

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of REEDBIRD FOOD MARKET)	
)	
Under DHMH Refusal to Accept)	Docket No. MSBCA 1753
WIC Application)	

December 3, 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:

Gary R. Maslan, Es.
Maslan, Maslan &
Rothwell, P.A.
Baltimore, MD

APPEARANCES FOR RESPONDENT:

Helen E. Bowlus
Sharon Krevor-Weisbaum
Asst. Attorneys General
Matthew A. Lawrence
Staff Attorney
Baltimore, MD

APPEARANCES FOR INTERESTED PARTIES:

None

Steve's Market
Federal Hill Food Market
Food King Supermarkets
E & S Stop, Shop & Save
Fort Avenue Meat Market
Giant #173
Basics #45

OPINION BY MR. PRESS

Appellant timely appeals from a Department of Health & Mental Hygiene (DHMH) WIC Program Procurement Officer's final decision denying Appellant's protest that it should have been awarded a WIC vendor contract.

Findings of Fact

1. On May 4, 1993, services solicitation DHMH DCT-93-1055 pertaining to the State's WIC Program¹ within DHMH appeared in the Maryland Register.

¹WIC is a government program for low-income persons with health problems to make sure they receive nutritious supplemental foods, nutrition education and assistance in arranging on-going health care.

2. Appellant on May 4, 1993, was sent an application package consisting of a cover letter, the Request for Proposal (RFP), contract Application Packet and a Contract.
3. On June 17, 1993, a WIC investigator inspected Appellant's store and found that the Appellant did not have in the customer service area of the store many of the required minimum stock of WIC foods as set forth in the Contract Application Packet, and Appellant was given another opportunity to secure the minimum required stock. The WIC investigator returned to Appellant's store on July 1, 1993 and found Appellant still did not have the minimum approved stock of WIC authorized foods, in particular, non-fat dry milk and ultra-high temperature milk.² Thus Appellant still did not meet the criteria as stated in the RFP and was found to be "unqualified."
4. Appellant alleges he attempted to secure the two items needed to qualify from two grocery wholesalers in the Baltimore Metropolitan area but was unsuccessful. However, on July 13, 1993 Appellant was able to purchase from a Giant Store, at retail, the required non-fat dry milk and the UHT milk.³
5. On August 23, 1993, through counsel Appellant sent a letter of protest to the DHMH Procurement Officer which states in pertinent part the following:

"...It is the opinion of our client that he did meet the minimum qualifications and other requirements listed in the RFP.

Further, our client feels that he is being discriminated against because of the size of his establishment. His establishment is highly accessible

²The WIC Program on July 15, 1993 decided since Ultra-high -temperature (UHT) milk was not readily available to vendors, a waiver would be given for UHT milk. If a vendor had all other required minimum foods it would be considered as qualified.

³The decision by the WIC Program to waive the requirement to stock UHT milk had not been conveyed to Appellant.

to the general public and in particular to WIC recipients which live in the neighborhood immediately adjacent to his store. Further, he believes he is being discriminated against because he is of Korean descent"

6. On October 1, 1993, by letter the DHMH Procurement Officer denied the protest stating in relevant part the following"

"Pursuant to Code of Maryland Regulations (COMAR) 21.05.03.03A, the evaluation of proposals must be based upon the factors set forth in the RFP. Furthermore, Section II, P on page 11 of the RFP states that "[b]y submitting an offer in response to this RFP, the offeror shall be deemed to have accepted all terms, conditions, and requirements set forth in this RFP unless otherwise clearly noted and explained in its proposals."

Specifically in response to your first argument, it is specified for this WIC solicitation at Sections VI, D, 7, c and d on page 20 of the RFP that "[o]nly the Office of the Maryland WIC Program, DHMH, has the authority to determine what constitutes participant hardship," and "[u]nder this solicitation, an offeror or vendor may not submit a protest based on the grounds of participant access or preference." The protest you submitted is based upon an argument that is clearly not allowed under the terms of the RFP.

Furthermore, only the participant, and not a store, has standing to argue the issue of access or inconvenience to the participant. As set forth at COMAR 21.10.02..01B(3), a protestor is one who is "aggrieved" by the solicitation or an award of a contract. The above-referenced store is not aggrieved by any alleged hardship on the part of the WIC participant

Concerning whether this store met the minimum stock requirements, WIC Program records show that the store failed to have non-fat dry milk at the time of the second inspection on July 1, 1993. (The store failed to have many of the required products at the time of the first

- inspection, which took place on June 17, 1993.)"
7. On October 6, 1993, Appellant appealed the denial of its protest to this Board. DHMH, on October 18, 1993 filed a Motion to Dismiss Appellant's appeal alleging that Appellant failed to state the grounds for its appeal pursuant to COMAR 21.10.07.02C(3). Appellant filed with this Board on October 26, 1993, a Memorandum in Opposition which states the grounds for appeal were contained in its August 23, 1993, protest letter to the DHMH Procurement Officer.

Decision

This Board will deny DHMH's Motion to Dismiss Appellant's appeal for failure to state grounds. The Board concludes that it may be clearly inferred from Appellant's appeal that Appellant's grounds for appeal is the denial of the basis of protest clearly stated in its protest letter of August 23, 1993. See COMAR 21.10.07.02C(3). Compare A & R Bowie Limited Partnership, MSBCA 1690, 4 MICPEL ¶316(1992).

At the commencement of the hearing Appellant withdrew from Board consideration the issue of discrimination based on Appellant's Korean descent as stated in its protest letter and proceeded on the issues of minimum qualification and participant hardship.

The Board turning first to the issue of minimum qualification concludes that the DHMH WIC Program properly disqualified Appellant's application in accordance with the criteria set forth in the application packet and that the Procurement Officer thus, properly denied Appellant's protest.

This Board has consistently stated that 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. See Systems Associates, Inc., MSBCA 1257, 2 MICPEL ¶116(1985) at p. 12.

Appellant in submitting its contract application agreed to the terms and conditions of the application packet including evaluation criteria. Section III.C. of the RFP requires that "[T]he offeror must meet the minimum stock requirement" as specified in the Con-

tract Application Packet. We conclude from the record before this Board that Appellant after being offered two opportunities to meet the minimum criteria Appellant failed to comply with minimum food requirements as stated in the RFP and was properly disqualified. Systems Associates, Inc., supra.

As to the issue of participant hardship 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 the process.⁴ 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.

We are aware of Appellant's contention in its protest letter: "[H]is establishment is highly accessible to the general public and in particular to WIC participants which live in the neighborhood immediately adjacent to his store." At the hearing this Appellant failed, however, to produce evidence from any WIC participants in the neighborhood of the store who would be aggrieved by an alleged hardship. 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.

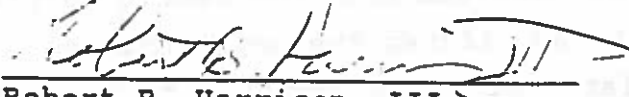
Therefore, it is this *3rd* day of December, 1993 ORDERED that the appeal is denied.

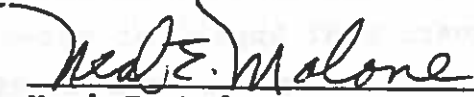
Dated: *December 3, 1993*

Sheldon H. Press
Sheldon H. Press
Board Member

⁴ See discussion of standing in Appeal of RGS Enterprises, Inc., MSBCA 1106, 1 MICPEL ¶45 (1983).

I concur:


Robert B. Harrison, III
Chairman


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:

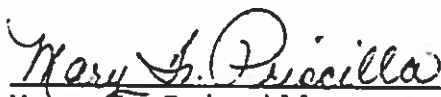
- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, 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 1753, appeal of Reedbird Food Market under DHMH Refusal to Accept WIC Application.

Dated: *December 3, 1993*


Mary F. Priscilla
Recorder