

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of WEIS MARKETS, INC.)
) DOCKET NO.
UNDER DHMH SOLICITATION)
) MSBCA 1652
NO. DHMH - PS - 91-788)

July 17, 1992

Responsiveness - Price must be ascertainable and evaluated from the face of the bid or proposal.

APPEARANCE FOR APPELLANT: John H. Morris, Jr., Esq.
Venable, Baetjer & Howard
Baltimore, MD

APPEARANCE FOR RESPONDENT: Sharon Krevor-Weisbaum, Esq.
Helen E. Bowlus, Esq.
Assistant Attorneys General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest regarding the determination of the Department of Health and Mental Hygiene (DHMH) Procurement Officer not to award contracts under the WIC Program (WIC) to several of its stores.

Findings of Fact

1. On April 19, 1991, a solicitation was issued by the Office of the Maryland WIC Program within DHMH for applications from retail stores for the stores to become approved vendors for the Special Supplemental Food Program for Women, Infants, and Children (WIC). Approval authorizes a retail store to provide certain food products in exchange for WIC vouchers from WIC recipients.

2. By the May 13, 1991, due date for the submission of WIC applications, the Appellant, a large chain outlet

with annual gross food sales of over \$1,000,000, had submitted applications on behalf of 15 of its retail store locations.

3. On September 23, 1991, Appellant received a letter dated September 17, 1991, from the WIC Program informing it that six of its stores were not approved as WIC retail vendors, and on September 24, 1991, Appellant submitted a written request for a debriefing concerning why the six stores in question were not approved.

4. On October 11, 1991, Appellant again requested a debriefing and submitted a formal protest as to the decision not to award WIC contracts to the six stores. On November 4, 1991, the Procurement Officer wrote to Appellant informing it that a debriefing could not be scheduled.¹

5. On November 22, 1991, a debriefing occurred.

6. By letters dated November 29, 1991 and December 4, 1991, Appellant supplemented its protest based upon information provided at the debriefing. On May 1, 1992, the Procurement Officer denied the protest, which denial was received by Appellant on May 9, 1992, and on May 19, 1992, Appellant filed an appeal with this Board.

¹ Pursuant to COMAR 21.05.03.06 A and 21.01.02.01 B (8), a debriefing could not have been held earlier because all awards had not been made.

7. On June 1, 1992, DHMH filed a Motion for Dismissal of the appeal because of alleged failure to abide by the requirements of COMAR 21.10.07.02 dealing with the filing of appeals in protests with the Appeals Board. The motion, however, was withdrawn at the hearing of the appeal.

On June 4, 1992, the Appellant filed an Amended Notice of Appeal. The Amended Notice specifically incorporated the decision of the Procurement Officer dated May 1, 1992, and deleted one of the six stores covered by the protest which, as a result of the protest, was awarded WIC vendor status.

8. At the hearing of the appeal, the Board and Appellant were advised that WIC vendor status as a result of certain recalculations had been recently conferred on two more of the five Appellant stores included in the Amended Notice of Appeal. The stores that remain the subject of the dispute are Store No. 123 in Baltimore County, Store No. 139 in Carroll County, and Store No. 121 in Montgomery County.

Decision

The Appellant contends that the WIC Program improperly denied approval of vendor status to three of its stores. Appellant argues inter alia that the WIC Program improperly calculated its food prices when

evaluating vendor applications, disregarded alleged hardships of WIC recipients, and violated federal regulations. Two of the three stores were previous WIC vendors and have been continued as WIC vendors pending the decision of this Board on the appeal.

The determination by the WIC Program not to award vendor status to the stores at issue in this appeal was the result of an error by Appellant in its initial application for vendor approval. Appellant failed to provide a price for cheese, one of the food prices requested by WIC in order to determine a rating for each vendor submitting an application. As a result of this error,² WIC replaced this omission with the cheese price submitted by the highest offeror in each respective county.

Although the Procurement Officer should have deemed the Appellant's application for the three stores that remain in dispute "non-responsive," the Procurement Officer decided to recalculate the price of Appellant's

² The effect of the omission of the prices for cheese was not trivial or negligible when contrasted with the total cost or scope of the procurement so as to fall within the ambit of COMAR 21.06.02.04. Thus the Procurement Officer properly did not waive the omission as a minor irregularity.

market basket of approved WIC foods. The Procurement Officer recalculated the foods, first, by eliminating cheese prices altogether, and, secondly, by using cheese prices obtained by WIC personnel during on-site verifications conducted shortly after the May 13, 1991 proposal submission date.

As a result of these recalculations pursuant to the aforementioned methods, Appellant's Store No. 129 in ZIP code 20872, which had originally not been awarded a contract, received a high enough ranking to receive vendor approved status, and Appellant was notified of this approval by letter dated May 1, 1992. Subsequent recalculations led to the approval of two more stores, which approval was conveyed to the Appellant at the hearing.

Appellant asserts that because of the goal of providing food at the lowest prices to WIC clients it is appropriate to use food prices for cheese submitted by Appellant from its November 1991 price list. These prices were forwarded by Appellant in support of its protest. In effect, Appellant argues that prices in effect during the contract performance period rather than those submitted pursuant to the RFP for competitive evaluation should dictate contract award. However, the use of food prices from November 1991 or any other time

except as set forth in the actual proposal would have been inconsistent with the concept of a competitive bid or offer under Maryland's General Procurement Law. To use prices submitted by the vendor after submissions were due would be in violation of the competitive bidding process mandated by the General Procurement Law and its implementing regulations. Price must be ascertainable and evaluated from the face of the bid or proposal. Compare Quaker Cuisine Services, MSBCA 1083, 1 MICPEL, paragraph 23 (1982), with Excelsior Truck Leasing Company, Inc., MSBCA 1102, 1 MICPEL, paragraph 50 (1983).

Appellant also contends that, notwithstanding food prices, client hardship justifies vendor status approval. DHMH disagrees. The Appellant has not met its burden on this record to demonstrate that a hardship for WIC clients may presently exist or may later develop in the areas in which Appellant's three stores are located. The Board makes no other finding as to hardship except to note that the WIC Program does have procedures to deal with any hardship situations that may arise.

Finally, Appellant contends that WIC has violated federal regulations by denying its three stores vendor status. However, the regulations claimed by the

Appellant to have been violated have not been introduced into the record and, with the exception of client hardship which has been discussed above, apparently such regulations do not pertain to a procurement for vendors³ and therefore cannot be relied on here.

Accordingly, Appellant's appeal is denied.

Dated:

July 16, 1997

Robert B. Harrison III
ROBERT B. HARRISON III

I concur:

Sheldon H. Press
SHELDON H. PRESS

Neal A. Malone
NEAL A. MALONE

³ The Federal Government has acquiesced in procurement for vendors pursuant to the State's General Procurement Law and COMAR Title 21.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1652, appeal of Weis Markets, Inc., under DHMH Solicitation No. DHMH-PS-91-788.

Dated: *July 17, 1992*

Mary F. Priscilla

Mary F. Priscilla
Recorder