



authorized food and infant formula to WIC participants in exchange for food vouchers. In addition, the solicitation advised prospective vendors the date, time, and place for pre-bid conference and date, time and place bids were due. Bids (applications) were due at the WIC office, 201 West Preston Street, First Floor, Baltimore, MD by 10:00 a.m. on May 13, 1991.

2. Appellant on May 10, 1991 mailed her application-packet by priority mail-return receipt which arrived in the DHMH mailroom on May 13, 1991. This mailing was postmarked May 11, 1991 by the U.S. Postmaster.

3. All mail to DHMH or a unit or program therein addressed to its 201 West Preston Street facility is directed to the ground floor mailroom. There it is received by mailroom personnel, and is sorted for eventual pickup by various addressees. The mailroom consists of a counter and approximately 20 bins in which all mail for DHMH is sorted for eventual pickup by DHMH employees at the counter. Persons picking up mail, however, are not permitted beyond the counter and are handed the mail by mailroom personnel from the bins.

4. On May 13, 1991, JoAnn M. McGowen of WIC made the following contacts with the DHMH mailroom pertaining to mail sorted for the WIC program:

9:30 a.m. - Telephone call - no mail

9:45 a.m. - Telephone call - no mail

9:55 a.m. - 10:00 a.m. - personal visit - Ms. McGowen advised by mail room personnel that there was no WIC

mail.<sup>1</sup>

5. The procedure for receipt of hand delivered application-packets differed from the procedure for mailed application-packets. Hand delivered application-packets were permitted to be taken directly to the WIC office on the first floor (Room 104) of 201 West Preston Street where they were received and logged in by WIC personnel.

6. In the Agency Report it is asserted that on May 13, 1991, at approximately 2:30 p.m. WIC program personnel made a normal daily mail pickup from the mailroom but no mail was there. However, Ms. McGowen testified that no further attempt was made to pickup mail on the 13th after 10:00 a.m. because WIC applications were supposed to have reached the mailroom by 10:00 a.m. She further testified that the next attempt to pickup WIC mail application-packets (or anything else) was not made until 2:30 p.m. on May 14, 1991, 2:30 p.m. being the normal time WIC personnel check the mailroom for WIC mail. Appellant's application-packet was signed for by DHMH mailroom personnel on May 13, 1991. On May 14, 1991 at approximately 2:30 p.m., Appellant's application-packet was picked up in the mailroom by a co-worker of Ms. McGowen and stamped late by Ms. McGowen when she received it shortly thereafter. The testimony is unclear that the Appellant's application-packet may have been among the unsorted mail in the mailroom when Ms. McGowen made her personal visit shortly before 10:00 a.m. on May 13.

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<sup>1</sup> Ms. McGowan beginning April 19, 1991 began to check for WIC applications with the mail room which were hand delivered to the first floor office where they were logged in. By 10:00 a.m. on the bid due date of May 13, 1991, WIC had received 483 timely applications. Ms. McGowan testified if an application was in the mailroom on May 13, 1991 at 10:00 a.m. she would have considered it to be a timely bid.

7. WIC by certified mail on July 3, 1991, notified Appellant her application was received late and Appellant filed a timely protest. On July 30, 1991, the Procurement Officer notified Appellant by certified mail denying the protest on the grounds her application was received after the required due time and date. A timely appeal was filed with this Board on August 12, 1991. Appellant in its appeal letter to the Board and at the hearing asserted that a telephone inquiry with a Mr. MacNamara of the U.S. Postal Service was made. Mr. MacNamara allegedly advised "All mail is delivered to that address (DHMH mailroom) between 8:00 and 10:00 a.m. Regular mail is delivered between 8:00 and 9:00 and certified, return receipt, priority mail, etc. being delivered between 9:00 and 10:00." Mr. MacNamara did not testify at the Board hearing.

#### Decision

COMAR 21, 05.02.10(A) provides "Any bid received at the place designated in the solicitation after the time and date set for receipt of bids is late." COMAR 21, 95, 92, 19(B) states: "A late bid, late request for modification or late request for withdrawal, may not be considered." [E]xceptions may be made when a late bid, withdrawal, or modification is received before contract award, and the bid, modification, or withdrawal would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees."

DHMH in this solicitation contends that applications were to be received per the following as set forth in the solicitation:

"Bids due: May 13, 1991, 10 a.m., 201 W. Preston St., Rm. 104, Balto., Md. 21201."

DHMH concedes the Appellant's application-packet was received in the DHMH mailroom on May 13, 1991. The Board finds that the DHMH mailroom was an approved location for receipt of mailed application-packets in addition to the location (Rm. 104 on 1st floor) noted in the solicitation and further set forth in materials forwarded to prospective applicants.

Pursuant to DHMH practice an application-packet mailed and not hand delivered to the first floor of 201 West Preston Street would be initially routed to the ground floor mailroom. The record reflects that the mailroom averages receipt of several thousand pieces of mail a day and may handle as many as 10,000 pieces of incoming/outgoing mail in a business day. There are three to five persons who work in the mailroom forwarding, receiving, sorting and passing out mail. Mailroom personnel were not advised to use any special procedure to ensure timely sorting of WIC application-packets. The use of the mailroom, with a lack of emphasis to State personnel handling incoming mail, as a receptacle for the WIC program applications could cause confusion. Even though there is no evidence affirmatively establishing the time Appellant's application-packet was received on May 13, this Board finds the DHMH handling procedures contributed to the determination by DHMH that the application-packet was considered to be received late in this particular appeal.

We recognize this Board has consistently held that the burden is upon the Appellant to demonstrate with reasonable certainty that the lateness was caused by State personnel directing the procurement activity or their employees. Appeal of Patco

Distributors, Inc., MSBCA 1270, 2 MICPEL ¶ 128 (1986). It was a DHMH decision to handle receipt of mailed applications in the outlined manner and changed the designated place within DHMH offices for initial receipt of mailed applications in variance to the solicitation notice to prospective applicants.

The treatment of mailed application-packet receipt, this Board finds differed from hand delivered applications which were allowed to be presented for receipt in the WIC, first floor office. The aforementioned procedure caused by State personnel directing the procurement activity or their employees demonstrates to this Board in this particular appeal by a preponderance of the evidence that the Appellant's application-packet would have been timely but for the action of State personnel directing the procurement activity or their employees. A reasonable inference to be drawn from the facts is that Appellant's application-packet was among the unsorted mail in the mailroom prior to 10:00 a.m. on May 13, 1991. Under the aforementioned facts we find the application-packet should be treated as timely received within the exception set forth in COMAR 21.05.02.10(B).

Therefore, the appeal is sustained.