and that Appellant's Pocomoke Store should have been awarded a contract in its place. From this record, it is apparent Appellant was ranked 12th in its region and service area. Apparently, there are two Meatland Stores in the service area and DHMH disqualified one (Meatland Store #244) for failure to have minimum stock on display. The second Meatland Store, Store #241, ranked higher than Appellant and was awarded a contract. Therefore, this Board concurs with DHMH that it has not acted unreasonably or arbitrarily in awarding a contract to a competitor who was in compliance with the RFP criterion.

⁶ If Appellant was concerned with the RFP evaluation criteria, and in particular the participating history criteria, this Board concludes Appellant could have raised his concern prior to June 8, 1993 when proposals were due. See COMAR 21.10.02.C3A.

This Board additionally considers that Appellant's allegation that it "does more total business and offers a more complete variety than does Meatland" is without merit. The evaluation criteria set forth in the RFP does not include consideration of either total sales volume or the variety of products offered to purchasers. Again, this Board concurs with DHMH, that Appellant in submitting its proposal was assenting to evaluation pursuant to the criteria as stated in the RFP. If Appellant, was concerned with the evaluation criteria it was incumbent that Appellant raise these concerns along with any others prior to June 8, 1993 when proposals were due. COMAR 21.10.02.03A

The allegation of comparative prices between Appellant's store and Meatland is also without merit for the record reflects that when proposals were due Appellant's prices were higher than those of its competitor Meatland #241.

DHMH asserts Appellant does not have standing to raise the issue of hardship. We disagree.

A WIC participant can at any time complain to the WIC Program about the issue of hardship distinct from requirements of the RFP, and Appellant has no standing in that process.⁷

However, the issue of hardship as it legally and factually arises during the solicitation process is within the range of interest of the vendor to which standing attaches. The vendor not the WIC participants receives the notice and the determination as to hardship during the RFP process and consequently to this extent the Appellant is interested in the issue of hardship.

Appellant also contends that because "all other competitors are at least 15 miles from Pocomoke City", this requires the DHMH, WIC Program to award it a contract. Apparently this ground of protest is based on participant hardship. This Board concludes Appellant was cognizant that this criterion was to be solely determined by the WIC Program. Appellant in submitting a proposal is

⁷ See standing discussed in Appeal of RGS Enterprises, Inc., MSBCA 1106, 1 MICPEL ¶45 (1983)

bound by the terms and conditions in the RFP and was explicitly forewarned that a protest may not be submitted based upon the grounds of participant access or preference. Consequently, Appellant has failed to meet the burden of proof necessary under hardship as defined in the RFP.

For the aforementioned reasons Appellant's appeal is denied.

Therefore, it is this 30th day of November, 1993
Ordered that the appeal is denied.

Dated: November 30, 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

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:

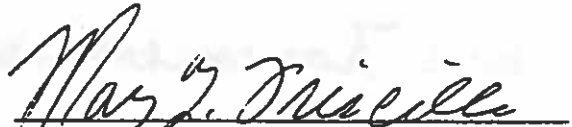
- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, 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 1756, appeal of Parker's Thriftways under DHMH Refusal to Award Contract Under WIC Vendor RFP.

Dated: 11/30/93


Mary F. Priscilla
Recorder