

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
REFERRAL BY THE COMMISSIONER OF ADMINISTRATION**

MEALS FOR ALL)

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v.)

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DEPARTMENT OF MILITARY AND)
VETERANS' AFFAIRS)

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OAH No. 14-0617-PRO
RFP No. 2014-0900-2302

DECISION

I. Introduction

The Department of Military and Veterans' Affairs (DMVA) issued a Request for Proposals (RFP) for the purchase of emergency food products. After the proposals were evaluated and a Notice of Intent to Award was issued, Meals For All (MFA) filed a protest. The protest was denied, and MFA appealed that decision.

DMVA filed a motion for summary adjudication pursuant to 2 AAC 64.250, seeking dismissal of all of MFA's protest issues, asserting that the protest was untimely. MFA did not respond in writing to the motion. Instead, it was provided with the opportunity to respond at the time of the scheduled hearing. An evidentiary hearing was held on the preliminary question of whether good cause for a late protest existed.

Lee Tincher, MFA's president, appeared in person and testified for MFA. Although she raised legitimate questions about this RFP, her concerns were all known to MFA and to the offerors well in advance of the due date for the proposals. The RFP and state law require that the concerns about the content of an RFP be protested ten days before the due date for proposals. MFA did not establish good cause for the acceptance of a protest after that date.¹

II. Facts

DMVA issued an RFP to purchase emergency food from a qualified supplier. The RFP stated

The initial food order will be for a sufficient quantity of food products to feed 40,000 people 3 meals a day for 7 days. Breakdown by area will be meals to feed 20,000 people 3 meals a day for 7 days in the Anchorage area (50%), and meals to feed 20,000 people 3 meals a day for 7 days in the Fairbanks area (50%). Thereafter orders may be placed against the contract to replace items issued

¹ Because good cause was not established, DMVA did not present any evidence in support of its determination.

during an emergency or to support a developing or on-going emergency, or to purchase additional times for DMVA use.

The emergency food supply should consist of immediate-use meals that can be prepared for either individual use or mass feeding. The meals offered must have a minimum 5 year, desired 7 or more year, shelf life under all storage conditions.^[2]

The RFP defined one day's worth of food as "breakfast, lunch, and supper for one adult for one day."³

Amendment one to the RFP was issued to answer questions asked by potential offerors.

One question asked about the minimum nutritional requirements. DMVA responded

The food is being purchased for emergency use, and we have no specific minimum nutritional requirements. Offers should provide nutritional information for the products they're offering with their proposals.^[4]

Another question asked

Is there more specific "adult" criteria that refer to the USDA Dietary Reference Intakes for key nutrients? Is there a minimum number of daily kilocalories that must be provided? Have you considered excess sodium and its effect on the water needs of disaster victims? Does the RFP require submitting the "Nutrition Facts" panel required for USDA food product labels?^[5]

DMVA answered that there were no specific minimum requirements.⁶ Question 14 asked

Obviously there is a significant price difference. I don't see anywhere in here where it would be advantageous for a company providing 1800 [kilocalories] versus, say 1000. Am I missing something here?^[7]

The answer was

No, you're not missing anything . . . Offerors need to understand this is for seven days and not survival for a year. It is only to feed people for seven days. We're not that concerned about calories for these seven days.^[8]

At the pre-proposal conference, DMVA also stated

Very seldom will someone die from starvation by having 1,000 calories versus 1,800 calories within seven days. That is not what this is about. This is not for survival for a year.

This is only for emergency for seven days, to get something in people's stomachs so that they can survive.

² Record at 42; RFP section 4.01.

³ Record at 43; RFP section 5.01.02.01(b)(5).

⁴ Record at 13.

⁵ Record at 14.

⁶ *Id.*

⁷ Record at 15.

⁸ *Id.*

And you know, there's many people that have done fasting for, you know, 60, 70 days with eating nothing, which is calories of zero. So the state in this instance is not that concerned about those amount of calories for seven days.^[9]

DMVA did adjust the scoring criteria to take nutrition into account. A new scoring factor was added to section 7.05 of the evaluation worksheet:

Did the offeror include information on the nutritional value(s) ingredient(s), and meal component(s) of the product(s) being offered within their proposal? Does the information provided indicate a product that may be better suited to the needs of the State based on the requirements outlined within the RFP and any amendment(s) to the RFP?^[10]

Section 7.05 of the RFP worksheet evaluates the quality of the emergency food being purchased.¹¹ When the new scoring factor was added, the weight given to this section was increased to 10%, and the weight given to two other sections was reduced. Accordingly, the new factor – the labeling and nutritional value of the food being procured – was worth 2% of each offeror's total proposal.¹²

Amendment Two addressed additional questions raised by potential offerors. One question concerned how the food should be placed on pallets for delivery to DMVA, and a response was provided.¹³ At least one person found that answer to be unclear, and asked again. This question concluded: "Could you please clearly define your definition of pallet configuration for mass feeding?"¹⁴ DMVA responded

The State prefers the product to be palletized in multi-person, multi-meal units, i.e., "a pallet contains breakfast, lunch, and dinner for x number of people for x number of days." However, this is a request for proposals, so it is the offeror's responsibility to state in their technical proposal how they will palletize the products they intend to offer in response to this RFP. We will accept proposals offering a configuration other than multi-person, multi-meal units on a single pallet.^[15]

Eight responsive proposals were received and scored.¹⁶ V.F. Grace received the most points with a total of 281. MFA's proposal was the sixth place proposal, receiving only 186.24 points.¹⁷

⁹ Record at 270 – 371.

¹⁰ *Id.*

¹¹ *See* Record at 30 & 35.

¹² *See* Record at 19.

¹³ Record at 12.

¹⁴ Record at 10.

¹⁵ *Id.*

¹⁶ Record at 566, Revised Notice of Intent to Award.

The evidence provided by MFA demonstrates the following. The Federal Emergency Management Agency (FEMA) recommends that emergency food be high in nutrition and calories.¹⁸ FEMA recommends avoiding salty foods during an emergency.¹⁹ The recommended daily caloric intakes for sedentary adults are as follows:²⁰

Age	Male	Female
19 – 30	2400 – 2600 calories	1800 – 2000 calories
31 – 50	2200 – 2400 calories	1800 calories
51 and above	2000 – 2200 calories	1600 calories

The meals in the winning proposal provide either 870 calories per day²¹ or 820 calories per day,²² depending on the day of the seven day cycle. While people can survive on fewer calories, a low calorie diet can lead to weakness, confusion, poor judgment, or hypothermia.²³ The daily sodium intake ranges between 2270 milligrams²⁴ and 2110 milligrams.²⁵

III. Discussion

A. Introduction

MFA’s protest appeal raises two issues. First, MFA questions DMVA’s failure to take nutritional needs into account in the request for proposal. Second, MFA questions DMVA’s decision not to require placing the food on pallets in a way that would make it reasonably possible to distribute food during an emergency. The protest states

1. [V.F. Grace’s proposal is a] nutritionally compromised plan that jeopardizes the well-being of Alaska citizens.
2. The lowest bid provides poor value for State of Alaska funds.
3. The awarded RFP is operationally flawed and will require labor to assemble food cases for distribution at the very moment that the State of Alaska will have [scarce] resources for pulling cases and assembling food for distribution.^[26]

¹⁷ *Id.*
¹⁸ Record at 479.
¹⁹ Record at 483
²⁰ Record at 498.
²¹ Record at 89.
²² Record at 90.
²³ Record at 475.
²⁴ Record at 94.
²⁵ Record at 95.
²⁶ Record at 474.

DMVA argues that MFA's protest is untimely because these issues could have and should have been raised prior to the opening of the offers.

Ms. Tincher testified under oath. She is a registered dietician and nutritionist with many years of experience, and she specializes in emergency feeding. She discussed the various concerns raised by potential offerors before the offers were submitted. She explained that she kept expecting revisions in the RFP to address those concerns. She believed that anyone trained in disaster response would recognize that DMVA's requirements were insufficient and might actually create secondary problems rather than address the needs of Alaska citizens. Ms. Tincher thought that once DMVA evaluators saw the proposals from the offerors, it would realize the inadequacy of the RFP requirements, cancel the RFP, and start over.

B. MFA's Protest Is Untimely

The Request for Proposals contains the following statement:

If an interested party wishes to protest the content of a solicitation, the protest must be received, in writing, by the procurement officer at least ten days prior to the deadline for receipt of proposals.^[27]

Similarly, AS 36.30.565 says that a protest

based on alleged improprieties or ambiguities in a solicitation must be filed at least 10 days before the due date of the bid or proposal, unless a later protest date is specifically allowed in the solicitation.^[28]

This statute, however, also provides for consideration of an untimely protest for good cause.²⁹

Factors to consider when deciding whether to consider an untimely protest include "(1) the timing of the protest, (2) the nature of the objections raised, and (3) the strength of the evidence presented."³⁰

MFA presented evidence that the lack of nutritional standards in the RFP was misguided. The successful offeror here was able to provide the lowest cost partly by providing fewer total calories. MFA has also raised reasonable questions about possible health problems that might be caused by the low nutritional content of the food. In addition, because of the way the food will

²⁷ RFP section 2.21.

²⁸ AS 36.30.565(a).

²⁹ AS 36.30.565(b).

³⁰ *Right! Systems, Inc. v. Enterprise Technology Systems*, OAH No. 12-0008-PRO (Commissioner of Administration 2012), at 4. *In re Sanders*, OAH No. 05-0240-PRO (commissioner of Administration 2005), at 12. Prior OAH procurement decisions are available online at <http://aws.state.ak.us/officeofadminhearings/Category.aspx?CatName=PRO>.

be palletized, there is a possibility that in an actual emergency there will be problems with delivering the food.³¹

Ms. Tincher explained that she came to Alaska at her own expense for this appeal because she believes DMVA is making a serious mistake. Her motivation is not questioned. She is clearly more concerned with improving DMVA's ability to provide assistance in the event of an emergency than she is in having her company win this contract. However, MFA was aware of its concerns well in advance of the due date for the proposals. While Ms. Tincher didn't know for certain that the winning proposal would provide, in her opinion, a nutritionally compromised menu, she knew that this was a possibility under the RFP. MFA received the amendments answering the questions about nutrition requirements and how the food would be delivered and organized on pallets. Proposals were due on February 20, 2014.³² The last questions answered about nutrition and caloric intake were answered on February 3.³³ The Notice of Intent to Award was not issued until March 14,³⁴ and MFA did not protest the RFP until March 24, 2014.³⁵ This was at least seven weeks after MFA knew or should have known of its concerns about the requirements.

Requiring a protest about the contents of an RFP in advance allows the procuring agency an opportunity to correct errors or improve the RFP requirements. This requirement also avoids giving offerors two bites at the apple. Offerors could otherwise wait to see if they prevail, and could seek a second chance at obtaining the award by challenging the requirements if they aren't selected as the best offeror. While various offerors, including MFA, raised concerns about the requirements, none of them actually filed a protest which would have forced DMVA to directly address those concerns. Because of the long delay between learning of the alleged problems and its protest, the timing of the protest weighs against a finding of good cause for allowing a late protest.

³¹ For example, if there is a need to deliver food for 100 people, someone would have to open four different pallets and provide 1.17 cases of breakfast product, 1.67 cases of lunch product, 1.67 cases of dinner product, and one case of pilot crackers. Record at 129. There may not be sufficient emergency responders available to take the time to count out and distribute food in this manner. In comparison, Meals for All offered a variety of pallet options that included DMVA's preferred option of having a pallet contain three meals per day for a set number of people for a defined number of days. MFA proposal, page 7. Another option was the "family pack" that would contain 21 meals for four people packed in cases which would then be stored on pallets sufficient to feed 112 people. MFA proposal page 3.

³² Record at 1.

³³ Record at 6 – 7.

³⁴ Record at 268.

³⁵ Record at 474.

The second factor to consider is the nature of the objections raised. MFA's objections do not raise questions about the integrity of the procurement process or whether the agency was unaware of important information or made incorrect factual assumptions. Instead, the objections question policy decisions made by DMVA. The questions asked during the amendment process informed DMVA of MFA's concerns. Based on the answers to those questions, it appears DMVA concluded that meeting certain caloric or nutritional requirements was not of high importance during a seven-day response to a disaster. Whether that conclusion was correct is precisely the type of issue that should be resolved before offers are opened. The nature of the objections raised does not weigh in favor of allowing a late protest.

The final factor looks at the weight of the evidence presented. MFA's evidence is sufficient to raise concerns about this procurement, but does not outweigh the other two factors. Even if it is assumed that DMVA is making a mistake by moving forward with this procurement, that is not enough to justify the delay in filing a protest where the alleged problems were known in advance, and concern choices about the agency's discretionary judgment, rather than the integrity of the procurement process.

C. Summary

In its appeal, MFA raised concerns that the successful offeror's product will not meet the nutritional requirements of the individuals DMVA intends to assist during an emergency. The product being purchased only accounted for 10% of the total scoring, and most of that was for evaluating packaging and preparation instructions. Only 2% of the total scoring was for the nutrition of the product, and at least partial points could be awarded for this criterion simply by *describing* the nutritional value and ingredients.³⁶ However, DMVA was aware that potential offerors had inquired about the lack of nutritional standards. DMVA concluded that specific nutritional requirements were not necessary for a short-term response to an emergency. It made an informed decision to only make a minor modification to the RFP. DMVA decided to weigh the offers primarily on cost³⁷ and each vendor's experience and management ability.³⁸ At that point, potential offerors had an opportunity to protest the contents of the RFP. No protest was filed.

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³⁶ Record at 19; 237.

³⁷ Record at 20.

³⁸ Record at 16 – 19.

IV. Conclusion

Meals For All did not file a timely protest of the content of the RFP, and has not established good cause for the acceptance of a late protest. Accordingly, the denial of its protest is upheld.

DATED this 28th day of May, 2014.

Signed _____
Jeffrey A. Friedman
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 36.30.675. The undersigned, on behalf of the Commissioner of Administration and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Rule 602 of the Alaska Rules of Appellate Procedure within 30 days after the date of this decision.

DATED this 8th day of July, 2014.

By: *Signed* _____
Signature
Curtis Thayer _____
Name
Commissioner _____
Title

[This document has been modified to conform to the technical standards for publication.]