

May 7, 1996

P.S. Protest No. 96-04

ILLINOIS DEPARTMENT OF REHABILITATION SERVICES

Solicitation No. 162745-96-A-0103

DIGEST

Request for reconsideration is denied where grounds for reconsideration reiterate contentions previously made in the course of the protest or present new grounds which could have been, but were not, previously raised.

ON RECONSIDERATION

The Illinois Department of Rehabilitation Services (DORS) requests reconsideration of the decision denying its protest of the terms of a solicitation for a cafeteria to be operated at the new Chicago Mail Processing Center.

The decision summarized the protest as follows:

The protest . . . asserts that the placement of vending machines within the cafeteria violates the requirements of 107(b) of [the Randolph-Sheppard Act, 20 U.S.C. 107 *et seq.* (the Act)], which the protester states requires that

priority be given to blind persons licensed by the State [Licensing] Agency [(SLA)] in the operation of vending machines on Federal property,

The protester asserts that the vending machine portion of the solicitation is subject to the portions of the Department of Education regulations implementing the Act pertaining to permits, and that it intends to submit a permit application for the vending operation.

Illinois Department of Rehabilitation Services, P.S. Protest No. 96-04, April 15, 1996.

The decision noted the distinction made between cafeterias and other vending facilities by the Department of Education (DOE) regulations implementing the Act, and that under those regulations a cafeteria "may be 'fully automatic,' that is, comprised exclusively of vending machines, as long as it meets the other necessary criteria" of a cafeteria under the Act. It concluded that the cafeteria being solicited here, which included vending machines in addition to manual service, was similarly a cafeteria under the Act, and accordingly, "that the protester's contention that it is entitled to operate those vending machines under permits [under the Act's provisions for vending facilities other than cafeterias], or alternatively, that it is entitled to the income from those machines [under the Act's provisions with respect to vending machines in direct competition with a blind vending facility], cannot prevail."

DORS makes the following contentions in its request:

-- The decision discussed the operation of the cafeteria and the cafeteria vending machines on a "break even" basis (that is, without the payment of a commission to the Postal Service, other than a 1.5 percent operating fee), and cited a portion of a postal regulation as equating the Postal Service's commission with "vending machine income" as used in DOE's regulations dealing with income sharing. Noting (as the decision had) that the DOE regulation's definition of vending machine income at 34 CFR 395.1(z) differs from the Postal Service definition, DORS contends that the Postal Service cannot defeat the Act's assignment of competing vending machine income to the blind simply by declining to require a commission from a commercial vending machine operator.

-- The decision included the contracting officer's explanation that the solicitation requirement for vending machines to be included within the cafeteria "to make the total requirements package economically attractive to potential food service contractors." DORS contended, in the course of the protest, that the contracting officer had failed to document the economic need which he expressed.

-- DORS contends that the Postal Service failed to consult with it in the planning stages for the cafeteria as required by 34 CFR 395.31(c) or to enter into negotiations for the cafeteria (or any of the other vending sites) as provided for at 395.33(d).

-- Finally, DORS asserts that the decision relies, impermissibly, on Postal Service regulations which are at odds with the DOE regulations implementing the Act, citing, in addition to the definition of vending machine income referred to above, the DOE definition of a cafeteria at 395.1(d), which, it contends, allows cafeterias to be "either primarily line service, limited waiter or waitress service or fully automatic," but not "to include the operation of supplemental vending."

DISCUSSION

Our review of requests for reconsideration is limited.

PM [Procurement Manual] 4.[6].7 n. states that a "request for reconsideration must contain a detailed statement of the factual and legal grounds upon

which reversal or modification is deemed warranted, specifying any errors of law made or information not considered." Further, the controlling decision on this standard of review states:

Information not previously considered refers to that which a party believes may have been overlooked by our office or to information which a party did not have access to during the pendency of the original protest. Reconsideration is not appropriate where the protester simply wishes us to draw from the arguments and facts considered in the original protest conclusions different from those we reached in that decision. Reassertion of arguments previously considered and rejected by this office does not constitute a ground for reconsideration. Similarly, where information and arguments were known or available to the protester during the development of its protest but were not presented in the original proceeding, such information and arguments may not be considered in a request for reconsideration.

Federal Properties of R.I., Inc., On Reconsideration, P.S. Protest No. 93-02, July 9, 1993, quoting *Fort Lincoln New Town Corporation, On Reconsideration*, P.S. Protest No. 83-53, November 21, 1983 (citations omitted).

The first ground for reconsideration, the protester's objection to the contention that in the absence of a commission no vending machine income would be available for sharing with the blind, was raised in its comments in the course of the protest, as reflected in the discussion at page 6 of the protest decision. Accordingly, its reassertion here provides no basis for reconsideration. Further, DORS' position in this respect, even if correct, would not alter the decision, which rested primarily on the conclusion that "the provisions of the [DOE] regulation dealing with vending machine income are not applicable to cafeterias." DORS does not challenge that conclusion, although, as discussed further below, it contends that the facility at issue here is not a cafeteria.

The second ground on which reconsideration is sought, that the contracting officer had failed to justify the economic basis for including vending machines in the cafeteria, was also raised in the course of the protest, as reflected at pages 5 and 6 of the decision, and thus does not require reconsideration. Further, nothing in the conclusions reached in the decision depended on the adequacy of the contracting officer's justification for the requirement for vending machines. In any event, it is not clear against what standard DORS believes the contracting officer's justification is to be reviewed, or the basis for that standard. In a somewhat analogous situation, that of a purported unduly restrictive specification, the standard is as follows:

[I]t is incumbent upon the procuring agency to establish *prima facie* support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable.

Equipment Marketing Consultants Corporation, P.S. Protest No. 90-07, April 17, 1990,

accord Telesec Temporary Services, P.S. Protest No. 92-05, March 16, 1992. The contracting officer's justification was sufficient under this standard.

The third basis urged for reconsideration, that the Postal Service failed to consult with DORS as required by the DOE regulations, is a ground of protest which could have been, but was not previously presented in the course of the protest, and thus is not a ground for reconsideration. The adequacy of the Postal Service's consultations with DORS concerning sites for blind vending facilities within the new Chicago facility, the subject of 395.33(c), appears unrelated to the substance of the protest, which involved the competition from the cafeteria vending machines with the vending facility sites which had been established by agreement between the Postal Service and DORS. To the extent that the protester contends that the discussions must extend beyond affording "the opportunity to select the location and type of vending facility to be operated by a blind vendor" to include, in the words of the request for reconsideration, "designing acceptable . . . cafeteria services . . . ," it lacks support in the DOE regulation. And, contrary to the protester's suggestion, the other regulation, 395.33(d), involving direct negotiation between the federal agencies and state licensing agencies for the operation of cafeterias, allows, but does not require, such negotiation at the discretion of the federal agency, and thus affords the protester no entitlement to such an opportunity.

The final ground for reconsideration, inappropriate reliance on postal regulations, also fails. As discussed above, the difference between the DOE and postal definitions of vending machine income does not affect the decision's result. The contention that the postal regulations are inconsistent with the DOE regulations in allowing cafeterias to provide food service through a combination of attended service ("manual" service, in postal parlance) and supplemental vending machines, in addition to fully manual cafeterias or to unattended automatic cafeterias, requires a cramped, unconvincing reading of the DOE regulation. The regulation provides that a cafeteria under the Act may consist entirely of vending machines. The protester does not suggest, and we cannot imagine, any purpose of the Act which would be served by the protester's interpretation, which prevents the combination of vending machine service with other service.

The request for reconsideration is denied.

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